

# HISTORIES OF INTERNATIONAL LAW: SIGNIFICANCE AND PROBLEMS FOR A CRITICAL VIEW

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## I. INTRODUCTION

Let me thank Jeff Dunoff for that introduction and, of course, for the invitation to visit Temple and Philadelphia for the first time. I must say, I am embarrassed to confront the situation of two days of discussion over issues that I have been pondering over many years with friends, many of whom I see in the audience. This is quite an exceptional situation, and I look forward to a humbling, delightful two days.

I will be speaking today, as I have in the recent past, on the history of international law. I must confess that I never thought of myself as a historian until recently when, as I skim the newspaper in the mornings, I tend to think that nothing really interesting seems to have happened since the French Revolution. But perhaps that is the nature of historical work; one becomes completely immersed in it. So, I hope you will bear with me as the present reflections, too, will grow out of my present work on the history of international legal thought from the late Middle Ages to the Napoleonic Wars. In the course of that work, I have had to confront a number of methodological questions. What it is to do international legal history, and especially legal history in a *critical* vein? In this talk, I shall foreground some of those questions without any pretense at comprehensiveness. The comments seek rather to identify a set of pertinent issues that anyone, including myself, dealing with international law's past, and the relationship of that past to the present, will have to think about.

Interest in the history of international law has grown tremendously in the recent years. It is now ten years since the inauguration of the *Journal of the History of International Law*. In that decade, something like twenty-four doctoral theses and other studies on the history of international law have been published by the Max Planck Institute for European Legal History in Frankfurt, under the leadership of its formidable director Michael Stolleis, and another series is starting with Brill publishers in the Netherlands. Just a few weeks ago in Berlin, a large event celebrated the launch of the more than 1,000-page *Oxford Handbook of the History of International Law*.<sup>1</sup> And to pinpoint a particularly significant development—the sudden interest in the history of human rights. Until not so long ago, human rights

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1. THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012) [hereinafter THE OXFORD HANDBOOK].

were considered paradoxically as both universal and eternal as well as very recent; somehow out of history it seemed, at most, subjected to occasional celebrations of the rise of present humanitarianisms. Thanks to the work of scholars such as Annabel Brett, Diethelm Klippel, Samuel Moyn, and others, however, rights have been situated in context, and a lively debate has begun on the continuities and ruptures governing their historical role.<sup>2</sup>

I think reasons for this turn to history are obvious. The dramatic increase in the 1980s and 1990s of international legal institutions and recourse to legal vocabularies in international policy created expectations about the spread of the “rule of law” and the pacific settlement of international disputes that failed to be met by the beginning of the new millennium. The narrative about the progress of peace and justice that accompanied the rise of new institutions—the World Trade Organization, human rights treaty bodies, the International Criminal Court—was undermined by heightened religious and social conflict, often accompanied by domestic and international violence in a way that threw a shadow on the new institutions. We see today, I think, a backlash grown out of disappointment that reflects on the plausibility of the inherited narratives. The taken for granted role of lawyers and intellectuals in the participation of endless institutional reforms and blueprints has come to seem quite problematic, no longer that attractive as a career option for a new generation. Instead what seems needed is a better understanding of how we have come to where we are now—a fuller and a more realistic account of the history of international law and institutions.

My presentation today will proceed in three parts. I will first say something about international legal history in its traditional modes as narratives building not only on familiar, but also fragile and contested assumptions about what international law as “law” is and how international legal “development” ought to be understood. All historians have a debt to their predecessors. We need to deal with those narratives respectfully, even when we find their operative principles methodologically or ideologically suspect—as I think we do with respect to past ways of thinking about our disciplinary inheritance. The second part will examine the Eurocentrism of international legal history, a topic that I have previously written about<sup>3</sup> and that remains a source of all kinds of methodological difficulty. In the third part, I will examine the benefits and limits of the “contextual turn” in the history of legal and political thought, and in international law specifically. We need more contextual readings of past international law. But at the same time, as critical lawyers have always known, law cannot just be a reflection of the social or historical context. It contains, and must contain, a utopian, context-breaking aspect. How to integrate that into the studies of international legal history is perhaps the greatest methodological challenge today. To put this in other terms, as historical awareness increases, it should be accompanied by a more complex

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2. See Martti Koskenniemi, *Rights, History, Critique*, in HUMAN RIGHTS: MORAL OR POLITICAL? (Adam Etinson ed.) (forthcoming).

3. See, e.g., Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 RECHTSGESCHICHTE 152 (2011) (Ger.) [hereinafter Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*].

understanding of the relationship between the historian, ourselves, and the past.

## II. LINEAR TRADITIONS

Those of us who grew into international law in the 1970s and 1980s learned to think of it through a very specific historical narrative, one of humanitarian progress. One aspect of this was secularization. We learned to think of events such as the Thirty Years' War in Europe, or the destruction of Native American communities in the sixteenth and seventeenth centuries, as a result of a lethal combination of religious fervor and imperial ambition. Paradoxically, we learned that narrative from such Protestant activists as Hugo Grotius, whose naturalist, scientifically-orientated way to look at the universe also included a providential view of the Dutch East India Company's militaristic activities. The view of providence operating through international law was then the subject of a series of philosophical positions developed by another Protestant, Immanuel Kant, whose famous 1784 essay on the *Idea for Universal History with a Cosmopolitan Purpose* laid the basis for a historical understanding of the European Enlightenment as the coming into consciousness of humankind's universal *telos*: freedom realized in public institutions under a constitution.<sup>4</sup> We learned to appreciate the Peace of Westphalia as a first step to be complemented by the gradual liberation of individuals, too, from their communities' chains. If the League of Nations or the U.N. Charter were still perhaps necessary parts of the statist nature of the international order—quite flawed as such—then we learned from Kant to view this state of affairs as a temporary moment before “perpetual peace” would be realized in some sort of a global order where communities' and individuals' legitimate claims would be balanced under the international “rule of law.” Successive invocations of a “Grotian moment” reminded us of the teleology of our discipline.

But this was stuff from textbooks and speeches at the United Nations whose point was only to remind us of international law's place in received narratives of modernist progress. In the 1970s and 1980s, there was not much professional international legal historiography. What there was represented two contrasting styles and sensibilities. There were “idealist” historians like the Alsatian, Franco-German public lawyer Robert Redslob, whose 1923 book *Histoire des grands principes du droit des gens* (“History of the Great Principles of International Law”) was a narrative of a European past from the European antiquity: Greece, Rome, then the Middle Ages, through Renaissance and the Reformation, through the Enlightenment, and the nineteenth century Concert system to the Great War.<sup>5</sup>

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4. IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE* (1784), reprinted in *KANT: POLITICAL WRITINGS* 41 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press rev. ed. 1991). I've explored these themes in Martti Koskeniemi, *On the Idea and Practice for Universal History with a Cosmopolitan Purpose*, in *TERROR, PEACE AND UNIVERSALISM: ESSAYS ON THE PHILOSOPHY OF IMMANUEL KANT* 122 (Bindu Puri & Heiko Sievers eds., 2007).

5. ROBERT REBSLOB, *HISTOIRE DES GRANDS PRINCIPES DU DROIT DES GENS DEPUIS L'ANTIQUITÉ JUSQU'À LA VEILLE DE LA GRANDE GUERRE* (1923).

Gazing across two millennia of Western legal thought, he saw the operation of four “great principles,” which he identified as *pacta sunt servanda* (the binding force of treaties); the freedom of the state; equality of states; and international solidarity.<sup>6</sup> Hundreds of pages to assure the reader that treaties were binding, states were free, and their relations were governed by equality and solidarity. One wonders which world Redslob was describing! But his narrative was deeply embedded in a familiar understanding of what was important in European history. Everything culminated for him in the French Revolution and the future course of history would consist of the universalization of its principles.

