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Histories of International Law:

Dealing with Eurocentrism

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Münster and Osnabrück are small German towns in today's North-Rhine Westphalia and Lower Saxony. They provide the setting for the conclusion of the Peace of Westphalia in 1648, the single most important event in the history of international law. Though recent scholarship suggests that the story of modern international law beginning at Westphalia is simply a "myth",¹ it remains central to the historiography of the field. It was then that international law emerged as a law of "states" that could be thought of as "legal subjects" or "persons" distinct from their rulers of elite groups. It was to be followed by other events and other locations: Utrecht, Vienna, Berlin, Paris, Geneva. Looking for origins of a law among sovereigns we focus on Europe's towns, its wars and revolutions, Bodin, Grotius and Thomas Hobbes. The histories of *jus gentium*, natural law, and the law of nations, *Völkerrecht* and *Droit public de l'Europe* are centred upon Europe; they adopt a European vocabulary of "progress" and "modernity". The key distinctions between "political" and "economic", "secular" and "religious" as well as "private" and "public" are part of the European mindset. Even as colonialism has now become an important subject of international law's history, it still remains the case that "Europe rules as the silent referent of historical knowledge".² This is true not only of the materials of the narrative but of the standards of legal historiography itself. What kind of history of international law would it be that made no reference to the "fall of the Roman empire" or to the rise of Protestantism? European stories, myths and metaphors continue to set the conditions for understanding international law's past as it does for outlining its futures.

When did this begin? Professional international law started in the 1860's as part of liberal entrenchment in Europe as the clouds of nationalism, racism and socialism were rising. It began as a project of practical men, lawyers active in politics and government, and not out of philosophical contemplation. What they aimed at was to "civilize" the behaviour of their nations, including in the colonies. They included the Belgian professor Ernest Nys (1851-1920) who eventually became the first historian of the new profession. Nys had taught legal history and jurisprudence at the *Université Libre de Brussel* from 1885 to

1898 and was thereupon appointed to professorship in international law at that same university. In the opening chapters of his *Le droit international, les principes, les théories, les faits*, Nys recounted the history of international law as part of the expansion of European civilization over the world. By 1904 there were forty-six states in the “international community” he wrote, of which 22 were European and 21 American. The remaining three were Japan, Liberia and the Independent State of the Congo. Nys accepted the division of humankind into civilized, barbarian and savage peoples and read the 1885 Act of Berlin as a powerful illustration of the will of the European powers to protect Africans and to advance their material and spiritual well-being.³ In due course, he would vigorously defend the practices of his king, Léopold II of the Belgians, in the Congo, against the accusations he attributed to commercially motivated interests in Britain.⁴

Nys found the “origins of international law” in the European renaissance and its crystallization in the Peace of Westphalia. Three great ideas had dominated history, he argued – progress, with freedom and the “idea of humanity”.⁵ With “progress”, Nys meant European modernity as he saw it around himself, with “freedom”, liberation from the Catholic Church (he was a staunch Protestant like most of the men of the new profession) and with “humanity” the view of all human societies being linked in a universal community resembling today’s Europe. International law grew up from Christian debates on the just war, he wrote, and from inter-sovereign activities in commerce, arbitration, and diplomacy. Hugo Grotius founded “the science of international law” by joining humanism and secularism with definite abandonment of universal empire.⁶ Nys confessed himself an admirer of England’s liberties that for him meant civilization, secularism, humanism and the universal freedom of trade. Together with the balance of power, these would form the basis of international order.⁷

Later historians have extended this narrative to the present. The long entries on the history of international law in the 1962 *Wörterbuch des Völkerrechts* prepared by the Max Planck Institute in Heidelberg use the Peace of Westphalia as the definitive break between the ancient origins and the “time of European international law” (1648–1815).⁸ The 19th century then became that of the “widening of European international

law”.⁹ In the standard account, European hegemony was broken only in the international institutions of the late 20th century, above all the United Nations.¹⁰ In the 1960s, international law began to expand in the different humanitarian, economic and technical fields.¹¹ This, we now read, has led from the political form of statehood into some kind of universal existence, perhaps “globalization”, perhaps, as Wilhelm Grewe, the author of the leading history of the field put it in 2000, into an uncertain oscillation between “international community” and the hegemony of a single superpower.¹²

This familiar account of global modernity was first recounted among late-19th century European elites. Today we meet it at institutions of higher learning everywhere; its point is to inculcate in the members of the professional classes a certain manner of reflecting on the world and on one’s historical place in it. Cultural markers such as “antiquity”, “the Renaissance” or “globalization” are as much part of it as are technical terms such as “cannon-shot rule”, “Concert of Europe”, or “humanitarian intervention”. Though all such notions bear the marks of their European origin, they enable lawyers from all over the world to communicate with each other by invoking widely shared historical associations and a teleology in which an idealized Europe, coded as nationhood, capitalism, “modernity” or “rule of law”, marks the horizon of its imagination.¹³

II

Nys formalised the practice of writing the history of international law as an account of Europe’s expansion to world dominance. The non-European world appeared occasionally in the form of “infidel” Turks or the Saracens, enemies at war or trade partners to Christian Europe, or as the enigmatic world of China that refused to yield its secrets to European diplomats. Late-19th jurists were not uncritical admirers of Europe’s colonial past. As Protestant liberals, they attacked religious and imperial justifications for Europe’s expansion. But they were enthralled by what they called “civilization” and sought to capture it within a narrative of secularization, state-formation and economic modernity they witnessed at home.¹⁴ Despite attempts, however, they never succeeded in developing a working standard of civilization. Yet

they used the *language of civilization* in order to mark out a cultural difference that seemed palpable but did not lend itself to a detailed articulation. It allowed Europeans to make the distinctions they needed without having to explain too much. After the Great War, however, that somewhat discredited language was replaced by progressive sociology, “modernization” and economic and technological development. In the 1960s, these languages were integrated into international law itself. Now international law became a project of free trade, third world development, human rights, environmental protection, fight against “impunity”, and setting up international authority to “protect” vulnerable populations. In the 21st century international law found its way home in a universal teleology of progressive humanitarianism.

