INTRODUCTION: TOWARDS A GLOBAL HISTORY OF INTERNATIONAL LAW

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1. 'The Road Less Traveled by'

With this Handbook, we, the editors and authors, tried to depart from what has been aptly described as the 'well-worn paths'[1] of how the history of international law has been written so far—that is, as a history of rules developed in the European state system since the 16th century which then were spread to other continents and eventually the entire globe.[2] It has also been written as a progressive history that in the end would lead to a

[1] See the contribution by M Koskenniemi 'A History of International Law Histories' in this volume at 970.

[2] See only F Amerasinghe 'The Historical Development of International Law—Universal Aspects' (2001) 39 Archiv des Völkerrechts 367–93 at 368: '[M]odern international law is linearly derived from earlier developments in the European world and adjacent areas and earlier international relations in other parts of the world, such as China and South Asia had little influence in shaping this law'. Amerasinghe nevertheless pleads for also studying the history of international law outside the European sphere 'as an addendum' (ibid 388).

world governed by the ideals of the Enlightenment, and the American and French Revolutions.[3] That history of progress in the name of humanity certainly has its beauty. It provides the history of international law with a clear underlying purpose and direction, and thus gives it a comprehensible structure. But unfortunately, this beauty is false.

The Eurocentric story of international law has proven wrong because it is incomplete. Not only does it generally ignore the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules, and the destruction of other legal cultures in which that dissemination resulted. Like most other histories, this history of international law was a history of conquerors and victors, not of the victims. Furthermore, the conventional story ignores too many other experiences and forms of legal relations between autonomous communities developed in the course of history. It even discards such extra-European experiences and forms which were discontinued as a result of domination and colonization by European Powers as irrelevant to a (continuing) history of international law.

To leave a well-worn path is exciting but always risky. It is an adventure as well as an experiment. Leaving the trodden path means meeting unforeseen obstacles. And if one wants to shed light on developments which so far remained in darkness, one better be prepared to encounter the unexpected and not so easily understood. In this sense, the present Handbook is a beginning only. It represents a first step towards a global history of international law. In the words of Robert Frost's wonderful poem, we tried to take the road 'less traveled by',[4] but we appreciate that we have only come so far.

The difficulties in writing a truly global history of international law begin (but do not end) with determining the time to be covered. In that respect, we did not succeed in completely avoiding a Eurocentric perspective as we started out from the notion of 'modern international law' as established in the Western historiography of international law. In other words, as far as Europe and the Western world are concerned, we wanted to exclude pre- and early history as well as Greco-Roman antiquity, although there is a fairly rich literature on the latter.[5] Furthermore, we decided to include European medieval history only in the light of a 'fluent passage' from the Middle Ages to modernity. The reason for this limitation was first practical (not everything can be achieved at a time, or in a single book), and secondly, the idea of focusing on that international law which has had a bearing on the contemporary international legal order in the sense that there is a 'living bond' between the past and the present. As Antonio Cassese remarked, '[t]he origin of the international community in its present structure and configuration is usually traced back to the sixteenth century'.[6] However, that does not mean that the law of antiquity, or of the early Middle

[3] Cf T Skouteris *The Notion of Progress in International Law Discourse* (Asser The Hague 2010).

[4] See R Frost 'The Road Not Taken' in *Mountain Interval* (Henry Holt and Co. New York 1916) at 9.

[5] See DJ Bederman *International Law in Antiquity* (CUP Cambridge 2007) (with a bibliography at 290 ff).

[6] A Cassese *International Law* (2nd edn OUP Oxford 2005) at 22.

Ages,[7] is completely absent from the pages of this Handbook. It is in fact discussed whenever it played a role, especially by way of its reception and transformation, in the construction of modern international law.[8]

Less Eurocentric is, we think, our decision to ask authors to end their respective accounts in 1945 because the end of the Second World War and the founding of the United Nations mark a caesura not only in Western but in world history.[9] Of course it is possible to write a history of international law of the 1950s or 1960s, but in a larger perspective the international law in force is still the law of the era of the United Nations founded in 1945.

For the history of the non-European regions, the beginning of the European modern era in the 16th century is not a meaningful divide. Accordingly, each author (writing, for example, about Africa, China, or India) had to decide where to start the respective history—a history which at some point of time converged with Western history.

Looking over the table of contents of this book, the reader will easily distinguish chapters with more conventional themes from those with which we tried to present something new. Examining the chapters more carefully, the reader will also see that many authors were assigned particularly difficult tasks. They were asked to write about subjects covered by very little literature, so that they had to start from scratch. The reader will also find that this Handbook is pluralist in many senses, something we see as an advantage but which again does not come without risk. The authors have different academic backgrounds; they are lawyers, historians, and political scientists. They come from, and work in, different regions of the world. They have chosen different historiographical methods. The result is, in some way, a Handbook not of *the* history, but of many histories of international law.

But enough of that *captatio benevolentiae*. Instead, we want to say a bit more about what we had in mind when devising this book, and of where in our view future historical research in international law should be heading.

[7] For a recent admirable study of that period, see H Steiger *Die Ordnung der Welt: Eine Völkerrechtsgeschichte des karolingischen Zeitalters (741 bis 840)* (Böhlau Köln 2010).

[8] See the contributions by M Kintzinger 'From the Late Middle Ages to the Peace of Westphalia' and by K Tuori 'The Reception of Ancient Legal Thought in Early Modern International Law' in this volume.

[9] In contrast, many authors consider the First World War as *the* watershed in the modern history of international law. See eg R Lesaffer 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2002) 73 British Yearbook of International Law 103–39 at 106 n 14 with numerous references. See also W Preiser *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt/Main (1963) Nr. 2, 31–66, repr Franz Steiner Wiesbaden 1964) at 62. M-H Renaut *Histoire du droit international public* (Ellipses Paris 2007) ends her historical acount with the Treaty of Versailles which in her view, 'esquisse une nouvelle metamorphose du droit international qu'il convient de réserver aux spécialistes du droit international public contemporain.'

2. Overcoming Eurocentrism

Traditional history writing in international law focused on the modern European system of states, its origins and precursors in antiquity and the Middle Ages, and the expansion of that system to the other continents. Non-European political entities appeared mainly as passive objects of European domination.[10]

Accounts of the history of international law, written from a non-European perspective, are still rare. Important examples are the works of Taslim Olawale Elias, Slim Laghmani, and Ram Prakash Anand.[11] More recently, critical scholarship has addressed 'international law's dark past',[12] the use of brutal power against, and the exploitation of, the colonized and dominated peoples which was an integral part of the imposition of European rule.[13] Guided by the best intentions, this scholarship, however, is also in a sense Eurocentric. As Emmanuelle Jouannet recently argued, the current historiographical strand which conceives of international law as being built on and imbued by the distinction between Europeans and Others, a distinction allegedly specifically designed to facilitate European hegemony over the rest of the world, corresponds neither to the intentions of the 17th- and 18th-century authors, nor—more importantly—to the objectives of the European sovereigns of the time. Jouannet, in our view correctly, points out that the 'counter-narrative' in fact perpetuates what it seeks to condemn, and basically reproduces the conservative effects of 'classical conservative historiography'. In reality, international law is and was neither 'good' nor 'bad'. It can be used for different and contradictory ends: for oppression and hegemony, but also for emancipation and stability.[14]

[10] But see for important examples of a more balanced historiography CH Alexandrowicz *An Introduction to the Law of Nations in the East Indies (16th, 17th, and 18th Centuries)* (Clarendon Press Oxford 1967); J Fisch *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Franz Steiner Stuttgart 1984); G Gong *The Standard of 'Civilization' in International Society* (OUP New York 1984); N Berman *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Brill Leiden 2011).