Redslob was neither the first nor the last of legal historians examining the past through the lenses of “great principles” or universal themes such as, for example, pacifism and empire, or sovereignty and international community. More recently, Emmanuel Jouannet has read the development of international law from the early Enlightenment to the present as a struggle between the principles of individual freedom and communal welfare—or liberalism and social democracy, if translated into an opposition of political projects.<sup>7</sup> More traditional histories have focused on individual jurists or European thinkers of relevance for the humanitarian pursuits with which international law associated itself. The Swiss jurist Ernst Reibstein, for example, went through nearly the whole canon of the profession from the Spanish scholastics to such German political or legal thinkers as Johannes Althusius, Samuel Pufendorf, or Christian Wolff, as parts of a natural law tradition slowly constructing the edifice of a rational science of sovereignty, peace, and humanitarianism with which we have learned to associate international law.<sup>8</sup> These works are still worth reading today—though we must now be suspicious of their underlying, and sometimes express, suggestion that history is the passing of large ideas or conversations over perpetual themes over centuries, a great chain of being. The works imagine the past obsessed with what we are obsessed with, albeit in a less mature, more primitive way, sometimes forgetting to read past jurists by reference to their *own* religious or political contexts or projects, as actors in worlds of thinking and acting often quite different from ours. Alongside this “contextualist” objection—to which I will return—there are jurisprudential problems with such histories. The view of law as “ideas” or “principles” developed in great scholarly treatises is a venerable, but also a much-critiqued, view of the law. Surely law is also, and perhaps above all, a social practice involving the operation of powerful public institutions. One need not be a legal realist to have doubts about the usefulness of thinking of law in terms of the ideas expounded in philosophically-minded jurists’ or political theorists’ writings. But, if at least something about the realist critique is correct and law is also about the institutional use of power, then the history of law must look elsewhere than to great principles

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6. *Id.* at 21–41.

7. See generally EMMANUELLE JOUANNET, *THE LIBERAL-WELFARIST LAW OF NATIONS: A HISTORY OF INTERNATIONAL LAW* (Christopher Sutcliffe trans., 2012).

8. See, e.g., ERNST REIBSTEIN, *JOHANNES ALTHUSIUS ALS FORTSETZER DER SCHULE VON SALAMANCA: UNTERSUCHUNGEN ZUR IDEENGESCHICHTE DES RECHTSSTAATES UND ZUR ALTPROTESTANTISCHEN NATURRECHTSLEHRE* (1955); ERNST REIBSTEIN, *VÖLKERRECHT: EINE GESCHICHTE SEINER IDEEN IN LEHRE UND PRAXIS* (1958).

or eternal philosophical themes.

Another way of composing histories of international law is exemplified by the German jurists Carl Schmitt and Wilhelm Grewe, both writing while the bombs were falling over Berlin during the end-phase of the Second World War. Schmitt's legal realism and his late view of law as part of "concrete order thinking" are today well-known and have inspired his search for legal orders determined by a powerful centre radiating its influence across the world.<sup>9</sup> Similar ideas inspired Grewe's *The Epochs of International Law*,<sup>10</sup> published in English in 2000, the most widely used textbook of international legal history today. It also presents a "realist" version of international law's past as the succession of great empires: the Spanish Empire, the French Empire, the British Empire, and then what Grewe chose to call the "Anglo-American condominium" of the twentieth century.<sup>11</sup> Like Schmitt, Grewe thought of law as a (superstructural) offshoot of projects and activities expanding from the imperial center to its peripheries.<sup>12</sup> The history of international law would then become a history of imperial power, the succession of large imperial "epochs" following one another: Spanish, French, British, and Anglo-American. And at the heart of international law would be States, war and diplomacy, strategy, and military power above all. Violence, or the threat of it, only makes the law tick—as manifested in the centrality of the balance of power for such stories. And yet, such an ultra-realist view of law is just as vulnerable to objections as its obverse. There never is a single spot that determines the law—just as imperial history can never be just what the emperor commands. On the contrary, empires are always divided against themselves, the imperial capital—a frugal source of factions quarrelling over policy with an imperial mainstream targeted by anti-imperial critics. Both sides use law and, as you in the United States know so well, sometimes the periphery actually wins. The realist view that law is a mere servant of power contains an important truth—often neglected, especially by international lawyers—but it has an overly simple view of what "power" is and how it works, including how legal ideas and concepts themselves operate as "power" by indicating the actors, processes, and, to a degree, the very objectives of imperial policy. The idea of imperial power as a single causal determinant of law is no less reductionist than the view of law as a predominant force of history.

What unites the "idealist" and "realist" views, however, is the (Kantian?) view of there being a single "universal" history in which the past unfolds slowly before the eyes of the historian, following one single trajectory of meanings that can be captured by such conceptual frames as "sovereignty," "human rights," "empire," "development," "capitalism," or "progress," for example. As I will later

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9. CARL SCHMITT, *DER NOMOS DER ERDE: IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950); see also Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 *CONSTELLATIONS* 492, 505–07 (2004).

10. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., De Gruyter rev. ed. 2000) (1984).

11. See, e.g., *id.* at 575–79.

12. See, e.g., *id.* at 296.

elaborate in more detail, it is true that it is impossible to write a history of international law that would not include a teleological element. But this is not to say that there would be a single, natural teleology embedded in history that it would be the task of the historian to uncover. On the contrary, individual histories tend to be very anti-universal, very concentrated on bringing forth the specific standpoint of the historian. This is perhaps easiest to see by the example of Belgium's key role in the field.

### III. BELGIAN HISTORIES: LAURENT, NYS, DESCAMPS

In *The Gentle Civilizer of Nations*, I told the story of how professional international law “began” in Belgium in the late 1860s and early 1870s.<sup>13</sup> So it is also perfectly logical that the first efforts to write professional histories of international law came from Belgium and embody a distinctly Belgian point of view. Not that long ago, while preparing my own historical work, I found the eighteen volumes on the *Histoire du droit des gens et des relations internationales* by Francois Laurent, professor of history in Ghent and Brussels at the time.<sup>14</sup> With not a little apprehensiveness, taking the first steps in my own work, I opened the first of these volumes—but was very soon comforted because there was no way I could have undertaken a similar work. For those not (yet?) familiar with Laurent's history, I recommend it to you as a significant timepiece. The first volume dealt with the great Middle Eastern empires, the Babylonians and Assyrians, followed by volumes on the Egyptians, the Greeks, and the Romans. When Laurent got to the fourth volume (on Christianity), he wrote in a new preface, relating that his friends had been contacting him, pointing out that this was not really the history of the law of nations at all, but the history of humanity. Which is why from that point onwards, the successive volumes have two title pages, on the left it continues to read, *Histoire du droit des Gens*, but on the right *Études sur l'histoire de l'Humanité*—studies on the history of humanity. The change made no difference as to the contents. The history of international law *is* the history of humanity. This, of course, is a familiar mindset.

Laurent's student and biographer, Ernest Nys, eventually became the first historian of the new profession of international law serving as professor of legal history in Brussels and writing a series of both larger and specific studies on international legal history.<sup>15</sup> We remember Nys as one of the group of lawyers and intellectuals in the *Institut de droit international*, the Institute of International Law, where modern “professional” international law was forged. But like most Belgian members of the Institute, he was also a member of King Leopold's *Conseil*

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13. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 12–19, 39–41 (2002).

14. FRANCOIS LAURENT, *HISTOIRE DU DROIT DES GENS ET DES RELATIONS INTERNATIONALES* (1851-1870).

15. See, e.g., ERNEST NYS, *ÉTUDES DE DROIT INTERNATIONAL ET DE DROIT POLITIQUE* (Brussels, Alfred Castaigne 1901); ERNEST NYS, *LES ORIGINES DU DROIT INTERNATIONAL* (Brussels, Alfred Castaigne 1894); ERNEST NYS, *THE PAPACY CONSIDERED IN RELATION TO INTERNATIONAL LAW* (Ponsoby A. Lyons trans., London, Henry Sweet 1879).

*Supérieur de l'État Indépendant du Congo*, the governing council of what was de facto King Leopold's private territory and industrial enterprise. So it was perhaps no accident that when, in 1904, he listed forty-five states in the world, of these twenty-two were European states; twenty-one American; and the remaining three, Japan, Liberia, and the Independent State of the Congo.<sup>16</sup>

Another Belgian of the same generation who served as Secretary General of the *Institut de droit international* was Baron Edouard Descamps, whom we have two reasons to remember. One is his role as a member of the *Committee des juristes* that drafted the Statute of the Permanent Court of International Justice in 1922—the predecessor of today's International Court of Justice. According to Article 38(3) of the Statute, the court in the Hague should apply “general principles of law recognised by civilised nations.”<sup>17</sup> Commentaries of the statute treat the formulation as “old fashioned” but appreciate its point, namely to open the door for the Court to have recourse in its jurisprudence to other sources apart from treaties and customs as well. Especially in the early days of the Court, it was far from obvious that the materials available to it otherwise would have been sufficient and the drafters wanted to avoid authorizing the Court to decide *non liquet*. From the Committee's records, we will find out that it was Baron Descamps who suggested the addition of that set of legal materials—principles joining the legal cultures of “civilised nations”—as a part of the “international law” that the Court could use to decide cases.<sup>18</sup>

But we should also remember Descamps for another fact, namely his having published in 1903 a 600-page tract called *L'Afrique Nouvelle: Essai sur l'état civilisateur dans les pays neufs et sur la Fondation, l'Organisation et le Gouvernement de l'État indépendant du Congo*, an attack against British commercial interests that had schemed to suggest that there was something dubious about the civilizing mission in the Congo.<sup>19</sup> No doubt Descamps was like many Europeans at the time—convinced that colonization and civilization went hand in hand, and like most, felt especially attached to colonization by their own rulers. For him, no doubt, like for Laurent, the history of international law was the history of humanity, and that history, again, largely a narrative of how European ideas and men will come to rule humanity.