European legal thought was always intensely teleological. Immanuel Kant’s 1784 “Idea for a Universal history with a Cosmopolitan Purpose” not only sketches the future of humanity in terms of a “cosmopolitan existence” under a world law, but assumes that to reach this goal Europe “will probably legislate eventually for all other continents”.¹⁵ With political economy, Kant contemporary Adam Smith canvassed a four-stage history of human societies that led from hunters and shepherds to agriculturalists and finally to commerce.¹⁶ Whatever the starting-point, Europe would be international law’s *telos*.

20th century lawyers have been more embarrassed to articulate the normative goal of international law. The expression “civilized nations” appears still in the Statute of the International Court of Justice where it was put in 1920 by the Belgian Baron Descamps – one of the defenders of King Léopold’s practices in the Congo. But that reference is routinely exorcised as an anachronism. International law now appears as a modernising project, a state-building project, a project for economic and technological development, for human rights protection, for conserving natural resources and seeing to global security.¹⁷ All of this now appears factual, functional and scientific, as if without any cultural bias at all. For example, the historical section at the beginning of Antonio Cassese’s recent textbook notes the while “international law rules and principles [of the 19th century] were the product of Western civilization and bore the imprint of Eurocentrism”, the “composition of the world community” has now changed radically:

“...at least at the normative level the international community is becoming more integrated and – what is even more important – such values as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them”.¹⁸

This view remains as much a teleological narrative as any – it is a view that originates in Europe but is ubiquitous in today’s international law and institutions. This narrative depicts progress in terms of the a unified “international community” emerging from functional differentiation and technical professionalism. It uses languages whose native speakers come from universities, think-tanks and civil society institutions in Europe and the United States. Viewing the shifts of vocabulary from the 16th century Spanish scholastics to “good governance” and the “war on terror”, Tony Anghie concluded that “whatever the contrasts and transitions *imperialism is constant*.”¹⁹ In writing this, he was making the old point about Europe always imagining its values as universal and its knowledge and science as not only valid for itself but for all. Whatever generosity may be involved, the point is never only about good intentions. When Western speech becomes universal, its native speakers – the West – will be running the show.²⁰

III

There are two ideal-types of international legal history: “realist” narratives concentrate on State power and geopolitics, “idealist” ones focus on lawyers and philosophers, legal principles and institutions. Neither of these is sustainable alone, without help from its counterpart.²¹ They are best seen as presumptive positions or biases – the one foregrounding war and diplomacy as history’s determining forces, the other privileging laws, institutions and doctrines to which diplomacy and State power provide the background. In both, the non-European world is reduced an object of either Europe’s policy or its thought. An example of the former is Arthur Nussbaum’s classical *Concise History of the Law of Nations* (second edition 1954) that concentrates on diplomacy and treaty relations. During the period 1648–1815 we encounter the

Ottoman empire and “countries outside Europe” in only four pages devoted to their treaty relations with Europe.²² The 19th century is addressed by reference to consular relations with Turkey, the widening of international law in South America, “open door policy” in China and the ending of “Japanese seclusion”.²³ But Nussbaum concludes that “[t]he widening of the Western law of nations to the Far East did not involve the fusion of European and Asiatic ideas”. Even if the law had become universal, he doubted if it had really “rooted in [non-European] minds”.²⁴

Wilhelm’s Grewe’s widely read 1984/2000 ultra-realist account of international law followed Carl Schmitt’s *Nomos der Erde* by finding a place for the non-European world only as an object of European land-taking.²⁵ The “foundation of the international legal community”, Grewe wrote, lay with the “occidental Christian community”. After the late Middle Ages, the voice of Christianity was seized by the succession of Spanish, French, British empires, the 20th century inter-war “Anglo-American condominium” and finally the “global community dominated by the West”. Grewe was dismissive of the “idealist” histories committing what he called a “methodologically questionable separation of theory and practice”.²⁶ He was ironically in agreement with postcolonial histories that have likewise read doctrinal writings (for example by the Spanish scholastics) as a soft glove over the imperial fist. As he wrote: “the newly discovered continents were only an object of European political manoeuvring. They were not a self-reliant sphere of activity with its own centres of gravity”.²⁷

In such geopolitical histories,²⁸ large “imperial” centres radiate their influence all over the world and determine the nature of the global legal order. Many kinds of critiques can be made against them. No empire is ever homogenous but is always split against itself by uncertainty about where its interests lie and what should be done to realize them. Internal oppositions and sectional interests clash on the determination of policy and imperial agents abroad tend to act unpredictably. The external world is no passive receptacle but plays the centre’s factions against each other using imperial favour or opposition to advance its agendas.²⁹ Realist history also fails to account for the conflicting regimes of knowledge that turn hegemonic “interests” into more or less stable

foundations for “policy” and has no sense for the dependence of policy on underlying social and economic structures.³⁰ The very proliferation of “realist” histories testifies to their dependence on epistemic and political frameworks (“what in the past is significant, what is not, what is “power”, and who its identifiable agent?) that are rarely discussed in them.³¹ Finally, it is unclear whether they are histories of “law” at all – their tendency after all is to reduce normative languages to pale reflections of the forces of Realpolitik in a way that fails to account for the shifting uses of law between hegemonic and non-hegemonic actors. Law itself is never a single norm but it is the norm and the exception, the principle and the counter-principle, the justification and the critique of hegemonic interests.³² After all “a large number of Afro-Asians attaining independence during the post-Second World War period utilized international legal norms in their struggles for national liberation”.³³ Such heterogeneity fails to be captured in the realist radar-screen that only registers what State power has produced but rarely what it is that produces such power.