[11] TO Elias *Africa and the Development of International Law* (R Akinjide ed) (Martinus Nijhoff Dordrecht 1988); S Laghmani *Histoire du droit des gens—du* jus gentium *impérial au* jus publicum europaeum (Pedone Paris 2004); RP Anand *Studies in International Law and History: An Asian Perspective* (Martinus Nijhoff Leiden 2004).

[12] See the contribution by A Becker Lorca 'Eurocentrism in the History of International Law' in this volume at 1054.

[13] See eg B Rajagopal *International Law from Below* (CUP Cambridge 2003); RP Anand *Development of Modern International Law and India* (Nomos Baden-Baden 2005); A Anghie *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005); JT Gathii 'Imperialism, Colonialism, and International Law' (2007) 54 Buffalo Law Review 1013–66; A Becker Lorca 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 Harvard International Law Journal 475–552; A Orford *International Authority and the Responsibility to Protect* (CUP Cambridge 2011).

[14] E Jouannet 'Des origines coloniales du droit international: A propos du droit des gens moderne au XVIIème siècle' in V Chetail and P-M Dupuy (eds) *Mélanges Peter Haggenmacher* (Brill Leiden 2012 forthcoming).

Arnulf Becker Lorca highlighted that the Eurocentric historical narrative is politically relevant to the extent that is has often performed an ideological function, namely to universalize and legitimize the particular Western standpoint. He argues, in this Handbook, that international lawyers should therefore 'devote energy to produce a divergent narrative and reveal a Eurocentric distortion'.[15] Indeed, we tried to pay particular attention to the non-European influences on the history of international law. Part III on 'Regions' includes sections on Africa and Arabia, Asia, and the Americas (including the Caribbean). Authors here often focus on the period before the arrival of the Europeans and 'their' international law. In a section called 'Encounters', we reflect on the situations and ways in which China, Japan, India, Russia, and the indigenous peoples of the Americas, respectively, opened themselves to European influences, knowledge, and law, and experienced European repression and domination. Not all of these encounters resulted in violent conflicts; some also led to creative forms of cooperation. They brought about 'altered forms and new mixtures,…and not just hegemony or homogeneity'.[16] In a more general way, many of the issues appearing in these encounters are dealt with in Part IV on 'Interaction or Imposition'.

The 'Encounters' section takes up the study of 'cultural encounters' by the pioneers of global historiography[17] who understand 'the self' and 'the other' as shifting constructions so that 'the West' (or 'Europe') can be seen as an invention responding to a global experience.[18] Of particular interest is the question whether there was not only a reception of European concepts and standards by the non-European states and peoples but also an influence in the other direction. In other words, we specifically asked what the contributions of a specific country or region to the development of international law were. As one might expect, the findings differ. The most 'acknowledged' regional contributions are probably the Latin American ones. Jorge Esquirol in his chapter on Latin America mentions in this context non-intervention by third-party States, compulsory international arbitration for State-to-State disputes, territorial limits based on *uti possidetis iuris,* third-party right to recognition of internal belligerents, the right of diplomatic asylum, the principle of *ius soli* in nationality laws, freedom of national rivers navigation, coastal security jurisdiction, and freedom of neutral trade in times of war.[19] Esquirol abstains from taking sides in the controversy whether a *separate* American international law existed or not. Instead, he argues that international law has been normally 'idiosyncratically adapted to local

[15] See the contribution by A Becker Lorca 'Eurocentrism in the History of International Law' in this volume at 1035.

[16] R Grew 'On the Prospect of Global History' in B Mazlish and R Buultjens (eds) *Conceptualizing Global History* (Westview Press Boulder Colorado 1993) 227–49 at 244.

[17] Seminally JH Bentley *Old World Encounters: Cross-Cultural Contacts and Exchanges in Pre-Modern Times* (OUP New York 1993).

[18] 'On the Prospect of Global History' (n 16) 242.

[19] See the contribution by J Esquirol 'Latin America' in this volume at 465.

circumstances' everywhere, whether this local adaptation is acknowledged or not, and that 'both approaches mobilize the identity of international law in support of *different* constructions of legal authority'.[20] In substance, Esquirol finds that the fleshing out of the topic of foreign interference in the affairs of relatively weak States was a particularly important contribution of international law in Latin America to international law as a whole, actually to its core concepts of modern sovereignty and statehood.

As regards Africa north of the Sahara and Arab countries, Fatiha Sahli and Abdelmalek El Ouazzani conclude that '[i]f there is a contribution of Islam to international law, it is in the field of the protection of the laws of the persons, particularly in the laws of the *Dhimmi*, and more precisely in the laws of the religious minorities and the humane treatment of the war prisoners'.[21] Bimal Patel in his chapter on India rejects explicitly the conceived wisdom that the earlier legal system of India was confined to its own civilizations, and has 'left no trace of continuity of history'. Instead, Patel opines that the rules of warfare observed by Indian kings and princely States prior to 1500 and even during 1500–1945 'were unique to the Indian civilization and have made a significant contribution to modern international humanitarian law'.[22]

As far as an Asian influence is concerned, Yasuaki Onuma had in a seminal article opined that there were only *coincidental practices* in Asia (for example, on the treatment of foreigners, on the law of the sea), but that it has so far not been demonstrated that these Asian practices brought about or influenced the formation and development of these rules in European international law.[23] This finding is resonated by Kinshi Akashi who, in his chapter on the Japanese–European encounter, gives our question a short shrift: 'if it is asked whether the original Japanese ideas on "international relations" and "international legal order" had "any influence and impact" on the body of international law as it emerged from the "encounter", the answer should be negative'.[24] Nevertheless, Akashi concludes that while the Japanese–European encounter did not result in a transfer of Japanese institutions to global international law (in the style of a 'macro-transferral' of single instruments and institutions), it did demonstrate the 'universal applicability of the concept and logic of international law' in a dynamic process of universalization.[25]

It is well known that non-Europeans appropriated 'European' international law and used it to further their political objectives (in part against European domination). For example, the North American Deskaheh and the Council of the Iroquis Confederacy addressed themselves to the League of Nations.[26] China, to give another

[20] ibid at 566 (emphasis added).

[21] See the contribution by F Sahli and A El Ouazzani 'Africa North of the Sahara and Arab Countries' in this volume at 405.

[22] See the contribution by BN Patel 'India' in this volume at 514.

[23] Y Onuma 'When was the Law of International Society Born?' (2000) 2 Journal of the History of International Law 1–64 at 61 fn 170 (with a reference to Alexandrowicz's work).

[24] See the contribution by K Akashi 'Japan–Europe' in this volume at 741.

[25] ibid at 742.

[26] See the contribution by K Coates 'North American Indigenous Peoples' Encounters' in this volume.

example, made international law arguments to get rid of the unequal treaties—for instance at the Paris Peace Conference of 1919 and the Washington Naval Conference of 1921.[27] But, arguably, Europeans inversely delved into regional systems and adapted themselves, too. For example, it is currently debated whether the European trading nations 'Westernized' the traditional China-centered East Asia trading system, or whether the Europeans—on the contrary—joined it themselves.[28] In the latter case, the conclusion would be that the Chinese system was never broken, even under European pressure, and has recovered quite well.[29]

Cases in which the encounter resembled more a 'one-way street' than a mutual give-and-take might be assessed in ethical terms. The judgment depends, *inter alia*, on whether this reception was (at least to some extent) voluntary and a result of reflection, also on the side of the receiver, or only brought about by force, intimidation, and economic coercion. Often both persuasion *and* imposition will have played a decisive role.