This may be a Belgian idea, but it is also a quintessential European idea. The view that Europe will “probably legislate eventually for all other continents” is given an expressly providential gloss in Kant's political essays from where it

16. 1 ERNEST NYS, *LE DROIT INTERNATIONAL: LES PRINCIPES, LES THÉORIES, LES FAITS* 117–18, 126 (1904).

17. Statute of the Permanent Court of International Justice art. 38(3), Dec. 16, 1920, 6 L.N.T.S. 391.

18. See Am. Ass'n for Int'l Conciliation, *The Draft Scheme Of The Permanent Court Of International Justice*, 157 INT'L CONCILIATION 509, 511–14 (1920).

19. See generally BARON EDOUARD DESCAMPS, *L'AFRIQUE NOUVELLE: ESSAI SUR L'ÉTAT CIVILISATEUR DANS LES PAYS NEUFS ET SUR LA FONDATION, L'ORGANISATION ET LE GOUVERNEMENT DE L'ÉTAT INDÉPENDANT DU CONGO* (Paris, Librairie Hachette 1903).

expanded in the course of the nineteenth and early twentieth centuries to the view of Europe's development representing humanity's future too—a view quite central in the intellectual consolidation of international law as an institutional and professional practice.<sup>20</sup> No wonder that towards the end of the twentieth century international law has been felt to carry an intensely Eurocentric heritage. Its history, too, has been a history of what Europeans have done or thought in their relations with other continents and peoples.

#### IV. EUROCENTRISM

Traditional histories are terribly Eurocentric.<sup>21</sup> European locations such as Munster and Osnabruck (Westphalia), Utrecht and Vienna, the Hague, Paris and Geneva, are central to the historiography of the field, places where we international lawyers find ourselves constantly even today. It is frustratingly difficult, indeed in some ways, impossible to do international law without European imaginary, without mentioning “Roman law,” “Renaissance,” or “Enlightenment,” for example. Or with no reference to such technical principles as the gunshot rule, the idea that the coastal state's maritime belt should be determined by reference to the capacity of eighteenth century European military technologies. You cannot write a history of international law without recourse to concepts such as *jus gentium*, which immediately take you back to the way imperial Rome imagined its commercial relations with foreigners, the people it arrogantly relegated to the uniform category of non-citizens of Rome. And what kind of history would it be that would not focus on the Napoleonic Wars, the debates on the balance of power and “concert” within the Congress of Vienna in 1815? It seems quite impossible to write about international legal history without writing the history of what Europeans have done and written, how they have imagined Europe, and the conduct of its expansion.

But the problem with traditional histories is not only that the events and ideas—the *substance* of international legal history—tends to be Eurocentric. The very *standards of historiography* are European. To write a credible professional history of the field, one needs to adopt European notions of relevance so that even a critique of Eurocentrism may appear to arise from European preoccupations and political attachments. This is a much more difficult problem to deal with than merely seeking to shrug off narratives Europeans have traditionally told. In the 1960s and 1970s, a first generation of non-European, non-American lawyers, who were often active in the United Nations, started to write other kinds of history. I mention here R.P. Anand, an Indian diplomat, scholar, and legal historian who wrote works on maritime and commercial laws in the East Indies and trade contacts between the Moghul Empire and the surrounding communities in the Indian subcontinent before and during the early years after the arrival of

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20. KANT, IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE, *supra* note 4, at 52.

21. See, e.g., Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, *supra* note 3; see also Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, in THE OXFORD HANDBOOK, *supra* note 1, at 1034.

Europeans.<sup>22</sup> Another one is Taslim O. Elias, a Nigerian diplomat, a judge at the International Court of Justice, and a historian of international treaty relations in the Saharan and sub-Saharan worlds before European penetration.<sup>23</sup> Those writings were enthusiastically received and significantly broadened the disciplinary horizons. And yet, it is not hard to grasp why a more recent generation of non-European, non-American, international lawyers has been reluctant to continue that kind of work. Those new histories always tended to suggest the following: that the non-Europeans *also* had international law; that they also thought that treaties were binding; that ambassadorial immunities should be honored; and that war should be waged according to some minimal rules of humanity. In other words, the silent suggestion in those works seemed to be that “we were also Europeans,” that non-European communities, too, recognized and followed standards that were familiar to Europeans, thus perversely confirming what Europeans had always known, namely that European standards and more are not really “European” but universal. A new generation of postcolonial historians no longer tries to demonstrate that non-European peoples also subscribe—and have always subscribed—to standards whose authorities are European writers. Instead, they seek to depart from any *a priori* commitment to those standards in the first place. Those standards, and the discipline based on them, they suggest, are an aspect of European colonization. Instead of showing how everybody has actually accepted its principles, what needs to be demonstrated is how, precisely, they have been imposed on everyone so as to support European domination. Tony Anghie’s now classic *Imperialism, Sovereignty and the Making of International Law* has inspired many other studies in the past decade whose point has not been to write about international law as a civilizing project or an instrument of humanitarian progress, but as stories of enslavement and the destruction of indigenous ways of life across the world—the universalization of a commercially drawn technological empire.<sup>24</sup>

The problem, these new histories seem to be suggesting, is that it is impossible to write international legal histories—or indeed to participate in international law in present professional or academic institutions—without doing this through a vocabulary and a set of techniques and understandings that are accomplices to a history of European domination. To participate in these Eurocentric practices—to accept that engagement in the diplomatic or academic debates is possible only through such practices—is to perpetuate that history and to close avenues for thinking and acting in other ways, to prevent imagining other

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22. R.P. ANAND, *STUDIES IN INTERNATIONAL LAW AND HISTORY: AN ASIAN PERSPECTIVE* (2004).

23. TASLIM OLAWALE ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1972).

24. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 23–28 (2005); *see also* NATHANIEL BERMAN, *PASSION AND AMBIVALENCE: COLONIALISM, NATIONALISM, AND INTERNATIONAL LAW* 44 (2012) [hereinafter BERMAN, *PASSION AND AMBIVALENCE*]; Emmanuelle Jouannet, *Universalisme du droit international et impérialisme : le vrai faux paradoxe du droit international?*, in 13 *IMPÉRIALISME ET DROIT INTERNATIONAL EN EUROPE ET AUX ÉTATS-UNIS* 15, 18–21 (Emmanuelle Jouannet & Hélène Ruiz Fabri eds., 2007).

futures for the world than those opened up by Laurent, Kant, and other European thinkers. And yet, it seems difficult to suddenly invent new vocabularies—or to replace constructive imagination by nostalgic retreat that celebrates the ways of life of native communities before the arrival of the Europeans. Postcolonial critics seem to be stuck between two strategies: either to accept the universality of the inherited standards and to concentrate on a demonstration of European hypocrisy—to show that Europeans never complied by those standards themselves—or to reject those standards and to indict international law as an accomplice to imperial domination. Some good work has been done on both sides since the 1980s, but two problems especially remain: what one should replace the existing vocabulary with and how to avoid subscribing to a naive realism for which international law is merely a superstructural veil over the relations of power? The intellectual agreement between postcolonial history and the imperial narratives of Grewe and Schmitt may or may not be a cause of concern. But it seems obvious that legal realism, as the basis of one's legal history, is not prone to nuanced narratives about the functioning of the law/power nexus.

The history of international law seems poised between two alternatives. Either to operate with the inherited vocabularies and seek to deal with the problems that arise from their association with dubious political causes as best one can, or to reject those vocabularies outright, and then to seek to replace them with something more congenial. Each alternative has an aspect of reductionism that makes it hard to recommend them as *prima facie* better or worse. Each has vital lessons to give to but also the propensity to turn into an intellectual trap, blinding adherents to history's ironies and ruptures, its counter-intuitive turns and contradictions.