But “idealist” histories concentrating on doctrines are no less Eurocentric. Albert de Lapradelle’s *Maîtres et doctrines* from 1950 includes only accounts of the lives and writings of a few European men – jurists, diplomats, legal thinkers. The Alsatian Robert Redslob’s history of the four “great principles” of international law (binding force of treaties, the freedom of the State, equality and solidarity) are viewed through a perspective of 2000 years of Western legal thought and policy.³⁴ A more recent work by Agnès Lejbowicz’ (1999) examines the question of the universality of international law but limits itself to what European philosophers and lawyers have said about the matter. Although the work puts intersubjectivity in a diverse world in its centre, no non-European voice can be heard in it.³⁵ Histories of cosmopolitan (legal) thought are invariably conceived as discussions of the Western philosophical tradition that is assumed to begin with the Stoics and to peak in Cicero, Grotius, Kant and Wilson. Redslob’s *Grandes principes* is squarely within that tradition. The non-European world is absent so that although he held the ideas of “solidarity” and “equality” indeed “universal”, he found them only in European thinkers (Grotius, Wolff, Vattel, Bentham, Kant...) and relevant only for Europe.³⁶

An additional problem in such works is the way they aim to carry a timeless conversation on perennial problems between the living and the dead. As if legal rules, principles or institutions travelled unchanged through time or then “developed” to their full maturity only in the present. This is to commit the sin of anachronism. Legal concepts are parts of the legal and political vocabulary of each period; their meaning cannot be seized without a grasp of that vocabulary. Projecting an unchanging meaning for a notion (Redslob’s “four principles”, Lejbowicz’ dilemma of humanity and statehood) or seeing its earlier appearances as “undeveloped” uses of present concepts conveys no sense at all of what they meant to those who used them. The meaning of a notion such as “sovereignty”, “*jus gentium*”, “property”, or indeed “law” is dependent on what one intends to use it *for*, what one tries to *achieve* through it.³⁷ This is especially obvious for such polemical language-games as law through which we seek to support ourselves (or our friends) while attacking our adversaries. It is true that it is not always clear what the right context (language) is. Is it the lawyer’s academic or professional context or the political-economic world where that person operates? Is it a context of books or guns, exchanges of language or exchanges of money?³⁸ Such disagreements highlight the larger point, namely that histories of international law come to us through the historian’s own prejudices that underline the political and rhetorical aspects of legal history itself.

IV

Whether focused on geopolitics or legal doctrines historiographies of international law have tended to be as Eurocentric as the world they describe. Nevertheless, there is today some acknowledgment of international law’s complicity in European expansion. Recent French collections focus on imperialism,³⁹ and the experience of a new generation that takes up postcolonial themes.⁴⁰ In her recent history of international law’s welfarist ambitions, Emmanuelle Jouannet points to the nonchalance with which European jurists treated dealt with colonization. Only 5 pages of Emer de Vattel’s almost 900-page classic 1758 treatise on the Law of Nations were directed to the matter. “Europe”, Jouannet writes, “is above all interested in itself”.⁴¹ This applies today, too. Most writing on the history of international legal

thought is oriented towards classical themes of European political and legal theory. An exception is the Marxist “school of Reims” whose most important representative today is Monique Chemillier-Gendreau and whose *Humanité et souverainetés* discusses the colonial implications not only of Western law but of Western legal rationality and includes a long section on Western domination through “juridically organized exclusion”.⁴² The book celebrates third world self-determination and reinterprets legal categories – especially categories of economic law – in favour of the equitable and the fluid reason (“*raison floue*”) of the dispossessed.⁴³ Slim Lahgmani’s recent history of international law juxtaposes the Christian and Islamic views on just war. Europe and European jurists remain in the centre, however, and European geopolitics rules the world. But Lahgmani’s anti-imperialist voice still stands out among histories of international law.⁴⁴

It is not obvious how to correct the bias in the discipline. The early postcolonial works by C.H. Alexandrowicz, R.P. Anand and T.O. Elias, for example, insisted to examine legal practices among Asian and African communities before the entry of Europeans.⁴⁵ But to the extent that they wrote to prove that “they, too, had an international law”, their narratives may be objected as once again projecting European categories as universal.⁴⁶ To argue that there was natural law in India, too, or diplomatic immunities in the Chinese realm, may finally turn out to support the universal nature of a category that in a relevant sense is still European, especially if the argument is supplemented by the claim that the Europeans themselves had failed to respect it – for instance that when accepting large Hinterland claims in Africa, Europeans failed to live up to the criteria of effective occupation. The claim of hypocrisy fires back as reinforcement of the power of a European notion.

A subsequent generation of critics have attacked this kind of conceptual Eurocentrism. Anghie and a group of scholars around him have argued that international law has from the outset operated as an instrument of European expansion. For these critics, international law is imperialist all the way down, or to quote Anghie, it is “fundamentally animated by the civilizing mission that is an inherent aspect of imperial expansion

which, from time immemorial, has presented itself as improving the lives of conquered peoples”.⁴⁷ If that is so, then *any* use of its categories – even a critical use – will be Eurocentric and there is no reason for pride if past indigenous institutions have resembled European ones. Those are corrupt institutions, instruments of domination and illegitimate control. Instead, what one needed to do is to attack the concepts and practices at their root by showing their historical (and present) uses as instruments of colonial oppression. The “rule of law” would not then be an antidote to war and oppression but an *incident of them*. As argued by Marx and Miéville, international law’s formal equality would only have sense as the ideological legitimization of a system of capitalist relationships that can never be a force for progressive change.⁴⁸