What can be learned is that genealogy does not determine identity. 'The transistor in Japan is no more American than the paper in Europe is Chinese. Like rubber, maize, or the potato, elections or political parties or corporate hierarchies may carry names that reflect a foreign origin, but they have been woven into diverse societies.[30] This 'domestication' is not limited to technical or cultural products but also includes legal institutions, among them rules and standards of international law. Cherished examples are human rights, the rule of law, and democracy. But there are also less-liked cases of 'domestication', such the Japanese theory of 'Great East Asian International Law', arguably a modified version of the national socialist German '*Grossraum*' or '*Lebensraum*' theory.[31] Unsurprisingly, these processes of creative appropriation and hybridization have recently been highlighted both by global historians[32] and by international and comparative lawyers.[33]

[27] See the contribution by S Kawashima 'China' in this volume.

[28] The Europeans and the Chinese sides may have had differing views on this already at the time. In Qing's official documents, the Netherlands and other European states were recorded as tributaries without those states necessarily being aware of that status. One of the reasons for the diverging views were translations: The European mission's official letters to the Qing emeperor did not follow the Chinese formalities for tribute in their original lanaguage, but the Chinese versions, actually submitted to the court, were considerably modified by the Chinese authorities so as to conform with the tribute formalities (S Hamamoto 'International Law, Regional Developments: East Asia' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2012) para 14).

[29] See the contribution by C-H Tang 'China–Europe' in this volume, with further references.

[30] 'On the Prospect of Global History' (n 16) at 234.

[31] See the contribution by K Akashi 'Japan–Europe' in this volume at 741.

[32] Seminally, Jerry Bentley sought 'to identify and understand the patterns of cross-cultural conversion, conflict and compromise that came about when peoples of different civilizations and cultural traditions interacted with each other over long periods of time'. Bentley concluded that 'syncretism represented an avenue leading to cultural compromise' (*Old World Encounters* (n 17) at vii–viii). See also EW Said *Orientalism* (Penguin Books London 2003) at xxii: 'Rather than the manufactured clash of civilizations, we need to concentrate on the slow working together of cultures that overlap, borrow from each other, and live together in far more interesting ways than any abridged or inauthentic mode of understanding can allow.'

[33] See in legal scholarship notably M Delmas-Marty 'Comparative Law and International Law: Methods for Ordering Pluralism' (2006) 3 University of Tokyo Journal of Law and Politics 43–59.

3. Global History and the Contribution of the History of International Law

This Handbook is inspired by a global history approach.[34] A related concept is that of a world history.[35] In simplified terms, these schools are the answer of (Western) historians to globalization. Both global and world history reject the 18th- and 19th-century essentialist concepts of a 'universal history'. The protagonists neither seek to establish a 'master narrative' (as, for example, Immanuel Wallerstein did),[36] nor wish to give a sweeping account of the course of the world's history, from a quasi celestial perspective (in the style of Oswald Spengler, Arnold Toynbee, or William McNeill[37]).

'Global history' is not produced by simply assembling all the events of world history. It rather needs to be conceptualized. This was done by one of its pioneers, Bruce Mazlish, in the following way: global history 'focuses on new actors of various kinds; it is dramatically concerned with the dialectic of the global and the local (recognizing, for example, that the global helps to create increased localism as a response); it embraces methods of both narrative and analysis as befitting the specific phenomena under investigation; and it necessarily relies a good deal on interdisciplinary and team research'.[38] Jürgen Osterhammel on his part defined global history ('in a narrow sense') as 'the history of continuous, but not linear intensification of interactions across vast spaces and of the crystallization of these interactions into extended networks or, sometimes, institutions which usually possess their own hierarchical structure. The tension between the global and the local is crucial for this approach'.[39]

[34] See seminally B Mazlish and R Buultjens (eds) *Conceptualizing Global History* (Westview Press Boulder Colorado 1993); also D Reynolds *One World Divisible: A Global History since 1945* (Allen Lane London 2000). For surveys, see P Manning *Navigating World History: Historians Create a Global Past* (Palgrave Macmillan Basingstoke 2003); further P Vries 'Editorial: Global History' (2009) 20 Global History 5–21. For the meta-level of history writing, see GG Iggers and QE Wang with the assistance of S Mukherjee *Global History of Modern Historiography* (Pearson Longman Harlow 2008); R Blänkner 'Historische Kulturwissenschaften im Zeichen der Globalisierung' (2008) 16 Historische Anthropologie 341–72.

[35] J Osterhammel (ed) *Weltgeschichte: Basistexte* (Franz Steiner Stuttgart 2008). Three journals have been founded as platforms for these approaches: The Journal of World History, founded in 1990; the Journal of Global History founded in 2006 (see WG Clarence-Smith, K Pomeranz, and P Vries 'Editorial' (2006) vol 1, 1–2); and the e-journal World History Connected, <http://worldhistoryconnected.press.illinois.edu> (accessed 5 May 2012).

[36] I Wallerstein *Modern World System* (4 vols Academic Press New York, Academic Press San Diego, University of California Press Berkeley 1974, 1980, 1989, 2011).

[37] O Spengler *The Decline of the West* (CF Atkinson trans) (2 vols Alfred A Knopf New York 1922); A Toynbee *A Study of History* (12 vols OUP Oxford 1934–61); WH McNeill, *The Rise of the West: A History of Human Community* (University of Chicago Press Chicago 1963).

[38] B Mazlish 'An Introduction to Global History' in *Conceptualizing Global History* (n 34) 1–24 at 6.

[39] J Osterhammel 'Global History in a National Context: The Case of Germany' (2009) 20 Global History 40–58 at 44.

Concomitantly, the same author defined 'world history' as 'a de-centered, and certainly not Eurocentric, perspective, detached, as far as possible, from the concrete circumstances and the national identity of the observer'. . . . 'World history considers interaction between peoples, but does not privilege it at the expense of internal developments. It only deserves its name when it is more than the addition of regional histories. In other words: World history is meaningless without some kind of comparative approach'.[40] Global history thus focuses on transfers, networks, connections, and cooperation between different actors and regions, while trying to avoid the temptation to draw straight lines from one time and place to another.[41] Another theme is 'transformation', highlighting processes rather than outcomes.[42]

Global history no longer takes the nation-state as the traditional object of historical analysis.[43] Instead, to global historians, the major actors or subjects of a global history are movements (such as the peace movement, or the women's suffrage movement), and business (such as chartered companies). Interestingly, current international legal scholarship also focuses on non-state actors as emerging subjects of international law.

Another objective of global history is to overcome the (primarily European) heritage of national history.[44] Therefore, attention is directed to non-European societies and regions. Their modern history is understood as an autonomous development, and not as a mere reaction to European conquest. This move is aptly captured in Dipesh Chakrabarty's quest for 'provincializing Europe'.[45] In legal scholarship, a parallel endeavour has been undertaken in a 'peripheries series' in the Leiden Journal of International Law which seeks to explore international law and international lawyers of the 'peripheries' (of Europe), with 'periphery' being understood 'geographically,

[40] ibid 43.

[41] cf *Navigating World History* (n 34) 3 and 7: '[W]orld history is the story of connctions within the global human community. The world historian's work is to portray the crossing of boundaries and the linking of systems in the human past. . . . I define world history as a field of study focusing on the historical connections among entities and systems often thought to be distinct.' See also E Vanhaute 'Who is Afraid of Global History?' (2009) 20 Zeitschrift für Geschichtswissenschaft 22–39 at 25, who propagates a threefold trajectory ('trinity') consisting in comparative analysis, a focus on connections and interactions, and a systems-analysis.

[42] Cf J Osterhammel, *Die Verwandlung der Welt: Eine Geschichte des 19. Jahrhunderts* (CH Beck München 2008), Engl transl *The Transformation of the World: A History of the 19th Century* (Princeton University Press 2011).

[43] 'An Introduction to Global History' (n 38) 5. 'On the Prospect of Global History' (n 16) 245: Global history should be 'substituting multicultural, global analysis for the heroic, national narratives on which our discipline was founded.' See also N Zemon Davis 'Global History, Many Stories' in J Osterhammel (ed) *Weltgeschichte: Basistexte* (Franz Steiner Stuttgart 2008) 91–100 at 92.