In a recent work, I have tried to outline four strategies with which colleagues have tried to cope with Eurocentrism while avoiding full commitment to either of the alternatives.<sup>25</sup> One is to simply tell the story of international law's engagement with specific colonial and imperial projects; the facts are often gruesome enough to shock the interlocutor into an anti-colonial consciousness. This is what the *Leyenda negra* purported to accomplish in the hands of Protestants such as William of Orange or Hugo Grotius, while simultaneously turning attention away from the colonial policies of their countries. There are innumerable moments where rhetoric of law or rights has accompanied imperial pursuits. Think of the way the rights of man in Paris were accompanied with the greatest number of the importation of slaves in Haiti around 1790, for example, or the reluctance with which the members of the National Assembly moved to end slavery—and even then only temporarily—in the French Caribbean. Or think of the turn to formal empire from the 1870s onwards, the enthusiasm with which international lawyers greeted the rule of King Léopold in the Congo in 1885, or their silence when Italian planes were spreading poison gas over Abyssinia in 1936. It is often sufficient to merely lay out the facts. (Though we are probably not as easily shocked today as people once upon a time—but cynicism is too large a theme to be treated here). The question about whether *the law* should be indicted, or the

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25. See generally Koskeniemi, *Histories of International Law: Dealing with Eurocentrism*, *supra* note 3.

lawyers, can be left for later, when the complexity of the moment may be duly acknowledged. Did the law *actually* support colonization in this way; were the lawyers *really* united in their view of what the law said—and what influence did they have? Is the law, as Nathaniel Berman’s “genealogist” would like to know, the Captain or the Imperial Valet, and whether the roles of the two sometimes get reversed?<sup>26</sup>

A second strategy is to point to the colonial origins of this or that institution that has customarily been thought of as originally “European.” Sovereignty and property are typical; the content of each has been crucially forged in a colonial context so as to either include or exclude forms of indigenous chiefdom or possession. Anghie’s work on imperialism poses the good question about whether international law as a whole was born out of the colonization of non-European territories.<sup>27</sup> Without the encounter in the sixteenth and seventeenth centuries, Europeans would easily have been able to construct their relations under the old principle of *jus gentium*, perhaps modernized into a *Droit public de l’Europe*, built on local European customs, forms of faith, and political community. A third way to do historical work, without presupposing the existence of a homogeneous European project of colonization by law that would then have to be either endorsed in principle—against European hypocrisy—or flatly rejected in a single act of postcolonial defiance, is to think in terms of hybrids of colonial and anti-colonial ideas and uses of the inherited vocabulary. Whatever the origin or content of principal notions of international law, many of those notions have been used in innovative ways also to support anti-colonial ideologies or practices. Sovereignty, national self-determination, binding force of treaties, and the idea of inalienable human rights are all rather obvious examples of notions that have travelled far and wide and have found supporters and adversaries in the most varied quarters. There is new work, for example, on how jurists from the third or the “semiperipheral” world have used traditional legal concepts to buttress their states against European powers in Latin America, Asia, and northern Africa.<sup>28</sup> International legal concepts are like any other legal notions—indeterminate as to their content and amenable for use for a number of contradictory causes. During the 1960s and 1970s, calls for the “permanent sovereignty over natural resources” (PSNR) were made also in terms of legal equity and sovereign equality, with stress on responsibility for former deprivation and injustice.<sup>29</sup> The story of that initiative’s fate and of the even more ambitious “New International Economic Order” project, which did not succeed in its most important goals—though some achievements were attained—constitutes an excellent illustration of the possibilities and perils of engagement in

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26. BERMAN, PASSION AND AMBIVALENCE, *supra* note 24, at 41, 45.

27. ANGHIE, *supra* note 24, at 13–15.

28. See, e.g., Nathaniel Berman, ‘The Appeals of the Orient’: Colonized Desire and the War of the Riff, in GENDER AND HUMAN RIGHTS 195, 223–29 (Karen Knop ed., 2004); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY, 1850–1950 (forthcoming 2013); Liliana Obregón, *Between Civilisation and Barbarism: Creole Interventions in International Law*, 27 THIRD WORLD Q. 815, 820–24 (2006).

29. ANGHIE, *supra* note 24, at 216, 317.

legal reform in existing institutions.<sup>30</sup> No doubt, more work should be done about what happened with those pursuits. Finally, a fourth strategy is to follow Dipesh Chakrabarty's advice in order to "provincialise Europe."<sup>31</sup> This means giving up the habit, learned from Laurent and Kant, and followed on to practically all twentieth century international legal history of thinking of European stories as the universal stories; world history as the history of European expansion; and the history of political and legal ideas as the narrative of European men having conversations across history over themes and concepts with a universal purport. Instead of thinking of the history of international law as "histoire de l'humanité" (Laurent), one could think of it as a "project" of a limited number of men to exert political influence or gather material resources in specific contexts. I sometimes think of my own *The Gentle Civilizer of Nations* in these terms, as an effort to bring international law down from epochal or conceptual abstractions and think of it in human terms, as a set of legal initiatives by men who defined themselves as authorities in the field and therefore had much to gain if indeed they might succeed. One could, in other words, seek to contextualize the uses of international legal vocabularies by reference to what it is that their native speakers have wanted to attain by them—such as, furthering the cause of a colonial company; buttressing the international status of one's own country; trying to work for or against the expansion of trade; or simply as an instrument for the political influence of one's employers. It is quite normal for lawyers to have clients and to plead for them. It is only international law's ideological ballast as representative of something greater that has made its historians too reluctant to bring it down to the human size. But I believe signs of a change in that regard are emerging.

#### V. VITORIA AND US: DEALING WITH ANACHRONISM

Two weeks ago, I attended a conference in Madrid on the legacy of Francisco de Vitoria, the Spanish Dominican cleric whose works on the Indies and on the laws of war have had great influence on later generations. The conference speakers often referred to Vitoria as "a great jurist" or an "activist in human rights" from whose humanitarian and "anti-imperial" positions we would have much to learn. This, by now commonplace way of addressing the Spanish second scholastic, is rather obviously anachronistic. What might Vitoria, *prima* professor of theology at Salamanca, have thought if he had learned that he would be downgraded as a "jurist" or addressed as a "human rights scholar" in a world where the expression "human rights" made no sense in either the Latin or Spanish languages and ideas that we associate with freedom in a secular community were frankly heretical? Vitoria, after all, was in favor of burning heretics! How should one react to the routine projection of present concepts, vocabularies, and biases onto people of other ages and other concerns? Surely, anachronism shuts our ears to what Vitoria was actually trying to convey to his Salamanca audience. Surely, we owe it to

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30. See generally SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 103–59 (2011).

31. See generally DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

Vitoria to try to understand him on *his* terms, instead of ours.

But most twentieth century international legal history operates precisely in the contrary way. It takes our present concepts and institutions as its starting points and works backwards to sketch a “tradition” operating as a conversation across generations over such familiar topics as sovereignty, diplomacy, treaties, humanitarian limits to warfare and so on, gradually gaining maturity in our present institutions, the United Nations, or the human rights treaty mechanisms. Historians rarely nowadays think in these terms. They have learned to be wary of “precursoritis,” the view of the past as significant predominantly as precursor to the present. To think in terms of “traditions” flattens history and erases its ruptures, transformations, and incommunicabilities. It may even be a wholly imaginary, violent way to fuse together persons and moments as different as an Italian Protestant at Oxford in late-sixteenth century (Gentili); a Spanish counter-reformation intellectual (Vitoria); a Dutch eclectic working for a trade company (Grotius); and a Huguenot *littérateur* looking for a job in eighteenth century Neuchâtel (Vattel). These men were concerned over political affairs on a rather wide scale—but their concerns and contexts, their “projects,” were otherwise widely different and hardly comprehensible in terms of their contribution to a “tradition” that came to fruition only long after they had left the scene.

The majority of Anglo-American historians today regard anachronism to be a mortal sin.<sup>32</sup> Historiography—especially study of legal and political thought—should not extract its subjects from their chronological contexts as may befit some contemporary project. It should read such subjects as against the debates and struggles that belonged to the world where they lived and produced their works. Or, as stated by the most famous of the contextual historians, Quentin Skinner, historical texts or events ought to be studied by asking the question about what the author of a text or agent intended to *achieve* by the text or the act in view of the linguistic conventions available and the audience to which it was directed. The objective of the process should be to understand the intention of the agent by locating the text or the act in the place and time of its production.<sup>33</sup> In this—“historicist”—view every idea is a product of the moment where it is born and operates. It emerges from the concerns of the period and lives through often polemical engagement with other ideas adjoining it at the time. Ideas do not have trans-historical meanings. They are part of vocabularies and systems of thought that emerge in particular periods, flourish and die. Their meaning is completely tied up with those systems and cannot be grasped separately from them.