But postcolonial critics such as Anghie do not go quite that far. Indeed this would be to commit the same mistake as Realist accounts did, namely to reduce law into a passive reflection of imperial desire. In a recent essay Anghie confesses to a certain bewilderment about the fact that notwithstanding its imperial origins, he has also found international law at times useful for the defence of Third World interests.⁴⁹ Sundhya Pahuja has also discussed the hopes and disappointments experienced by the Third World in relation to laws regarding the decolonization and development.⁵⁰ Formal independence and the policies of economic institutions have rarely worked in the Third World’s favour; nothing came of the “New International Economic Order”, for example. Nevertheless, principles such as sovereignty and self-determination have assisted them occasionally to *oppose* those policies. Already the indeterminacy of international law commits the critic to a nuanced position: whatever their origin, legal concepts may sometimes be used for anti-colonial, anti-hegemonic purposes. Strategic awareness is needed – including awareness of the fact that the mere alignment of the law with the interests of Third World elites is often not sufficient, but may even be counterproductive from the perspective of their (subaltern) populations. Not rarely one sees Third World jurists slide from a sophisticated critique into uncritical nationalist advocacy.⁵¹

So how to go about it, using notions of European origins for non-Eurocentric purposes? Let me sketch four avenues. One consists of the

demonstration of the colonial origins of international legal rules or institutions. It is not at all difficult to show the way in which such key notions as property and sovereignty have been formed in the context of the “discovery” and settlement of the new world. Grotius and John Locke possessed a theory of occupation that only accepted European forms of agriculture as capable of establishing property rights on land. On the other hand, their notion of a political sovereignty did not include forms of indigenous communal life.⁵² Notoriously, too, the laws of war came to be defined in such a fashion as to encompass only European methods of killing. It was felt that “[t]ribal warriors are...either too cruel or too imbecile or both to be able to respect the laws of war”.⁵³ Much recent work on the history of the law of development has been inspired by the objective to show how it has imposed Eurocentric ideas about modernity and technical standards of “rule of law” and enforcement of contract so as to maintain a situation of social and economic disequilibrium. According to Jennifer Beard, for example, the “inner logic of economic growth and technological advance” qualified a large part of the world as an “underdeveloped” terrain whose populations were to be rapidly “incorporated” by enacting law for the protection of foreign investors.⁵⁴ In a similar vein, Anne Orford has discussed humanitarian intervention and the “responsibility to Protect” in view of classical political theory that creates a nexus between protection and obedience. This, she argues, now provides the best frame for understanding the asymmetries of recent UN operations in the Third World.⁵⁵ These studies have also highlighted how colonial domination may operate in the shadow of “internationalization” and through the instrumentality of international organizations.⁵⁶

Another way of dealing with Eurocentrism is by focusing on the encounter between Europe and the new world as an important or even foundational moment to the discipline itself. This could take place by laying out the rules and the practices and by recounting the facts – the making of the first treaties, for example, building of the settlements or *entrepôts*, the endless warfare with the “natives”, efforts at evangelization and so on. The recent international law history by Dominic Gaurier seeks also to situate the “grands figures” of the European canon in their temporal and thematic context. The encounter with the non-European

world is one of the book's "great themes". The 25-page discussion reviews the conditions of territorial occupation in the classical writers and discusses the treatment of American Indians in the 19th century, highlighting the emergence occupation and "agriculture" as bases of European title while enquiring – perhaps anachronistically – whether Europeans had ever regarded native communities as "legal subjects".⁵⁷

No general works on the international law aspects of the colonisation exist today beyond Jörg Fisch's *Die europäische Expansion und das Völkerrecht* (1984).⁵⁸ Fisch, a student of Reinhardt Koselleck's, the father of *Begriffsgeschichte*, presented an extensive and nuanced account of the asymmetries and injustices but also the temporal and geographical variations in the colonial encounter. He also gave room to occasional reciprocity and varying hierarchies in which – for example in the Chinese sphere – Europeans sometimes found themselves in a subordinate position. Fisch also gave an over 200-page account of "self-interpretations" by the Europeans of what they were doing – that is to say, a history of the development of European law of occupation by reference to the status of overseas territories.⁵⁹ Against Carl Schmitt's notorious doctrine of the *Nomos* of the earth that pictured massive European land-taking in the colonies as the foundation, ex nihilo, of European public law, Fisch maintained that the overseas territories had never been regarded as a "*rechtsleere Raum*".⁶⁰ This is a historical debate of some momentum, and still unresolved. But its protagonists agree that from the early 18th century onwards, the law between European sovereigns was constructed largely in opposition to the law applicable overseas. To maintain that contrast, broad notions such as Christianity, civilization, modernity and development direct even universal international law in a particular direction. Fisch was also among the first to detect the persistence of colonial relations even *after* the attainment of formal independence by the Third World in the 1960s. His study is still the most complete work on the now fashionable theme of "international law and empire", though not widely read owing to the disappointing Anglo-centrism in international law today.

The centrality of the Spanish 16th century theologians to the development of international law has long been known.⁶¹ The Dominicans Francisco de Vitoria (c. 1483/86 -1546) and Bartolomé