[44] B Mazlish, *The New Global History* (Routledge New York 2006) at 104.

[45] D Chakrabarty *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000). See also A Dirlik 'History without a Center? Reflections on Eurocentrism' in E Fuchs and B Stuchtey (eds) *Across Cultural Borders: Historiography in Global Perspective* (Rowman & Littlefield Lanham 2002) 247–84.

politically, economically, and discursively'.[46] The objective of the series is 'to foster engagement with the discursive function of centre-periphery oppositions in public international law in their various iterations, and through this to confront questions of resource allocation, dependency, geography, and power'.[47] However, that perspectival shift will only be completed once Europe itself is understood as 'a series of assembled peripheries'.[48]

Along this line, Bruce Mazlish called '[p]erhaps the single most distinguishing feature' of global historiography 'that of perspective, awareness, or consciousness'.[49] 'The challenge of global history is to construct global perspectives'.[50] It is not denied that any writer, be it a lawyer or a historian, inevitably analyses the past and its legal institutions from his or her own perspective which is necessarily rooted in the present, and often uses categories and logics developed in a 'Western' system of thinking. But globally oriented historiographers are conscious of this very fact. They try to avoid the narrow perspective of traditional epistemic Eurocentrism which constructed and reified periods, regions, and cultures.[51] This attitude is shared by international lawyers who seek to overcome the epistemic nationalism of their discipline.[52] The approach not only 'challenges the often too readily accepted notion that the Western model remains at the centre of historical studies and radiates its influence all over the world', but more radically it challenges 'the Western/non-West dichotomy underpinning many well intentioned comparative studies'.[53] The crucial endeavour seems to be to shift perspectives, and to allow for a multipolar perspective, acknowledging that the dynamics for developing these perspectives have been generated by various sources and emerged from all parts of the world. Accordingly, there is no single global history, no universal law to be discovered resulting in a unidirectional evolution of the world.[54] Instead, there have been and will be many global experiences.

Even if this multiperspectival ideal can never be fully realized, it is our hope that a collective work such as this Handbook can at least come close to it. Global (or world)

[46] F Johns, T Skouteris and W Wouter 'The League of Nations and the Construction of the Periphery: Introduction' (2011) 24 Leiden Journal of International Law 797–8 at 797.

[47] F Johns, T Skouteris and W Wouter 'Editors' Introduction: India and International Law in the Peripheries Series' (2010) 23 Leiden Journal of International Law 1–3 at 3.

[48] E Balibar 'Europe as Borderland' The Alexander von Humboldt Lecture in Human Geography, University of Nijmegen (24 November 2004) at <http://socgeo.ruhosting.nl/colloquium/Europe%20as%20Borderland.pdf>, at 12 (with reference to Edward Said who used that term for European literature in a posthumously published interview ('An interview with Edward Said' (2003) 21 Society and Space 635–51 at 647)).

[49] 'An Introduction to Global History' (n 38) 6.

[50] 'On the Prospect of Global History' (n 16) 237.

[51] R Sieder and E Langthaler 'Was heißt Globalgeschichte?' in R Sieder and E Langthaler (eds) *Globalgeschichte 1800–2010* (Böhlau Wien 2010) 9–36 at 12.

[52] A Peters 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 721–76.

[53] *Global History of Modern Historiography* (n 34) 394.

[54] 'An Introduction to Global History' (n 38) 4.

history is already now an interdisciplinary endeavour to which many disciplines contribute—economics, sociology, anthropology, demography, archaeology, geography, the history of music, art history, historical linguistics, geology, biology, and medicine.[55] It is therefore not far-fetched that legal studies can also make a meaningful contribution to that effort of a comprehensive *Welterfassung*, or recognition and understanding of the world.

4. Events, Concepts, People: Three Modes of Writing History

History can be written in many modes or forms. Simply put, three such modes can be distinguished—the history of events, the history of concepts, and the history of individual people. All three approaches have also been used in the historiography of international law.[56] There is the tradition of a doctrinal history which analyses the teachings of important theorists of international law, their development, and interaction.[57] There is further the tradition of a diplomatic history which focuses on events which had a bearing on international law. Thirdly, international legal historiography has occasionally also used the biographical method by recounting in detail the life and work of an important scholar, statesman, or diplomat.[58] Many chapters of this Handbook try to combine these three approaches, realizing, for instance, that a

[55] *Navigating World History* (n 34) 121–36.

[56] See for (older) surveys of the historiography of international law F Stier-Somlo 'Völkerrechts-Literaturgeschichte' in K Strupp (ed) *Wörterbuch des Völkerrechts und der Diplomatie* (de Gruyter Berlin 1929) vol 3, 212–27; A Nussbaum *A Concise History of the Law of Nations* (1st edn Macmillan New York 1947) 293 ff (Appendix: 'Survey of the historiography of international law').

[57] The classic work (though not using modern historiographical methods) is DHL von Ompteda *Literatur des gesamten natürlichen als positiven Völkerrechts* (2 vols Montags Regensburg 1785, repr Scientia Aalen 1963). Its first part is a history of international legal scholarship, starting with the Roman authors (at 139 ff). See further eg C von Kaltenborn *Die Vorläufer des Hugo Grotius auf dem Gebiete des ius naturae et gentium sowie der Politik im Reformationszeitalter* (2 vols Mayer Leipzig 1848); A Rivier *Note sur la littérature du droit des gens: Avant la publication du* Jus Belli Ac Pacis *de Grotius (1625)* (F Hayez Bruxelles 1883); A de la Pradelle *Maîtres et doctrines du droit des gens* (Les Editions internationales Paris 1939, 2nd edn 1950). For a modern classic, see R Tuck *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 1999).

[58] Fine modern examples are provided by the series 'The European Tradition in International Law' in the European Journal of International Law, beginning in 1990, featuring Georges Scelle, Dionisio Anzilotti, Alfred Verdross, Hersch Lauterpacht, Hans Kelsen, Charles de Visscher, Alf Ross, Max Huber, and—most recently—Walther Schücking (2011). The Leiden Journal of International Law reacted with its series on non-European international legal scholars, so far featuring Alejandro Alvarez (2006) and Taslim Olawale Elias (2008).

history of a certain concept, idea, or notion were incomplete without enquiring into the people who invented them, or saying something about the historical events which occasioned that invention.

To turn to the history of events or facts first, international legal historiography treated wars and treaties as the most significant 'events'. The treaties attracting particular interest were treaties of alliance, seeking to forestall war, on the one hand, and peace treaties, ending wars in a legal sense, on the other hand. As a third group, treaties of commerce can be mentioned. In this mode, history is told as a matter-of-fact story, concentrating on states, power, war, trade, and diplomacy. It is therefore often called 'diplomatic history'.

This type of historiography treats law as a dependent variable of political and military events. However, the degree of impact or importance ascribed to international law varies greatly. Law might be considered as completely ancillary to political power or on the contrary as a normative power shaping the events. A more critical and more distanced way of writing history in this factual mode is to problematize the respective role of international law, and to ask whether and why this role was 'small'[59] or 'great', and which factors account for that result. In his influential book *The Epochs of International Law*, about we shall say more later in this introduction,[60] Wilhelm Grewe defended his emphasis on state practice as follows:

> Numerous authors examining the history of the law of nations adopted a peculiar and methodologically questionable separation of theory and state practice. In doing so they were placing themselves at a disadvantage, as such a separation does not concern two divided branches of the history of the law of nations, but rather only two sides of the same process. On the one hand, they lost themselves in an abstract history of the theory, which could not acknowledge the concrete intellectual historical position of a Vitoria, a Gentili or a Grotius, nor the concrete political and sociological background to their theories. On the other hand, inter-State relations were regarded as a bare array of facts to be grasped and systematised by way of a theoretically-derived, abstract intellectual method.[61]

The structure of his own book, Grewe said, was 'based on the conviction that it is important to recognise and demarcate the close connection between legal theory and State practice, and to comprehend that both are forms of expression of the same power, which characterise the political style of an epoch just as much as its principles of social, economic and legal organisation'.[62]

[59] See SC Neff 'A Short History of International Law' in MD Evans (ed) *International Law* (3rd edn OUP Oxford 2010) 3–31 at 27: 'If there is one lesson that the history of international law teaches, it is that the world at large—the "outside world" if you will—has done far more to mould international law than *vice versa*.'