A contextual reading of Vitoria, then, would look very different from most contemporary accounts. It would highlight that his lectures on the Indians or on just war were composed in the context of teaching future clerics on the management of the sacrament of penance.<sup>34</sup> The proper intellectual context would

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32. I am inspired, however, by Anne Orford's defence of anachronism. See Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 170–77 (2013).

33. I QUENTIN SKINNER, VISIONS OF POLITICS: REGARDING METHOD 86–87 (2002).

34. Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61

not at all be a tradition of international law but the “Second Part of the Second Part” of the *Summa Theologiae* of Thomas Aquinas that deals with the virtue of justice—and not “law”—and opens into a series of questions and answers about the conditions of absolution that confessors ought to bear in mind. They were also given publicly as summaries of a rather wider series of lectures that dealt with such other aspects of justice as restoration, the rights of property and exchange, just price, and usury, that had immediate relevance for thinking about two important points of concern for theologians at the moment: the expansion of a commercial culture in Europe and in imperial lands and the standards of behavior Christians ought to follow when dealing with non-Christians.<sup>35</sup> But almost none of this context has ever been included in legal histories celebrating Vitoria as a “founder” of international law. Instead, Vitoria’s image has been overlain by anachronistic images about international legality and human rights protection. Almost no attention has been given to Vitoria as a Counter-Reformation intellectual, worried about Luther’s expanding influence and the theological reforms that his colleague and friend Domingo de Soto was advancing at the Council of Trent—which he could not personally attend owing to ill health—and concerned over the state of the souls of commercial men like the Spanish *cambistas* in Antwerp who asked for a second opinion from Vitoria in 1530 about whether their professional activities were sinful, and if so, what they could do about the matter.<sup>36</sup> Vitoria did not have a direct response, and we can imagine that it must have been the letter, and the changing world from which it emerged, that inspired him to devote such meticulous attention to the justice of commercial exchanges, as well as to rights of property and jurisdiction, to natural law and the *jus gentium* in his lectures in Salamanca.

If apart from the readings by Annabel Brett and Richard Tuck,<sup>37</sup> Vitoria has so far not been the object of wider contextual studies in the Anglophone world, this is not the case with the Protestant political activist Hugo Grotius, especially in regards to his work as legal advisor to the Dutch East India Company in the early years of the seventeenth century. His large work, *De jure praedae*, which was unearthed from his *Nachlass* only in the nineteenth century, has been meticulously situated in context by Martine van Ittersum while others have read his theological texts with close attention to their reception in the predominantly puritan milieu of the Dutch rebellion.<sup>38</sup> Another contextual work is that on Alberico Gentili by

U. TORONTO L.J. 1, 13 (2011).

35. See FRANCISCO DE VITORIA, *COMENTARIOS A LA SECUNDA SECUNDAE DE SANTO TOMÁS* (Vicente Beltrán de Heredia ed., 1932).

36. See generally MARJORIE GRICE-HUTCHINSON, *THE SCHOOL OF SALAMANCA: READINGS IN SPANISH MONETARY THEORY 1544–1605*, at 38–58 (1952).

37. ANNABEL BRETT, *LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT* 124–40 (1997); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 51–77 (1999); see also ANTHONY PAGDEN, *THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY* 84–99 (1982).

38. HUGO GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Martine Julia van Ittersum ed., Liberty Fund 2006) (1868). See generally MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER*

Diego Panizza that has discussed the works of this Bartolist jurist as a member of the “war party” in the England of Elizabeth I and a target of religious criticisms by the puritan members of the Oxford law faculty.<sup>39</sup> More recently, that bastion of universalist ideologies, human rights, has also been subjected to contextual readings by Samuel Moyn<sup>40</sup> and others. These works are perhaps still not read by international lawyers to the extent one would hope, but I have no doubt that they will in the future contribute to undermining the ideologies of progress that have been an ineradicable part of international legal history.

## VI. THE LIMITS OF CONTEXTUALISM

But even as contextualism opens an enlightening avenue for the examination of past legal and political worlds, it is not without its difficulties. In particular, it tends to rely on a “positivist” separation between the past and the present that encourages historical relativism, indeed an outright uncritical attitude that may end up suppressing efforts to find patterns in history that might account for today’s experiences of domination and injustice.<sup>41</sup> Suggesting that the past is literally “another country” whose mores and thinking can only be uncovered with the greatest difficulty and whose conceptual schemes, once uncovered, cannot be submitted to criticisms by standards based on today’s “value-systems” is to attack both the progressivist narratives of the traditionalists as well as the postcolonial critiques of international law’s involvement with empire and colonization. Both before and after Anghie, critical lawyers have pointed to how Vitoria’s way of dealing with the Indians subordinated them under a theological vocabulary that justified Europeans’ disciplining them.<sup>42</sup> From the perspective of a rigorous contextualism, however, attacking Vitoria as a legitimizer of colonialism would mean that “some standards of historiographical analysis have been abandoned.”<sup>43</sup> In a sustained discussion of the matter, Ian Hunter has noted that both sides in the controversy over Vitoria’s legacy have utilized “a global principle of justice capable of including European and non-European peoples within the ‘universal

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IN THE EAST INDIES (1595–1615) (2006).

39. DIEGO PANIZZA, ALBERICO GENTILI, GIURISTA IDEOLOGO NELL'INGHILTERRA ELISABETTIANA (1981).

40. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

41. The connection between historicism and positivism was made long ago (by specific reference to Weber) in LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 9–80 (1953). My discussion is, however, much more influenced by Anne Orford, *The Past as Law or History? The Relevance of Imperialism for Modern International Law*, in TIERS-MONDE: BILAN ET PERSPECTIVES (Emmanuelle Jouanet & H  l  ne Ruiz-Fabri eds., forthcoming 2013) and Orford, *supra* note 32, at 170–77.

42. See, e.g., ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 96–108 (1992); Jos  -Manuel Barreto, *Imperialism and Decolonization as Scenarios of Human Rights History*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 140, 144–51 (Jos  -Manuel Barreto ed., 2013).

43. Pablo Zapatero, *Legal Imagination in Vitoria. The Power of Ideas*, 11 J. HIST. INT’L L. 221, 271 (2009).

history' of [the] unfolding [of *jus gentium*]."<sup>44</sup> In so doing they have—falsely—upgraded their own locally-determined biases and preconceptions into universal standards that they then impose on others. But to operate with anything like “universal justice” or a “historical tradition” is to neglect the chronologically delimited sense in which historical agents and their works and texts ought to be understood. It is to commit the sin of anachronism.

However, it has long been known that a clear separation between the object of historical research and the researcher's own context cannot be sustained; that the study of history is unavoidably—and fruitfully—conditioned by the historian's prejudices and pre-understandings, conceptual frames and interest of knowledge. “Historians,” Michel de Certeau has observed, “begin from present determinations. Current events are their real beginning.”<sup>45</sup> The point about the intermingling of the object-vocabulary with the historian's own vocabulary has been often made, but there is perhaps reason to remind ourselves of its importance for critical study of law and history. The answers we receive from history are dependent on the questions we pose—those questions, again, being dependent on our present projects, our understandings and pre-understandings, including where we believe the present is leading us now. As Hans-Georg Gadamer used to stress, “History is only present to us in light of our futurity.”<sup>46</sup> This is precisely what we see when our present problems with “globalization” lead us to examine the past of our inherited legal concepts and institutions.

It is important to respond to concerns about anachronism because many of them are so obviously relevant for international legal historiography. It is true that present concerns ought not to prevent us from trying to understand past legal texts or events in their context. On the other hand, complete freedom from anachronism is impossible—positivism is still mistaken. All historical study can—in fact, must—rely on is the historian's own pre-understanding and techniques. The point is that this fact ought not to make the historian unable to hear the voice of the past and engage in a critical contact—“dialogue” if one wishes—with it. Let me make briefly two arguments. First, the kind of “pure” contextualism that stresses the limitation to historical work to the description of past contexts or “conceptual schemes” cannot succeed on its own terms. Choice and evaluation are necessarily part of history as much as any other study, perhaps in an especially intense way in history. And second, the choices and evaluations which enable the historian to engage with the past ought to reflect an effort to attain a better understanding of the nature of the present, including the causes of today's domination and injustice, in order to contribute to their eradication. I have no problem with the old Marxian view that the validation of propositions about the world cannot depend on the correspondence of those propositions with some (non-propositional) state of

44. Ian Hunter, *Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations*, in *LAW AND POLITICS IN BRITISH POSTCOLONIAL THOUGHT: TRANSDISPOSITIONS OF EMPIRE* 11, 11–12 (Shaunnagh Dorsett & Ian Hunter eds., 2010).