de las Casas (1484-1566) have traditionally been seen as the great humanitarian “friends of the Indians”. But a different view of them has emerged lately.⁶² It is true, critics say, that the Dominicans disapproved of the way the conquest was being carried out. But the lawful titles they granted to Spain easily compensated for their critique of the illegitimate ones.⁶³ Both Vitoria and Las Casas accepted the presence of the Spanish in the Indies for reasons of evangelization and trusteeship and never conceived their relations in symmetrical terms. They were apologists of empire, concerned over its legitimacy, but not its ultimate purpose. But I wonder to what extent this view renders the Dominicans as symbols of something too uniform – “Spanish imperialism” or “European colonialism”. As Vitoria began his famous analyses of Spanish actions at Salamanca there was no clear view of where the Spanish (or Castilian) interests lay or what the position of the Catholic Church ought to be towards the inhabitants in the New World.⁶⁴ Vitoria’s “universalism”, as it finally emerged from his *Relectiones theologicae* of 1537 and 1539, was so open-ended that it could and would be used to support varying types of policy. Much of international law originates in these debates and we can still learn from them. But we have little reason to attack them either as apologists of empire or for celebrating them as humanitarian heroes.⁶⁵ The lesson they provide is that of ambiguity. The mere fact of presence in foreign lands under whatever vocabulary – evangelisation, trusteeship, trade, civilization, development – is insufficient as a basis for judgment in a situation where positions are constantly developing and it is unclear where the interests of the protagonists – including indigenous communities – lies. Love may be difficult to distinguish from a desire to dominate – which is not to say that no distinction should be made between the two.⁶⁶

Studies of the colonial encounter provide a sufficient amount of gruesome materials that might be used in the fashion of the *Leyenda negra* so as to shock the reader into an anticolonial consciousness. But the many stories might equally well be used to distinguish between different moments and locations of the colonial encounter and to bring out the varying uses of the law that tended to follow the convenience of the Europeans but was not without its momentary benefit to the indigenous as well. Or they might focus on the innumerable ways that Europeans failed to understand – often to their own disadvantage –

the cultures they came to contact with.⁶⁷ Yet another theme might be to analyse shifts between formal and informal control through which European domination was created and ensured: it would seem very important for example to study the role of the expansion of European-originated private law rules over contracts and property and the use of “cat’s paw” techniques with native allies to carry out dispossession or establish informal domination.⁶⁸ There is room for a thesis according to which the mainstay of Western domination has been the informal one – rule through private property, and contract – instead of formal annexation. If there is any pattern of a *longue durée* in the legal articulation of empire, this is it.

But Eurocentrism might also be dealt with by directing attention to the hybridization of the legal concepts as they travel from the colonial metropolis to the colonies and their changing uses in the hands of the colonized. This approach might, for example, examine particular colonial actors – jurists, politicians, resistance fighters – using European concepts but turning them to the support a particular project or preference of the colonized. A good example would be Nathaniel Berman’s discussion of the debates between the French colonial and anti-colonial intelligentsias during the War of the Rif (1925), instrumentalised by the charismatic rebel leader Abd-el Krim for his anti-colonial purposes.⁶⁹ Or it might focus on Latin American Creole elites’ use of international law in the 19th century in order to support their local hegemony both vis-à-vis Europeans as well as the more “backward” inhabitants of those territories.⁷⁰ Latin American international law textbooks have adapted the universal vocabulary of European writings into a “professional style uniquely Latin American”, supporting not the passive assimilation of the region to Europe, but its asserted distinctiveness.⁷¹ Such studies complicate the homogeneous idea of Europeanization by undermining the view that the surface adoption of a European international law vocabulary would always or necessarily produce the similar consequences, indeed that it would necessarily operate in the favour “Europe”. And it would highlight the heterogeneity of the non-European world and vest non-European subjects with an agency of their own thus operating as a counterpoint to the pervasive European habit of treating the outside world as a homogeneous “Orient” as well as to the indigenous ideology that

views decolonization in terms of a return to a mythical pre-colonial authenticity.⁷²

A variant of such as “hybrid” view would show the effects of the colonial encounter on the empire itself. To what extent European laws, or perhaps the identity of “Europe”, is a result of colonialism? Might it be the case that by being obsessed by its “other” Europe might end up defining its identity – its “civilization”, “modernity” or “development” – by that other, in a subtle master/slave dialectic? There is, as many recent studies have shown, a certain “imperial ambivalence” in the politics of European Great powers that continues to be quite central to today’s liberal internationalism and of a certain kind of metropolitan modernity itself. The oscillation between the condemnation of the “bad” imperialism by others and the celebration of the good policies of “trusteeship” or “protection” one is carrying oneself appears as a historical constant in the self-constitution of forms of Western political consciousness.⁷³

Yet another, fourth, technique is to exoticize (provincialize) Europe and European laws. In my *Gentle Civilizer of Nations*, I tried to give close “anthropological” attention to the contexts in which international law emerged as a cultural sensibility among a class of late-19th century European liberal elites. Instead of depicting it as part of some universal metaphysic I described international law as a platform or a vocabulary for the political project of a small group of activist lawyers, hoping to make it appear as a narrow – or indeed “exotic” – aspect of fin de siècle European culture. Such genealogies may operate to pinpoint the “particular” that is hidden by the discipline’s universal voice. This I take to be also the point of recent studies that have interpreted early modern writers such as Grotius or Locke from the perspective of their activity as legal counsel for the Dutch East India Company or a shareholder of the Virginia company.⁷⁴ Showing the close connection between the doctrine of the freedom of the seas and Dutch colonial interests in the 17th century contextualizes the relevant rules and although it does not formally “de-legitimize” them, it makes visible the relations of power they entail. This applies also to accounts of the mandates system in the League of Nations or the idea of international executive authority within the UN that read them as reactions to the collapse of old forms

of imperial rule and efforts to maintain some way to exercise control on former colonies.⁷⁵ Again, the point is to make that which presents itself as timeless and universal as contextually bound to particular projects or interests. Eurocentricism might then be destabilized with the realization that “Europe”, too, is just a continent with its particular interests and neuroses, wisdom and stupidity – rather like realizing that the choice for a French restaurant is also to opt for ethnic food.