[60] See Section 7 'About the Handbook's Place in the Historiography of International Law' below.

[61] WG Grewe *The Epochs of International Law* (Michael Byers trans) (Walter de Gruyter Berlin 2000) at 2.

[62] ibid 6. See for a seminal methodological critique along this line already *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (n 9) *passim*, esp at 39, 46, 48, 50.

After the cultural turn in historiography, many historians have denounced the history of power politics and diplomacy as *demodé*. However, as much as it is important to study cultural and social history, power and competing state interests have not become irrelevant. The legal historian should still take them into account.[63] Furthermore, the empirical study of events should complement any account of the history of legal ideas and doctrines, as developed by scholars or practitioners. It does matter in which particular (political or military) context an idea or doctrine was brought up, and it is of course crucial whether and how ideas were implemented in practice.

For these reasons, the authors of this Handbook were asked to give, *inter alia*, an account of the practice of international law. It is, for example, important to know not only which treaties were concluded, but also whether and for which reasons they were complied with or not. A difficulty in this respect is that for many issues historical research has so far not compiled sufficient empirical data. And the further into the past we look, the more difficult it will be to establish both categories and facts, especially on compliance.

In German historical scholarship, the history of events ('*Ereignisgeschichte*') has traditionally been contrasted with the history of ideas ('*Ideengeschichte*'). A subfield of the latter is conceptual history ('*Begriffsgeschichte*') as developed by Otto Brunner and Reinhart Koselleck.[64] In this Handbook, contributions in Parts II and IV (on 'themes' and 'interaction or imposition', respectively), but also in other sections, deal with such concepts or notions as 'territory', 'domination', or 'the civilized'. Conceptional history is particularly relevant to legal history because legal rules consist of, and are based on, concepts.

Concepts change over time. They are no more solid than the period or context in which they originated. Therefore, the analysis of a legal concept should include a reflection about the social and political context of the concept, and the political agenda behind it, about the 'speakers' and the 'addressees', and about the shifting meaning of a concept in the course of time. Surely a legal historian should not limit him- or herself to concepts found in legal documents. Other concepts too can be of legal relevance. Conversely, notions used in legal texts may have turned out not to

[63] J Osterhammel 'Internationale Geschichte, Globalisierung und die Pluralität der Kulturen' in W Loth and J Osterhammel (eds) *Internationale Geschichte, Themen, Ergebnisse, Aussichten* (Oldenburg München 2000) 387–408 at 398. See also Stephen Neff's approach to his very 'short history of international law' which covers 'both ideas and State practice', with the author pointing out that 'it was the two in combination—if not always in close harmony—that made international law what it became', 'A Short History,' (n 59) 3–4.

[64] R Koselleck 'Einleitung' in O Brunner, W Conze and R Koselleck (eds) *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Klett Cotta Stuttgart 1972) xiii–xxvii; R Koselleck *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten* (Suhrkamp Frankfurt aM 1979), translation: *Futures Past: On the Semantics of Historical Time* (Keith Tribe trans) (Columbia University Press 1985).

affect the practice of international law. Such a distinction can help to identify blind spots in the law, or illustrate the blurred boundary between the spheres of law and politics.

In the biographical mode of history writing, the persons studied may be politicians, legal practitioners, or scholars. Biographical history need not tell a story of heroes, and it need not overstate the role individuals have in 'making history'. The context in which the person described lived and worked can be featured. Or he (rarely she) can on the contrary be presented as a representative of an epoch. The persons' ideas and acts can be 'keyholes' through which we can see an entire 'room' or historical space. In this Handbook, the biographical mode of history writing is used in Part VI, 'People in Portrait', but also in other chapters.

As already mentioned, all three historiographical approaches need 'contextualization',[65] in order to avoid history 'lite', or what David Bederman called 'Foreign Office International Legal History'.[66] The relevant context must be established according to the chosen approach and the historical problem to be solved. For a conceptual historian, for instance, the textual context of a legal text matters greatly. But beyond that, the contextualization of a legal idea or doctrine requires, in our view, an analysis of the *Leitmotive* and academic styles of the time.[67] With regard to events, contextualization means looking also at processes, and not only at outcomes. Often, the relevant process is determined by the domestic political situation of a state. For example, a main reason for Japan's swift adaptation to European legal standards was the Japanese revolution ('Restoration'), and the new government's desire to change the entire legal and political system.[68] Ideally, contextualization should also bear in mind the *Zeitgeist* shaping or influencing certain developments. It is, for example, noteworthy that the delegates of the two international peace conferences in The Hague in 1899 and 1907 met in 'Japanese' and 'Chinese' rooms which were fashionable at the time. Furthermore, the contextualization of events and ideas means to look at long-term developments and trends. That perspective may lead to a relativization of what usually is considered a historical caesura or break. The First World War, for instance, was on the one hand a rupture, but on the other hand a bridge to the international law of the League of Nations period.

[65] Q Skinner *Visions of Politics*, vol 1: *Regarding Method* (CUP Cambridge 2002); Q Skinner 'Surveying the Foundations: A Retrospect and Reassessment' in A Brett, J Tully and H Hamilton-Bleakley (eds) *Rethinking the Foundations of Modern Political Thought* (CUP Cambridge 2006) 236–61.

[66] By this, Bederman understood picking and choosing facts and primary sources ripped out of context to serve purposes of a lawyer's brief, 'in order to make some point that has no basis in reality' (D Bederman 'Foreign Office International Legal History' in M Craven, M Fitzmaurice and M Vogiatzi (eds) *Time, History and International Law* (Martinus Nijhoff Leiden 2007) 43–63 at 46).

[67] For a good example, see JE Nijman *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press The Hague 2004).

[68] See the contribution by M Yanagihara 'Japan' in this volume.

5. The Linguistic Turn and Beyond

In all three modes of historiography (the history of events, of concepts, and of people) the writer is, to our mind, free to choose whether to write about events, texts, or persons, or about *narratives (or pictures) about* events, texts, and persons. Behind this distinction lurks a fundamental epistemological problem, not limited to historiography but also present whenever we study contemporary events or texts. In fact, the problem arises in any scientific research, and relates to all kinds of the acquisition and transmittal (or communication) of knowledge: can we 'really' 'know' anything of, and make true statements about, events, texts, and persons? The answer to that problem depends on what we mean by 'knowledge' and 'truth'.

Some historians believe that there are no 'objective' facts or texts, or that, if they exist, observers (such as historians and lawyers) never can get access to them.[69] From that perspective, it is only possible to write *about narratives about* facts, texts and people. This also means, crucially, that there is no clear-cut difference between historiography and fiction.

In contrast to this stance, we believe that an intersubjective consensus (if only a very narrow one) can be established among historiographers about the meaning and significance of past events, texts, and of the conduct and actions of individual people. In that limited sense, there do exist 'objective' historical facts, and there is a distinction between description and fiction, and between writing and making history. We deem three insights crucial for modern history writing, as follows:

Perspectives: The first insight is that history cannot be written from an external omniscient point of view. As Hilary Putnam said, '[t]here is no God's Eye point of view that we can know or usefully imagine; there are only the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve'.[70] Every author writes from an individual perspective. As lawyers, we inevitably use our own legal experience as a tool for understanding the past, and if we do so we tend only to see what we already know or believe to know.[71] The writing as well as the reading of history takes place within the writers' and the readers' horizons. When both writers and readers are conscious of the inevitability of a subjective perspective, it is not unscholarly to approach an issue (such as colonialism) with ethical considerations or preferences.