45. MICHEL DE CERTEAU, *THE WRITING OF HISTORY* 11 (Tom Conley trans., 1988).

46. HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* 9 (David E. Linge ed. & trans., 1976).

affairs, but how they contribute to what, for lack of a better word, can be called human emancipation. Commenting on this view Hayden White has noted:

We apprehend the past and the whole spectacle of history-in-general in terms of felt needs and aspirations that are ultimately personal, having to do with the ways we view our own positions in the ongoing social establishment, our hopes and fears for the future, and the image of the kind of humanity we would like to believe we represent.<sup>47</sup>

The limits of contextualism become most clearly visible in efforts to define what the “context” for a historical text or an event is. Is it that of writing books or making claims and counterclaims within some diplomatic or military dispute? What role do the institutions and traditions of academic life play for the assessment of the contribution of a jurist, and can those institutions be understood without regard to wider histories of the university in Europe, the rise of professional disciplines and their role in the formation of the modern (European) State? And then there are large questions raised by Ellen Meiksins Wood at the outset of her recent series of volumes on the history of political thought. Many historians, she complains, appear to concentrate only on the *intellectual* context—the texts produced by the historical agent, his or her relations to colleagues, correspondence, and activity within some intellectual or political institution.<sup>48</sup> In all this history, she observes, there is very little “substantive consideration of agriculture, the aristocracy and peasantry, land distribution and tenure, the social division of labour, social protest and conflict, population, urbanization, trade, commerce, manufacture, and the burgher class.”<sup>49</sup>

In the history of international law, too, there are large questions to be posed about the cultural, political, and economic role of law and lawyers that have to do with the shifting position of the systems of knowledge represented by theology, politics, and economics. Although it is necessary that a study of Vitoria take account of his work as commentary on the *Summa Theologiae*, a proper account of *that* activity, again, ought to encompass some discussion of the dogmatic history of Catholic theology, including the nominalist challenge that Vitoria confronted during his apprenticeship in Paris. But it should also consider the suppression of the *comuneros rebellion* in 1519-1521 in Northern Castile that shook the political consciousness of the contemporaries, and whose lesson was recorded in the strong appeal for social discipline in Vitoria’s 1528 *relectio* on civil power.<sup>50</sup> Nor should it overlook the massive expansion of commerce following the entry of silver from the Indies into the networks of trade that challenged religious attitudes and dramatically undermined Church doctrine.<sup>51</sup> But further, surely the “context” of

47. HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 283 (1973).

48. See ELLEN MEIKSINS WOOD, *CITIZENS TO LORDS: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM ANTIQUITY TO THE MIDDLE AGES* 8 (2008).

49. *Id.* at 9.

50. See VITORIA, *On Civil Power*, in *POLITICAL WRITINGS* 10, 32–34 (Anthony Padgen & Jeremy Lawrance eds., 1991).

51. See, e.g., Martti Koskenniemi, *Ius Gentium and the Birth of Modernity*, in

Vitoria cannot be strictly limited to the moment when he lived; after all, that period was situated “inside” such larger chunks of history that are usually labeled “the rise of capitalism,” “renaissance conscience,” “the Reformation,” or “the rise and fall of the Habsburg empire,” together with hypotheses about the causal relations between such large items. While it is important to read Vitoria “in context,” that is merely a preliminary to the work of determination of what the appropriate context is. There is no a priori reason to think that chronology would provide the decisive standard instead of, say, some *longue durée* assumption about the role of “organic intellectuals” or relations between religion and state power. Points relevant for reading Vitoria include the nature of Spanish imperialism, its effect on Castilian peasantry, events taking place in the German realm—the use of Protestantism to support the independence of territorial polities—and the way easing the prohibition of usury would facilitate the expansion of international commerce by legitimizing long-distance credit operations, for example.<sup>52</sup>

Now the simple point is, of course, that none of such “contexts” appears automatically on the legal historian’s screen. They reflect the historian’s choice—and that choice is obviously dependent on some criteria of relevance that enables the historian to produce a meaningful narrative out of the mass of texts and events of which the past consists. It does not require more than a casual glance at twentieth century historiography to realize that the criteria of relevance have varied enormously and radically; types of historical explanation have come and have gone as methodological debates among historians have proceeded—those debates again reflecting larger contextual changes in contemporary understandings of the role of ideas and facts, psychological causalities, and material transformations in producing what to us appears as the real historical context where we live. It is impossible, but also largely unnecessary, to press upon the point that the stories of the past we tell always reflect our present concerns, that every history is a history of the *present*.

## VII. CHOOSING SCOPE AND SCALE

With those last remarks, let me make a few final points on how any account of international law’s past is necessarily and fruitfully embedded in contemporary concerns and preferences and participating in present-day debates and disputes. Because those debates often have political implications, it is especially useful for accounts that aim to possess a critical edge to be aware of them and to learn to use them in intelligent ways. I will summarize the remarks, following Christopher Tomlins, by references to choices of scope and scale that are involved in the study of international legal history.<sup>53</sup>

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CONSTRUCTING INTERNATIONAL LAW: THE BIRTH OF A DISCIPLINE 3 (Luigi Nuzzo & Milos Vec eds., 2013).

52. See Martti Koskenniemi, *The Political Theory of Trade Law: The Scholastic Contribution*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 99–100 (Ulrich Fastenrath et al. eds., 2011) [hereinafter Koskenniemi, *The Political Theory of Trade Law*].

53. Christopher Tomlins, *After Critical Legal History*, *Scope, Scale, Structure*, 8 ANN. REV.

As for the determination of the *scope* of one's historical work, there are a number of jurisprudential choices that need to be made at the outset that reflect on what kind of account one is going to produce. I already pointed to two alternative ways to examine international law's past: (1) an "idealist" approach that examines the past through "ideas," "rules," or "principles" that appear in canonical texts or can be detached from relevant events or practices; and (2) a "realist" approach that examines imperial policies, economic or military power. The former embodies a traditional way of writing international legal history, but it is premised on a definition of "law" that has been highly contested. A whole "realist" tradition, from French sixteenth century historical jurisprudence onward, rejects imagining law as abstract ideas and instead proposes to shift attention to past practices and the uses of social power. Both Hobbesian "realism" and the critique by the nineteenth century historicists of enlightenment universalism embody alternative ways of understanding law as the part of the life of a community, an aspect of its practices and relations of power. In the middle of the twentieth century, such realisms proliferated to seek the presence of the law "in operation" in patterns of administrative or judicial decision-making, the consciousness of legally qualified professionals, or ideologies of legitimacy embodied in a society's hegemonic structures. The works by Schmitt or Grewe emanated from such criticisms, as do the works of many postcolonial scholars attacking international law by associating it with the opprobrium of colonialism and imperialism.<sup>54</sup>

Choosing the scope of one's history requires, among other things, a choice between either examining legal or philosophical texts produced at academies, professional acts and instruments from public administrations and foreign ministries, or then focusing on economic interactions and interests, the development of military technology, or the strategies of balance of power. How should one define the scope of one's history—should it be a history of thinking or acting, a history of rules or practices? The great interest international lawyers have had with the laws of the Spanish empire in the Americas in the sixteenth and early seventeenth centuries manifest each. If the scope of one's study is focused on the lectures given by the Dominican scholars in Salamanca, the resulting account will look very different than if one examines what was going on in Mexico or Peru at the time among the conquistadors or the *encomenderos*. For instance, the title of Lewis Hanke's classic account, *The Spanish Struggle for Justice in the Conquest of America*, already delimits the scope of his work by heavy normative tilt.<sup>55</sup> The events, it suggests, are significant inasmuch as they illustrate the "struggle for justice" waged by (some) Spaniards in the course of the conquest—a kind of antidote to the famous title of Las Casas' *Short Account of the Destruction of the Indies*.

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OF L. & SOC. SCI. 31 (2012).