A final point needs to be made. A standard way to deal with Eurocentricism, has been to ask the question of whether non-Europeans were either “included in” or “excluded from” international law. The question is based on the (Eurocentric) assumption that being included is good (because international law is “good”) whereas exclusion needs to be condemned. But this cannot be right: the key question is not whether somebody is included or excluded but what “inclusion” and “exclusion” mean. Among the merits of Anghie’s classic postcolonial analysis is the way inclusion by the Spanish Dominicans of the American Indians in the Christian system of natural law and *jus gentium* operated as a means to discipline the Indians and to establish authority over them.⁷⁶ In this case: “exclusion” would have been a sign of respect. It seems pointless to engage in a controversy about the morality of Vitoria, the man, and important instead to stress the ambivalence of his options. Then as now, “it all depends”. The meaning and status of an encounter cannot be determined in abstraction from its meaning to its participants – and these cannot be known independently of recourse to assumptions about what they “must have thought” – that is, what seems “right” to *us*. The four techniques above try to avoid taking the meaning of any encounter as a given and look instead for interpretative imagination and the agency of all concerned. “Europeanization” is a complex phenomenon that may serve different agendas at different moments. It remains important for post-Eurocentric research in the history of international law that the mere employment of a particular vocabulary (of “intervention”, “natural law”, “positivism”, “Christianity”, or “jihad”) does not alone tell us how we should assess the relations of power addressed by it. Different actors will use it for different purposes and everything will depend on the context (the definition of which may, again, be a subject of dispute). For example, the application of formal sovereignty and UN membership in the colonies since the

1960s has done little to abolish factual inequality in then world, but it may have made that inequality slightly more invisible and thus slightly less politically vulnerable. But whether it does is a matter of research and not the application of dogma.

V

And what should be expected of non-Eurocentric histories, keeping an eye on past imperialism, and its traces in today's world? Of course, this cannot a plea for a fully objective, true account of the past "wie es eigentlich gewesen [sei]". There is no point from which to view history that would not be a particular standpoint. To the contrary, new histories must highlight the contested and political nature of any readings of the past. In recent years, there has been a massive increase in histories of international law. Some of this is an effect of the rising postcolonial consciousness in the field. Much is also inspired, I think, by a sense of history's importance for understanding and coming to grips with the ambivalence of that set of phenomena that is sweepingly labelled "globalization". Old histories were progress narratives that projected European modernity as the *telos* of history. This is no longer believable. But nor can the opposite view of law as a mere apology of European power be sustained. If grand history is over, this means the end of stories of linear progress *and* linear decline. History becomes then – again, some would say – stories that illuminate the ambivalence and reality of the choices we make. History would not be *magistra vitae* in the sense of providing ready-made lessons or blueprints but a storehouse of narratives of wisdom and stupidity, political courage and moral corruption in a world of irreducible ambiguity. This is a kind of teleological history, too, to the extent that it calls upon the historian to judge in view of her preferred futures. Positivism, too, is dead. We are always in some frame, writing our histories and understandings from an always already committed standpoint. Historical vocabularies are, to use Paul de Man's familiar image, mechanisms of blindness and insight. A shift of vocabulary enables us to see things that were previously hidden but they also inevitably throw something in the dark. The point is not to write "global history" in which everything is visible – and impossible undertaking – but to diminish the power of blindness, and thus to act in a more acceptable way in the future.

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Notes

- 1 For challenges to the centrality of “Westphalia”, see e.g. Benno Teschke, *The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations* (London, Verso 2003).
- 2 Dipesh Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference* (Princeton University Press, 2000), 28.
- 3 Ernest Nys., *Le droit international, les principes, les theories, les faits*. (Three volumes, Brussels, Castaigne 1904–1906, 1912), Vol I, 117–118, 126.
- 4 For these debates, see my *Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University press 2002), 11–178 and especially 155–166.
- 5 Ernest Nys, *Les origines du droit international* (Bruxelles, Castaigne 1893), 404–5.
- 6 Nys *Origines*, 10–12, 401–405.
- 7 Nys, *Origines*, 164.
- 8 Wolfgang Preiser, ‘Völkerrechtsgeschichte’, in Karl Strupp & Hans-Jürgen Schlochauer, *Wörterbuch des Völkerrechts. Dritter Band* (Berlin, De Gruyter 1962), 690a. For a very similar discussion, see e.g. Arthur Wagner, *Geschichte des Völkerrechts* (Stuttgart, Kohlhammer 1936).
- 9 Ernst Reibstein, ‘Zeit des europäischen Völkerrechts (1648–1815)’, in Strupp–Schlochauer, *Wörterbuch*, 703.
- 10 Ulrich Scheuner, ‘Neueste Entwicklung’ (seit 1914), Strupp–Schochauer, *Wörterbuch*, 754.
- 11 Wolfgang Friedmann, *The Changing Structure of International Law* (London, Steven & Sons 1964).
- 12 Wilhelm G. Grewe, *The Epochs of International Law* (Berlin, De Griyter 2000), 703–706.
- 13 The view of an idealized Europe as the indispensable horizon of modern historical consciousness is well presented in Chakrabarty, *Provincializing Europe*.
- 14 The classic is Gerrit Gong, *The ‘Standard of Civilization’ in International Society* (Oxford, Clarendon 1984).
- 15 Immanuel Kant, ‘Idea for a Universal History with a Cosmopolitan Purpose’, in *Political Writings* (Hans Reiss ed., Cambridge University Press 1991), 52. See Martti Koskeniemi, ‘On the Idea and Practice for Universal History with a Cosmopolitan Purpose’, in Bindu Puri & Heiko Sievers (eds.). *Terror, Peace and Universalism. Essays on the Philosophy of Immanuel Kant* (Oxford University Press, 2007), 122–148
- 16 For the content and influence of Smith’s four-stages theory, see Istvan Hont, *Jealousy of Trade. International Competition and the Nation-.State in Historical Perspective* (Harvard University Press, 101–103 and passim).
- 17 See Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague, Springer 2010).