Selectivity: Writing history on a given subject depends on making innumerable choices. The historian constantly must decide which facts, developments, documents, persons, and so on, he or she considers significant to his or her research question. What is important is that authors consciously reflect about the choices they make, and are explicit and transparent about them.

[69] See M Stolleis *Rechtsgeschichte schreiben: Rekonstruktion, Erzählung, Fiktion?* (Schwabe Basel 2008).

[70] H Putnam *Reason, Truth and History* (CUP Cambridge 1997, orig 1981) at 50.

[71] *Rechtsgeschichte schreiben* (n 69) 27.

The multiplicity of histories: There is a temptation to tell one, and only one, story. Some fifty years ago, the Dutch historian of international law, Johan Verzijl, had posed the question, with regard to the (ancient) laws of Egypt, Asia Minor, the Far East, and India: 'have not all those individual roads of the law of nations appeared to be blind alleys?…Is it therefore not necessary, instead of descending from antiquity to the present, rather to start as a matter of principle from the contemporary law of nations as the object of historical research and to attempt to retrace the origins of that law by moving from the present to the past until we reach the point where no traces are any longer discernible?'[72] Verzijl had thus basically asked for writing legal history 'backwards', taking the current law as point of departure. In contrast, this Handbook's methodological guideline was to avoid 'cutting alleys through history'. Former legal ideas, concepts, and rules are not necessarily 'precursors' of the law (including international law) as it stands now.[73] There are lines of evolution, but there is also discontinuity, conceptual fragmentation, contradiction, modification, and rearrangement.[74] In many chapters of this Handbook these phenomena are highlighted.

6. Lost in Translation?

Historiography comprises (even if only implicitly) a *diachronic comparison* (of the past international law with the present law). In order to describe, as a present-day author to a present-day readership old international legal institutions, both writer

[72] JHW Verzijl, *International Law in Historical Perspective* (AW Sijthoff Leyden 1968) vol 1, at 403–4.

[73] In other words, the idea is to avoid what Randall Lesaffer scathingly called 'evolutionary history of the worst kind' ie 'genealogic histories from present to past', a history writing which 'leads to anachronistic interpretations of historical phenomena, clouds historical realities that bear no fruit in their own times and gives no information about the historical context of the phenomenon one claims to recognise. It describes history in terms of similarities with or differences from the present, and not in terms of what it was. It tries to understand the past for what it brought about and not for what it meant to the people living in it.' (R Lesaffer 'International Law and its History: The Story of an Unrequited Love' in *Time, History and International Law* (n 66) 27–41 at 34–5).

[74] See for an attempt to make sense of international law through a history of its 'finalités' E Jouannet *Le droit international libéral-providence: Une histoire du droit international* (Bruylant Bruxelles 2011), translation: *The Liberal-Welfarist Law of Nations: A History of International Law* (C Sutcliffe trans) (CUP Cambridge 2012). Jouannet seeks to seize international law's 'logiques originaires' and diagnoses its 'double fin', namely liberalism and welfarism. She describes her approach as not being 'une histoire historienne' but as a type of history writing which seeks to open 'des pistes de réflexion' for comprehending our current international law by furnishing a new angle of reflexion, a strategy to acquire the means to rethink the significance of contemporary international law (at 1 and 9).

and reader inevitably rely on and relate the historical account to the contemporary understanding of concepts and legal institutions.

The difference between the diachronical comparison (of the past and present law) and the synchronological comparison (of different contemporary legal systems) seems to be twofold. First, history is inevitably within us (like in Wittgenstein's fibre metaphor),[75] whereas the 'other' legal system or culture does not necessarily form part of our own identity. Second, in contrast to an at least potentially dialogical transnational legal comparison, no dialogue can be entertained with the past.

But despite these two important differences, the comparative method (be it diachronic or synchronic) is in its basic structure similar. Just as in comparative legal scholarship, the diachronic comparison needs a *tertium comparationis* to compare (or only to relate) another epoch's and region's legal institutions to the present ones. The choice of the *tertium comparationis* depends on the research question and on values. Depending on that choice, the outcome of the comparison will differ. So the point is that we need not only to compare, but to actively *translate*.[76] Such a translation is a creative, and not a mechanical act. The translation is even more complex if it does not only involve the temporal dimension (translating from past to present meanings) but additionally a regional dimension (for example, translating Asian to European meanings).[77]

Let us give some examples of translations undertaken in this Handbook. A writer might compare the Japanese *Iiki*[78] to the (historical) European concept of *hinterland* by pointing out that both concepts sought to establish and justify control over territory. Or, Fatiha Sahli and Abdelmalek El Ouazzani, in their chapter 'Africa North of the Sahara and Arab Countries', find that the Muslim international law principles applied after a conquest of non-Muslim countries (*Futuhat*) can be 'compared to the spirit of colonization of a civilization because the Muslims intended to bring to the conquered population the "divine" message that was Islam'.[79] Ken Coates, in his chapter on the encounters of North American Indigenous peoples with Europeans,[80] traces how the

[75] 'Our concept of, let us say, peace, has grown like in the making of a thread by drilling fibres with other fibres. The strength of the thread does not lie in the fact that one fibre runs through its entire length, but in the interlinkages of so many fibres.' (L Wittgenstein 'Philosophische Untersuchungen No 67' in L Wittgenstein *Werkausgabe* (Suhrkamp Frankfurt 1984) vol 1, at 278).

[76] In a somewhat different sense, Baltic lawyers have historically been translators from Russian to (Western) European international law, and have thereby also shaped the history of international law; cf L Mälksoo 'Russia–Europe' in this volume.

[77] Seminally LH Liu *The Clash of Empires: The Invention of China in Modern World Making* (Harvard University Press Cambridge Mass 2006). See also LH Liu 'Henry Wheaton' in this volume.

[78] cf the contribution by M Yanagihara 'Japan' in this volume.

[79] See the contribution by F Sahli and A El Ouazzani 'Africa North of the Sahara and Arab Countries' in this volume at 395.

[80] See the contribution by K Coates 'North American Indigenous Peoples' Encounters' in this volume.

first partnerships between Aboriginals and Europeans were, due to their formality, the annual payments, and rituals of alliance, conceived by both sides as 'nation-to-nation' relationships with considerable authority. It could be further asked whether the North American Aboriginal peoples had prior concepts of boundedness akin to treaties, and to what extent the alliances with the Europeans mirrored these pre-existing concepts. In any case, writes Coates, these arrangements gave 'Aboriginal people the clear expectation that they had a permanent role in the emerging societies of North America', and that they had a formally equal status to the newcomers, which however did not survive the 19th century.[81]

An additional difficulty of any translation is that the understanding of traditional legal concepts, even within their own 'culture', has been and continues to be in flux. For example, Muslim legal consultants have in the past strongly disagreed and continue to disagree about the meaning of *Jihad*.[82] Or think of the Ottoman capitulations. Umut Özsu, in his chapter on the Ottoman empire, retraces their qualification in their own time. Capitulations had been issued unilaterally by Ottoman sultans, but many European and American jurists sought to endow them with greater legal force and therefore presented them as treaties imposing binding legal obligations upon both parties, not only on the non-Muslim power but also on the Ottoman sultans themselves. Such jurists cast the capitulation not as a temporary and unilateral concession, but as an enduring and bilateral treaty. In contrast, the Ottoman lawyers generally insisted that the capitulations were not to be confused with treaties in the European sense. It was exactly this 'interpretational fluidity' which characterized the capitulations.[83] An example for a retrospective re-interpretation is the quality of the traditional Chinese trading scheme(s). It has now become controversial which parts constituted a tributary system and which were mutual trade.[84]

Most often, we rely—for the comparison, or translation—on the lead categories of our historical, legal (and social and cultural) research, such as the state, politics, law, and justice, and use those as a *tertium comparationis* (of diachronical or synchronical comparison). But these lead categories have not in every part of the world and in any time corresponded to the same phenomena. The categories are not merely cloaked differently while being 'functionally' identical.[85] Despite their abstract quality, the

[81] 'First Nations passed from military and political allies to wards of the State in less than two generations', ibid at 792.