54. See SLIM LAGHMANI, *HISTOIRE DU DROIT DES GENS: DU JUS GENTIUM IMPÉRIAL AU JUS PUBLICUM EUROPÆUM* (2004).

55. LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* (1949).

One could try to overcome the definitional quandary (is international law better seen as ideas or power?) by the jurisprudential compromise to think of the law as an “institutional fact,” an amalgam of ideologies and practices. But would one then focus on academic or military institutions, and what about the relations between economic institutions—forms of property and contract—and institutions of public law and administration—sovereignty and constitutional forms? I make these points not to show that it is impossible to do historical work, but that, before such work can start in international law, some very consequential choices have to be made about what the “law” is that will determine the scope of the study. Let us say someone wants to do research in international law in the eighteenth century. The chronological scope of such research might be defended by the argument that, during the Enlightenment, important developments took place in ideas about and practices of statehood, international trade, warfare, and in the overall ideologies of political and legal legitimacy. One might contest this by arguing that such a definition is completely Eurocentric—“Enlightenment,” “rights of man,” and “balance of power” were aspects of European debates and ideologies and instead focus on the expansion of the slave trade in the same century, or the process leading up to Haiti’s independence in 1804 in which the National Assembly did its best to limit the *Déclaration de droits de l’homme et du citoyen* to mainland France.

But even if one wished to remain inside the old, Eurocentric scope of international legal histories of that period, there would still remain charged issues to be resolved. In traditional histories, the work by Immanuel Kant on cosmopolitan law figures as a limit case. Is Kant’s *Perpetual Peace* a work in international law or is it not?<sup>56</sup> If it is, then international law is defined in part as philosophy—but why would Christian Garve’s sharp anti-idealist work on the difference between private morality and the morality of statesmanship—to which Kant was in part reacting—be then left outside?<sup>57</sup> After all, it was much closer in spirit and practical conclusions to the work on *Staatsklugheit* by influential German professors of law of nature and of nations, such as Johann Hieronymus Gundling or Gottfried Achenwall. Is Hobbes a part of the (intellectual) tradition of the law of nations? If he is (as most would concede), then surely the tradition of *ragion di stato*, inaugurated by the Counter-reformation activist Giovanni Botero at the turn of the seventeenth century, would also have to be included in the history of international law?<sup>58</sup> I have elsewhere argued that international law is a “German discipline.”<sup>59</sup> To make that argument, I have included the very powerful German

56. See generally KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH, in POLITICAL WRITINGS, *supra* note 4, at 93.

57. See generally CHRISTIAN GARVE, ABHANDLUNG ÜBER DIE VERBINDUNG DER MORAL MIT DER POLITIK ODER EINIGE BETRACHTUNGEN WIE ES MÖGLICH SEI, DIE MORAL DES PRIVATLEBENS BEY DER REGIERUNG DER STAATEN ZU BEOBACHTEN (1788).

58. See generally GIOVANNI BOTERO, THE REASON OF STATE (P. J. Waley & D. P. Waley trans., 1956). For a useful, recent commentary, see ROMAIN DESCENDRE, L’ÉTAT DU MONDE: GIOVANNI BOTERO ENTRE RAISON D’ÉTAT ET GÉOPOLITIQUE (2009).

59. See generally Martti Koskenniemi, *Between Coordination and Constitution: International Law as German Discipline*, 15 REDESCRIPTIONS: Y.B. POL. THOUGHT AND

public law into the history of international law—Pufendorf, Thomasius, Achenwall, Jellinek, Schmitt, Kelsen . . . . Again, I recognize this is a contestable choice. Making it will make the history of international law look very different from narratives where Emer de Vattel and such French *littérateurs* as Abbé de Saint Pierre or Jean-Jacques Rousseau play a large role. Either way, the choice will determine whether one understands international law as a governmental project of managing external relations or a debate on “perpetual peace” by intellectuals. And is Adam Smith part of the history of international law? The least one can say is that defining the field so as to *exclude* him would participate in the colossal “forgetting” in much of international legal history of the influence of economic thinking—and this despite the fact that some of the basics of that thinking are to be found in the subjective right vocabularies of men unquestionably included in the canon (such as Vitoria or Grotius).<sup>60</sup>

Finally, one can say that delimiting international legal history to accounts about kings and wars and balance of power tends to remain a big problem, especially as it ignores the close relationship that has always existed between sovereignty and property, public and private law in external government and empire. This is why, in my recent work, I have tried to delimit the scope of “international law” in such a way as to include the development of private law rules on ownership and contracts and to look closely at the operation of trade companies from the seventeenth to the nineteenth centuries as instances where the cooperation between the two is most clearly visible. Again, I find it astonishing that the global laws of the economy have not been subjected to study by international lawyers—even as it is clear that everything about the economy is built on legal rules and practices of enforcement, as institutional economists readily concede.<sup>61</sup> That the market is not, and has never been, independent from public power, but, contrarily, the effect of constant state intervention has not inspired international legal historians so far to examine how this cooperation has taken place. Yet, signs of a change in this respect are visible.<sup>62</sup> And it is not at all wrong to assume that this change in the scope of international legal history is wholly inspired by a contemporary concern to make sense of the operations and morality of what is now called globalization.

Alongside the determination of the scope of one’s history, there is also the question of its *scale*. Histories of international law have tended to encompass large, even global, wholes that are supposed to determine the substance of the international laws of a period, such as the “Spanish,” “French,” or “British” “epochs” discussed by Grewe. I am a great admirer of universal history of the kind

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CONCEPTUAL HIST. 45 (2011).

60. See, e.g., Koskenniemi, *The Political Theology of Trade Law*, *supra* note 52, at 95–101.

61. See DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 17–18 (1973).

62. See, e.g., Doreen Lustig, *International Law and the Business Enterprise* (March 2011) (unpublished Ph.D. thesis, New York University).

that Fernand Braudel has produced,<sup>63</sup> slightly less so the work of Immanuel Wallerstein.<sup>64</sup> Their big structural narratives about European expansion have tremendous power to explain things to us, including explaining the nature and effect of law in the world. But those scholars had very little, almost nothing, to say about the law. On the other hand, for the very reasons that contextual historians have highlighted, the ambition of global history tends to be overly generalizing, and integrating law in it might easily build on dubious assumptions about its causal relations with the social world. Besides, it is surely not the only wide-angle lens we can take to examine international law. Other alternatives might be class or religion, and although the relevance of both, or at least the latter, has been widely recognized, there are still rather few historical studies using them as starting points.

What would be the appropriate scale on which to examine the work of an individual such as Alberico Gentili? What weight should be given to the fact that he was born in Italy and had studied Roman law in the Bartolist vein? The (large) fact of religion, that he became a Protestant refugee in England, must surely play some role in a contextualization of his works but precisely what? And how important might it be to focus sharply on the Oxford environment, his struggles with his Puritan adversaries at a time of the production of his most important texts? Such considerations have often been included in discussions of his achievement, and in them, the scale keeps changing from large to small, epochal to personal, geographic to ideological. Clearly, the fact that he was a jurist operating during the “Spanish epoch” might be relevant in understanding his famous appeal for the silence of the theologians in matters of law. Or was that call made in an intra-Protestant schism? Is the proper large scale that of “Spanish imperial expansion”—or the struggle against counter-reformation?<sup>65</sup> It seems likely that we can choose the appropriate wide lens only once we have grasped in a narrow focus, Gentili, the individual, writing in a specific place at a specific moment. But the choice of the place and the moment cannot be uninfluenced by what we know about the general context and so on. The narrative moves back and forth between a wider and a narrower scale in order to gradually come to a clearer view of its object.

It is an almost unthinking practice of international lawyers today to adopt a global scale, no doubt in part owing to the predominance of earlier biographical studies in the field. But my first contact with the subject was through a textbook with the title (in Finnish) “Finland’s International Law.”<sup>66</sup> There is an important sense in which the proper scale for a history of international law is that of the nation, and I have already said that some of the best German works on the subject in the eighteenth and nineteenth centuries regarded it as “external public law” (“*äusseres Staatsrecht*”). The scale here is that of the nation’s foreign policy as

63. 2 FERNAND BRAUDEL, *CIVILIZATION AND CAPITALISM 15<sup>TH</sup>-18<sup>TH</sup> CENTURY: THE WHEELS OF COMMERCE* (Siân Reynolds trans., 1992).

64. See IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* (2011).

65. See generally PANIZZA, *supra* note 39.

66. ERIK CASTRÉN, *SUOMEN KANSAINVÄLINEN OIKEUS* (1959).

seen from the foreign ministry—the domestic laws and treaty-arrangements that regulate the conduct of external relations. This is a very close relation to the—also German—idea or ideology about the primacy of foreign policy, whose nationalist implications seem objectionable to many international lawyers. Whether “Foreign Relations Law” is or is not included in an international law course tells much of the ideological orientation of the professor making the proposal. And yet, to depict international law as part of a country’s legal arsenal goes a long way to produce one important truth about it.