- 18 Antonio Cassese, *International Law* (2nd edn., Oxford University Press 2005), 45, 30.
- 19 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press 2004), 315.
- 20 Out of the very wide literature on this point, see e.g. Immanuel Wallerstein, *European Universalism. The Rhetoric of Power* (New York, New Press 2006).
- 21 Martti Koskeniemi, *From Apology to utopia. The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University press 2005),
- 22 Nussbaum, *Concise History*, 51-60, 121-124.
- 23 Nussbaum, *Concise History*, 194-196.
- 24 Nussbaum, *Concise History*, 196.
- 25 Grewe, *Epochs of International Law*; Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Ius publicum europeum* (Berlin, Duncker & Humblot 1950).
- 26 Grewe, *Epochs of international Law*, 2.
- 27 Grewe, *Epochs of International Law*, 295.
- 28 See also Karl-Heinz Ziegler, *Völkerrechtsgeschichte* (Munich, Beck, 1994). The realist frame operates behind the histories of many legal institutions of relevance to the non-European world. For example, the studies in the 1920s by Lindley and Goebel on the law of territory, though very useful, were written completely from the perspective of the law as an instrument of empire. M.F. Lindley, *The Acquisition And Government Of Backward Territory In International Law; Being A Treatise On The Law And Practice Relating To Colonial Expansion* (London 1926), Julius Goebel, *The Struggle For The Falkland Islands. A Study of Diplomatic History* (Yale University Press 1927).
- 29 I have made some of these critiques in 'A History of International legal Histories', in Anne Peters & Bardo Fassbender, *Encyclopedia of International Legal History* (Oxford University Press, forthcoming) and in a book review in *Kritische Justiz* (2002), 277-281
- 30 For such points, see e.g. Justin Rosenberg, *The Empire of Civil Society* (London, Verso 1994); Teschke, *The Myth of 1648*..
- 31 For such an alternative realist account, see China Miéville, *Between Equal Rights. A Marxist Theory of International Law* (Leiden, Brill 2005), especially Ch 3 and 6. A triking illustration of the biases of realist historiography is given by a recent volume on neorealist approaches among the contributors of which we find such leading lights of the movement as Richard Rosencrance, Robert Keohane, Niall Ferguson and Paul Schroder. None of the 16 essays takes up colonialism or the Third World. The obsession is with US power and any historical examination has meaning only if it illuminates problems or dilemmas in American foreign policy. See Ernest R. May, Richard Rosencrance, and Zara Steiner, *History and Neorealism* (Cambridge University Press 2010).
- 32 See e.g. my 'International Law and Hegemony: A Reconfiguration,' 17 *Cambridge Review of International Affairs* (2004), 197-218
- 33 Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Leiden, Nijhoff 2010), 349.

- 34 Albert Geouffre de Lapradelle, *Maîtres et doctrines du droit des gens* (2nd edn. Paris, Éditions internationales 1950); Robert Redslob, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre* (Paris, Rousseau 1923).
- 35 Agnès Lejbowicz, *La philosophie du droit international. L'impossible capture de l'universalité* (Paris, Puf 1999).
- 36 Redslob, *Histoire des grands principes*, 271–274, 290–297.
- 37 See e.g. Quentin Skinner, 'Meaning and Understanding in the History of Ideas', in *Visions of Politics. Regarding Method* (Cambridge University Press 2002), 57–89.
- 38 See e.g. Ellen Meiksins Wood, *Citizens to Lords. A Social History of Western Political Thought from Antiquity to the Middle Ages* (London, verso, 2008), 4–11.
- 39 Emmanuelle Jouannet & Hélène Ruiz-Fabri (dir.), *Le droit international et l'impérialisme en Europe et en Amérique* (Sociétés de droit et de législation comparée, 2007)
- 40 Emmanuelle Jouannet, Hélène Ruiz-Fabri et Jean-Marc Sorel, *Regards d'une génération sur le droit international* (Paris, Pedone 2008)
- 41 Emmanuelle Jouannet, *Le droit international liberal-providence. Une histoire de droit international* (Brussels, Bruylant 2011), 97, 98.
- 42 Monique Chemillier-Gendreau, *Humanité et souverainetés. Essai sur la fonction du droit international* (Paris, Découverte, 1995), 153,
- 43 Chemillier-Gendreau, *Humanité et souverainetés*, especially 231–277.
- 44 Slim Lahgmani, *Histoire du droit des gens. Du jus gentium imperial au jus publicum europaeum* (Paris, Pedone 2003).
- 45 See Charles H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford, Clarendon 1967); R.P. Anand, *Studies in International Law History: An Asian Perspective* (Leiden, Nijhoff, 2004); id. 'Maritime Practice in South-East Asia until 1600 and Modern law of the Sea', in: Anand, *International Law and the Developing Countries* (Dordrecht, Nijhoff 1987), 53–71; id. *Development of Modern International Law and India* (Baden Baden Nomos 2005); T.O. Elias, *Africa and the Development of International Law* (Leiden, Oceana 1972).
- 46 Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (The Hague, Nijhoff, 2010), 182; *Idem*, 'When was the Law of the International Society Born?. 2 JHIL (2000), 61.
- 47 Antony Anghie, 'On Critique and the Other', in Anne Orford, *International Law and its Others* (Cambridge University Press, 2008), 394. ,
- 48 Miéville, *Between Equal Rights*, 98, 84–101 and Chapter 5 and 6. For the argument in a contemporary context, see B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 EJIL (2004), 1–37.
- 49 Antony Anghie, in Emmanuelle Jouannet, Hélène Ruiz-Fabri & Jean-Marc Sorel, *Regards d'une génération sur le droit international* (Paris, Pedone, 2008), 38.
- 50 Sundhya Pahuja, *Decolonizing International law. Development, Economic Growth*