[82] See the contribution by F Sahli and A El Ouazzani 'Africa North of the Sahara and Arab Countries' in this volume. See also M Fadel 'International Law, Regional Developments: Islam' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2012) paras 58–59.

[83] See the contribution by U Özsu 'Ottoman Empire' in this volume at 432.

[84] See the contribution by C-H Tang 'China–Europe' in this volume, with further references. In parallel, the merit of the influential description of the tributary system by the US-American historian John Fairbank and its possibly 'hegemonial' impact on the academic dicourse is being challenged (ibid).

[85] But see H Steiger 'Universality and Continuity in International Public Law?' in T Marauhn and H Steiger (eds) *Universality and Continuity in International Law* (Eleven International Publishing The Hague 2011) 13–43, esp at 30–2, 40, 42.

categories are never historically empty, but are impregnated by the respective ideational, cultural, and social context. Along this line, Shin Kawashima, in his chapter on China, argues that China's understanding of the *Wanguo Gongfa* in a Chinese context in the second half of the 19th century did not necessarily dovetail with the international community's understanding of international law by the first half of the 20th century. He hypothesizes that 'China's own view of the international order and understanding of international law continued to exist in the first half of the 20th century, like overlapping layers of low-pitched sounds.'[86]

Additionally, the problem of perspective comes in. Even if *we* realize the experience, ideologies, myths, and values inscribed in the said lead categories, we inevitably do this within an aura which is itself saturated with meaning, and in which we as scholars have been socialized and trained.[87] So ultimately, in historiography as in comparative law, the question of commensurability or incommensurability arises. Although new psychological research has demonstrated that not only value-judgments, but more generally the subject's way of intellectually grasping and structuring the world seems to be contingent upon culture,[88] these modes of thought and judgement are not fix and determined (just as cultures do not have sharp boundaries or fixed identities). Writers of international history can, upon self-consciousness and self-reflection, espouse also the Others' perspective, and overcome their epistemological and moral 'paradigm'—they are not trapped in it.[89] To conclude, because of all these complexities, something might get lost in translation. But something might also be gained.

7. About the Handbook's Place in the Historiography of International Law

We wish briefly to situate the Handbook in the historiographical landscape of international law, and to acknowledge the previous work on which it builds. In a modern sense, the history of international law has been academically treated since the first half of the 19th century. However, much of that history writing was either based on an assumption of linear progress which strikes contemporary observers as almost

[86] See the contribution by S Kawashima 'China' in this volume, at 473.

[87] 'Was heißt Globalgeschichte?' (n 51) 13.

[88] RE Nisbett *The Geography of Thought: How Asians and Westerners Think Differently…and Why* (Free Press New York 2003).

[89] A Peters and H Schwenke 'Comparative Law Beyond Post-modernism' (2000) 48 International and Comparative Law Quarterly 800–34.

naïve,[90] or it was essentialist, assuming that international law was eternal and immutable, 'un droit qui a existé de tout temps et au sein de toutes les civilisations'.[91] The concept of a critical historiography, which relies on sources (in particular written documents) and on a critical analysis of those sources, which dismisses the idea of a grand narrative of progress, and which recognizes as inescapable the particular perspective of an individual historian, was accepted in the historiography of international law only belatedly.[92]

The number of scholars seriously studying the history of international law in the 19th and 20th centuries was so small that the lack of exploration of the issue has been called an 'intellectual scandal'.[93] Several reasons account for this scandal, one of them being that historians, not trained in legal science, often felt they were not sufficiently competent to analyse complex legal issues of the past. Lawyers, on their part, were generally not very much interested in legal history, and if they were, that history was usually the history of their own law (for instance, *Deutsche Rechtsgeschichte*), of Roman law, or of canon law. Even today no single chair or university institute is—to

[90] See eg H Wheaton *Histoire de progrès de droit des gens depuis la Paix de Westphalie jusqu'au Congrès de Vienne* (Brockhaus Leipzig 1841). Wheaton wrote his treatise in response to a call for papers issued by the *Académie des Sciences morales et politiques de l'Institut de France* in 1839. The (arguably suggestive) question of the Academy was as follows: 'Quels sont les progrès qu'a faits le droit des gens en Europe depuis la paix de Westphalie?' Wheaton concluded that 'le droit international s'est perfectionné, comme système des lois positives, ou d'usages servant à régler les relations mutuelles des nations, par le progrès de la civilisation générale, dont ce système est un des plus beaux résultats' (ibid v and 440). See also the 17 volumes F Laurent *Histoire du droit des gens et des relations internationales* (Gand Paris 1850–70). From the fourth volume on, Laurent had added a new sub-title: *Etudes sur l'histoire de l'humanité*. The object of the enterprise was, as Laurent defined it in his preface to the second edition of the first volume: '*suivre les progrès du genre humain vers l'unité*' (2nd edn 1861, vol 1, at v, emphasis added). See also C Calvo *Le droit international théorique et pratique précédé d'un exposé historique des progrès de la science du droit des gens* (6 vols Rousseau Paris 1887–96). But see alreadyR Redslob *Histoire des grands principes du droit des gens depuis l'Antiquité jusqu'à la veille de la grande guerre* (Rousseau Paris 1923) at 547: 'L'histoire du droit des gens n'est pas l'histoire d'un progrès continu, méthodique et toujours grandissant.'

[91] O Nippold 'Le Développement Historique du Droit International depuis le Congrès de Vienne' (1924-I) 2 Recueil des Cours de l'Académie de la Haye 5–124 at 5.

[92] See F Stier-Somlo who opined that, until the end of the 19th century, 'the history of international law or what was taken to be such did not possess sufficient sources' ('Völkerrechts-Literaturgeschichte' (n 56) 214, trans by the authors). The book FC von Moser *Beyträge zu dem Staats- und Völker-Recht und der Geschichte* (4 vols JC Gebhard Franckfurt 1764, 1765, 1772), is, despite its promising title, basically a compendium of legal acts and a description of practices of the German territories. A 'pre-modern' historiography of international law was R Ward *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans to the Age of Grotius* (2 vols Wogan Dublin 1795). According to Arthur Nussbaum, who mentioned this work right at the beginning of his survey of the literature on the history of international law, that 'was the first literary enterprise of its author (born 1765), who later won some renown as a novelist. Its core consists of a stupendous if sometimes diffuse compilation of historical data and anecdotes, preceded by a lengthy theoretical 'Introduction' (Concise History (n 56) 293).

[93] 'A Short History' (n 59) 3–31 at 3.

the best of our knowledge—exclusively devoted to the study of the history of international law anywhere.

If the number of scholars turning to historical questions of international law has been small, the circle of scholars who did not only write about particular events (such as peace conferences and diplomatic summits, or the creation of a new state) but who tried to give a systematic account of the (modern) history of international law is even smaller.[94] In 1947, Arthur Nussbaum's *A Concise History of the Law of Nations* was published in New York; a second, enlarged edition followed in 1954 and was translated into German.[95] Nussbaum, born in Berlin in 1877, had practised law and taught trade law, banking law, and stock exchange law at Berlin University before he was forced to emigrate to the United States in 1934.[96] He taught at the Columbia Law School as a Research Professor of Public Law from 1934 until his retirement in 1951, and died in 1964 in New York.