There are, of course, formidable philosophical difficulties in the opposite choices of scale offered by available alternatives—the wide-angle of “global history,” mid-level “national history,” and the limited scope of biography—that have to do with the tools of understanding available to present observers. The vocabularies of political causation, that seem needed for the production of wide-angle explanations, have to date dominated diplomatic history and the associated “realisms.” Here we see empires, large states, powerful statesmen, and their jurists as the principal actors of our narratives. Such histories have been challenged as lacking a sociological grasp on what it is that makes empires or state representatives “tick”—how they operate in relation to other social forces. Justin Rosenberg, Benno Teschke, and Ellen Meiksins Wood each have contested the predominance of an exclusively political focus on the international world.<sup>67</sup> What about the role of social classes, and forms of production in the formation of the agents and relationships even at a global scale? Does the “international” at all constitute a meaningful whole that we can examine independently of the social or economic forces that seem to account for such important aspects of the way the world has come about? If it is true, as Teschke argues that “[t]he constitution, operation, and transformation of international relations are fundamentally governed by social property relations,”<sup>68</sup> then this must surely occasion a shift of focus in the writing of international legal history. It should now discard the distinction between public law and private law so as to bring into view how notions of property and contract, the structures of family law, inheritance and succession, as well as the corporate form have developed over time. It is one of the greatest problems of past histories of international law that they have chosen the scale of the state and traced the trajectories of “sovereignty” only—whereas the global network of property relations, thoroughly legalized as these are, would have made them see much further and deeper. Although social history has now entered the world of international relations, no comparable turn has appeared yet in international law. China Miéville’s Marxist account of international legal history is

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67. See generally ELLEN MEIKSINS WOOD, *CITIZENS TO LORDS: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM ANTIQUITY TO THE MIDDLE AGES* (2008); ELLEN MEIKSINS WOOD, *LIBERTY & PROPERTY: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM THE RENAISSANCE TO ENLIGHTENMENT* (2012); JUSTIN ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS* (1994); BENNO TESCHKE, *THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKING OF MODERN INTERNATIONAL RELATIONS* 271 (2003).

68. TESCHKE, *supra* note 67, at 273.

so far the most accomplished effort to take seriously the social determination of aspects of the international political world, including international law, though the jury is still out on the usefulness of the “commodity-form-theory” as the proper explanatory frame.<sup>69</sup> But the scarcity of *legal* debates about this point is disappointing.

To start on this, something might still be said for depicting the history of international law as the history of legal *ideologies*. Despite the attacks suffered by the notion in recent decades, it may still be useful in capturing what jurisprudence has sometimes dealt with in terms the “judge’s legal ideology,” the complex of presuppositions about the world received through legal training, by the integration in a class and profession of jurists, especially international jurists.<sup>70</sup> There are already many accounts of the works and contexts of legal advisors of governments, of officials, and activists of international governmental and non-governmental organizations that might allow the delineation of something like the “ideology of competent international lawyers,” a specific “sensibility” that might unite the concerns of the history of legal *thought* with the study of social history. It seems obvious that the relative absence of debates on *ius gentium* in Britain until the mid-nineteenth century was occasioned at least in part by the specific outlook of English jurists predisposed to view the world through a combination of commercial laws and the crown’s imperial prerogatives to which the absence of adoption of Roman law added something. In the absence of other vocabulary for addressing the specificity of the outlook of English jurists, product of a complex contextualization, the notion of “ideology” might usefully contrast that world to those of the universities of Prussia-Brandenburg at a time when central European statecraft began to cope with the challenges of what appeared an increasingly autonomous sphere of “the economy.” Here, “ideology” and “sensibility” would become meeting-points for history of thought and social causation, just flexible or porous enough to account for both punctual and differential history, the formation of shared meanings in a loosely defined cultural and professional context that would also be amenable to change induced by external forces.

### VIII. SEEING (IN) HISTORY

The turn to contextual readings of international law marks a welcome advance from the older search of origins and the progressive accounting of international doctrines that accompanied traditional histories. Reading Vitoria as a “human rights lawyer” can scarcely be taken as a serious historical engagement with him. Nevertheless, there was something valuable in the sweeping normativity of older histories, in the way they sought to produce “lessons” from their narratives. A careful reconstruction of the context cannot be all. Critical history must also examine how those contexts were formed and to what extent they have persisted to make the world into what it has become today.

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69. CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 155–56 (2005).

70. See ALF ROSS, *ON LAW AND JUSTICE* 76 (1959).

There is much reason to continue reflecting about the sixteenth century Spanish theologians also in normative terms. As we compose our narratives about Vitoria and his colleagues, we shall continue to differ in ways that reflect our normative predispositions—and our readers will continue to be differently influenced. They may perhaps be moved by the plight of intellectuals pressed by the demands of power, faith, and the wish for integrity—or they might be outraged by their hypocrisy and lack of sensitivity to the consequences of their teaching. When they shift the scope of their vision from individuals and their institutions to the wider world, they will learn about how law participates as a supporter or critic of military operations, about state-building, about imperial ambitions, and about the virtues and vices of missions to civilize. In this process, our readers may also come to think of as strange and problematic that which earlier seemed unthinkingly familiar—the fact, for example, that massive poverty in the world can be upheld by theological respect to the right of property whose contours have nevertheless varied sharply across contexts. They may also come to find out that neither “inclusion” nor “exclusion” appears as a *prima facie* beneficial basis on which to move about in the world but that every relationship has its specific nature and history, and that even as patterns and paradigms do form, they never account for the full sphere of future possibilities.

Which leads me to my final point. The reduction of a historical narrative to its context is relative to the way the historian frames the context, decides its scope, and chooses its scale. But, history is not just incommensurate contexts miraculously collapsing into each other. In order to account for change, historians must accept that however thick a description of a context they have achieved, it never exhausts all future possibility. It is also part of the critical legal *acquis* not just to focus into how contexts reproduce themselves and their accompanying structures of domination but to also examine context-breaking moments, ideas, and practices that transform what was earlier taken for granted, as well as the accompanying hierarchies.<sup>71</sup> Historians are familiar with the distinction between great, context-changing “events” and the monotonous routines through which the context merely keeps reproducing itself.<sup>72</sup> Such events draw upon the way that the boundaries of a context—any context—are porous and enable interactions and processes that may lead to the transformation of the context itself—an “epoch” turns into another, a realist historian might later come to write. In their preface to a recent work on “events,” in international law, the editors highlight the opportunities opened by moments or activities that rise against the gray normality of routine applications of the law and instead move the law forward, contribute to crystallizing a substance or a content that seems “‘startlingly inconsistent’ with

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71. See ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK: A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* 130–34 (1987); see also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 548–61 (Reissue with a new epilogue, 2005).

72. See, e.g., Martin Jay, *Historical Explanation and the Event: Reflections on the on the Limits of Contextualization*, 42 *NEW LITERARY HIST.* 557, 564–68 (2011).

that which had come before.”<sup>73</sup> Such events, rare as they are, cannot be reduced to the context, even as one must be wary of an international law in which “reform” has tended to operate precisely like this.<sup>74</sup> Stereotypical context-breaking “events” in the political world are of course great revolutions—the French and the October Revolutions, but perhaps also “1989,” the Arab Spring and the whole process leading up to the demise of the West. But “events” do not have to be grand scale; they can also consist of minute acts where the expectation is not realized, where the counting is disturbed—acts of resistance or as de Certeau pointed out, “deviation,” a breakdown of the symbolic and thereby also the political order.<sup>75</sup>

The discovery of the new world certainly was an “event” of this type, but so was getting rid of the prohibition of usury—colonialism and commercial expansion both being parts of the world in which Vitoria operated and to which he gave intellectual articulation. Using old materials in innovative ways he, like Grotius, opened possibilities of thinking and acting for his contemporaries that were not visible earlier, or at least not in the same way. Attention to such context-breaking events, or minuscule moments where the new is being articulated for the first time, is surely as necessary as attention to the ways in which contexts and their articulations keep reproducing themselves—the way, for example, Vitoria and Grotius both regarded their religious writings as the core of their oeuvre. Stability needs explaining, but so needs change. It is hard to think of a task that would be more important today than to encourage a live sense of the possibility that even as everything seems to be bogged down in routine, we might already be living an event that finally breaks it up.

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73. Fleur Johns, Richard Joyce & Sundhuya Pahuja, *Introduction*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* 1, 2 (2011).

74. See, e.g., David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000).

75. Attention to the context-breaking “event” against the monotonous routine of “mere existence” is a large theme of continental political philosophy. For a recent discussion, see ALAIN BADIOU, *L'ÊTRE ET L'ÉVÈNEMENT* (1988). For a brief English overview, see, e.g., ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* 66–69 (Peter Hallward trans., 2001).