- and the Politics of Universality* (Cambridge University Press 2011).
- 51 For this theme, see g. Prabhalan Singh, 'Indian International Law: From Colonized Apologist to Subaltern Protagonist', 23 *Leiden Journal of International Law* (2010), 79-109.
 - 52 See e.g. John Locke, *Two Treatises of Civil Government* (Liberty Fund 2011 [1689]), Bk II, Ch IV § 40-49, Ch VII 87-89 (113-115, 131-132).
 - 53 Frédéric Mégret, 'From 'Savages' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's 'Other'', in Orford, *International Law and Its Others*, 293.
 - 54 Jennifer Beard, *The Political Economy of Desire. International law, Development and the Nation State* (London, Routledge 2007), 159-160, 168-169. See further,
 - 55 For a wonderful reading of expansion of international executive authority in this direction, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).
 - 56 See e.g. Mark Mazower, *No Enchanted Palace. The End of Empire and the ideological Origins of the United Nations* (Princeton university press 2009), Nathaniel Berman, 'L'affaire des décrets de nationalité', in: in *Passions et ambivalences. Le colonialisme, le nationalisme et le droit international* (Paris, Pedone 2008), 279-316.
 - 57 Dominic Gaurier, *Histoire du droit international. Auteurs, doctrines et développement de l'antiquité à l'aube de la période contemporaine* (Presses universitaires de Rennes, 2005), 285-311.
 - 58 Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, Steiner 1984).
 - 59 Fisch, *Die europäische Expansion*, 153-380.
 - 60 See e.g. the summary in Fisch, *Die europäische Expansion*, 475-499.
 - 61 Regarding the Spanish empire, the works by Luciano Pereña remain largely unknown outside Spain. Though not completely free of imperial apologetics, they, as well as the 29 volumes of the *Corpus Hispanorum de Pace* (CHP), edited by Pereña, are an invaluable (though again, little known) source of materials For Pereña's own summary, see Luciano Pereña, *La idea de justicia en la conquista de América* (Madrid, Mapfre 1992),
 - 62 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press (2004), 13-31; China Miéville, *between Equal Rights. A Marxist Theory of International Law* (Leiden, Brill 2005), 173-178; Robert A. Williams Jr, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford 1990), 96-107;
 - 63 See especially Jörg Fisch, *Die europäische Expansion und das Völkerrecht* (Stuttgart, Steiner 1984), 214-222.
 - 64 Urbano, *Francisco de Vitoria*, 317-323.
 - 65 As attempted e.g. by Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel. Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *JHIL* (2008), 181- 209; and Pablo Zapatero, 'Legal

- Imagination in Vitoria. The Power of Ideas', 11 *JHIL* (2009), 221-271.
- 66 For useful reflection on this theme, see Tzvetan Todorov, *The Conquest of America. The Question of the Other* (New York, Harper 1984).
- 67 See e.g. Teemu Ruskola, 'Canton Is Not Boston: The Invention of American Imperial Sovereignty', 57 *American Quarterly* (2005), 859.
- 68 See e.g. James Tuo Gathii, 'Imperialism, Colonialism and International law, 54 *Buffalo Law Review* (2007), 1013-1066; Martti Koskenniemi, 'International law and Empire: The Real Spanish Contribution', 67 *University of Toronto Law Journal* (2011), 1-36.
- 69 Nathaniel Berman, "'The Appeals of the Orient.'" Colonized Desire and the War of the Riff", in Karen Knop (ed), *Gender and Human Rights* (Oxford University press 2004), 195-230.
- 70 Liliana Obregón, 'Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America, in Orford, *International law and its Others*, 247-264.
- 71 Arnulf Becker Lorca, 'International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination', 47 *Harvard International Law Journal* (2007), 289-290 and generally 283-305. Adopting the narrative that international law was created by the encounter with the "Indies" might even offer Latin American authors with a privileged disciplinary voice, 291.
- 72 For a theorization and discussion of "hybridity" in the Egyptian context, see Amr Shalakany, 'Sanhuri and the Historical origins of Comparative Law in the Arab World (or How Sometimes Losing your *Asalah* can be Good for You)', in Annalise Riles (ed), *Rethinking the Masters of Comparative Law* (Oxford, hart 2001), 152-188.
- 73 Berman, 'Les ambivalences impériales', in *Passions et ambivalences*, 425-476.
- 74 For Grotius, see. Martine van Ittersum., *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies* (Leiden, Brill 2006)); for Locke, see Barbara Arnell, *John Locke and America. The Defence of English Colonialism* (Oxford, Clarendon 1996).
- 75 See Orford, *International Authority*.
- 76 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press 2004).

Curriculum Vitae

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Professor Koskenniemi began his career in the Finnish Diplomatic Service in 1978-1994, lastly as director of the Division of International Law. In 1997- 2003 he served as judge in the administrative tribunal of the Asian Development Bank and in 2002-2006 he was a member of the International Law Commission (UN). Professor Koskenniemi is well-known for his critical approach to international law. His present research interests cover the history and theory of international law and most recently he has been co-directing the Helsinki-based research project "Europe between Revolution and Restoration: Rethinking the European Century 1815-1914"

Professor Koskenniemi main publications include *From Apology to Utopia; The Structure of International Legal Argument* (1989 and with a new epilogue, Cambridge 2005) that presents a view of international law as an argumentative practice that seeks to avoid criticisms of being either an irrelevant moralist utopia or an apology to Realpolitik. International law, he claims in that work, attempts to remove the political from international relations. In the *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge 2001) Professor Koskenniemi presents an intellectual history of international law in the relevant period as well as a sociology of the profession, using biographical studies of lawyers such as Hersch Lauterpacht, Carl Schmitt and Hans Morgenthau. Many of his principal articles have been published as *The Politics of International Law* (Oxford 2011).

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