By far more influential was Wilhelm Grewe's book *Epochen der Völkerrechts geschichte*,[97] translated into English by Michael Byers (*The Epochs of International Law*).[98] The work was soon acknowledged as a standard text on the history of modern international law.[99] It interpreted that history as a sequence of particular epochs defined in each case by the then-dominant power in the system of states. The modern history of international law, according to the author, began at the time of the French invasion of Italy under Charles VIII of France in 1494. Since then, there has been a modern system of states characterized by the principle of the balance of power and the 'infrastructure' of a permanent diplomacy. The author divided the succeeding periods according to the politically dominant power which in his view substantially influenced, or even created, the respective legal order. Grewe distinguished a Spanish age (1494–1648), a French age (1648–1815), and a British age (1815–1919). This periodization

[94] In addition to the works of Arthur Nussbaum, Wilhelm Grewe, and Martti Koskenniemi which we discuss in greater detail below, we would like to mention G Butler and S Maccoby *The Development of International Law* (Longmans London 1923); A Wegner *Geschichte des Völkerrechts* (Kohlhammer Stuttgart 1936); A Truyol y Serra *Histoire du droit international public* (Economica Paris 1995) (in Spanish under the title *Historia del derecho internacional publico* (Tecnos Editorial Madrid 1998)); C Focarelli *Lezioni di Storia del Diritto Internazionale* (Morlacchi Editore Peruggia 2002); D Gaurier *Histoire du droit international: Auteurs, doctrines et développement de l'Antiquitié à l'aube de la période contemporaine* (Presses Universitaires de Rennes 2005); DM Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Martinus Nijhoff Leiden 2007).

[95] A Nussbaum *A Concise History of the Law of Nations* (2nd edn Macmillan New York 1954); ibid *Geschichte des Völkerrechts in gedrängter Darstellung* (H Thiele-Fredersdorf trans) (CH Beck München 1960).

[96] See EC Stiefel and F Mecklenburg *Deutsche Juristen im amerikanischen Exil (1933–1950)* (JCB Mohr Tübingen 1991) at 62–4.

[97] WG Grewe *Epochen der Völkerrechtsgeschichte* (Nomos Baden-Baden 1984, 2nd unchanged edn 1988).

[98] *The Epochs of International Law* (n 61).

[99] The following is taken from B Fassbender 'Stories of War and Peace: On Writing the History of International Law in the "Third Reich" and After' (2002) 13 European Journal of International Law 479–512.

was recognized by other authors[100] and by the editors of the *Encyclopedia of Public International Law* at the Max Planck Institute in Heidelberg[101] which in turn led to a universal dissemination of Grewe's ideas.[102] While Grewe was strongly influenced by the ideas of Carl Schmitt, his periodization followed that suggested by the historian Wolfgang Windelband.[103]

A first manuscript of the *Epochen* was already completed in late 1944, but in the conditions prevailing in Germany in the last months of the war the book could not be printed. However, in a long article published a year earlier Grewe had summarized the principal findings of his as yet unpublished book.[104] He turned to the manuscript again after his retirement from the German diplomatic service. He revised and expanded the text, taking into consideration the literature that had appeared since the 1940s; he continued the account beyond the year 1939 (where the original text had ended), and added a new chapter dealing with the period since 1945 under the title 'United Nations: International Law in the Age of American-Soviet Rivalry and the Rise of the Third World'. In this form, the book was published in 1984.

While Grewe's resolute view of the history of international law as a function of great power politics was new, he continued a tradition of writing the history of international law begun in the 19th century. The founders of that tradition had taken the State as they experienced it in their times as a starting point for their historical reflections, and had looked back on the past with the particular form of State in mind. Grewe revitalized that tradition and even carried it over the edge of a new century. He certainly reinvigorated the study of historical issues in international law, and drew the attention of a new generation of scholars to the discipline.

Very differently from Grewe's work, Martti Koskenniemi's *The Gentle Civilizer of Nations* of 2002,[105] a series of essays covering the period from 1870 to 1960, combined

[100] KH Ziegler *Völkerrechtsgeschichte: Ein Studienbuch* (CH Beck München 1994, 2nd edn 2007). Alternative periodizations have been proposed by Heinhard Steiger and Douglas M Johnston. See H Steiger 'Vom Völkerrecht der Christenheit zum Weltbürgerrecht: Überlegungen zur Epochenbildung in der Völkerrechtsgeschichte' in P-J Heinig et al (eds) *Reich, Regionen und Europa in Mittelalter und Neuzeit: Festschrift für Peter Moraw* (Duncker & Humblot Berlin 2000) 171–87, repr H Steiger *Von der Staatengesellschaft zur Weltrepublik? Aufsätze zur Geschichte des Völkerrechts aus vierzig Jahren* (Nomos Baden-Baden 2009) 51–66; Engl version H Steiger 'From the International Law of Christianity to the International Law of the World Citizen' (2001) 3 Journal of the History of International Law 180–93; and *The Historical Foundations of World Order* (n 94).

[101] See the articles by W Preiser et al in R Bernhardt (ed) *Encyclopedia of Public International Law* (North-Holland Publ Co Amsterdam 1984) Instalment 7, at 126–273, and vol II of the 'Library Edition' (North-Holland Publ Co Amsterdam 1995) at 716–861.

[102] See the contribution by O Diggelmann 'The Periodization of the History of International Law' in this volume.

[103] W Windelband *Die auswärtige Politik der Grossmächte in der Neuzeit* (1494–1919) (Deutsche Verlags-Anstalt Stuttgart 1922, 5th edn 1942). See 'Stories of War and Peace', (n 99) 505–7.

[104] WG Grewe 'Die Epochen der modernen Völkerrechtsgeschichte' (1943) 103 Zeitschrift für die gesamte Staatswissenschaft 38–66 and 260–94.

[105] M Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP Cambridge 2002).

legal analysis with (postmodern) historical and political critique, drawing in part on the biographical method with a study of key figures (including Hans Kelsen, Hersch Lauterpacht, Carl Schmitt, and Hans Morgenthau). Koskenniemi challenged the metanarrative of progressive legal development, and emphasized concealed antinomies in international law and the problem of interests and values protected and promoted by international law. He unveiled 'the radical character of the break that took place in the field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885'.[106] In the author's own words, the book constitutes 'an experiment in departing from the constraints of the structural method in order to infuse the study of international law with a sense of historical motion and political, even personal, struggle.... [N]o assumption about history as a monolithic or linear progress narrative is involved'.[107] By analysing the ideas and arguments of some of the most influential international lawyers of the 19th and 20th centuries, Koskenniemi sought to describe 'a particular sensibility, or set of attitudes and preconceptions about matters international', and the 'rise' and 'fall' of that professional sensibility.[108] However, despite the difference of approach, Koskenniemi, like Grewe, emphasized the dependence of the development of international law on power and politics.

The translation of Grewe's work into English and the *Gentle Civilizer* have triggered a 'historiographical turn' in the discipline of international law.[109] Not only the history of international law, but also its methods and the objectives of studying this history have found heightened scholarly attention. It is therefore unsurprising that, quite recently some new collective works on the history of international law have been published.[110] However, histories written from a non-European perspective are still the exception.

[106] ibid 3–4. [107] ibid 2. [108] ibid.

[109] See GR Bandeira Galindo 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 European Journal of International Law 539–59. Already some years before, the Journal of the History of International Law had been launched. In its first editorial, Ronald Macdonald described the journal's objective as 'to contribute to the effort to make intelligible the international legal past, however varied and eccentric it may be, to stimulate interest in the whys, the whats and the wheres of international legal development, without projecting present relationships upon the past, and to promote the application of a sense of proportion to the study of modern international legal problems.' (R St J Macdonald 'Editorial' (1999) 1 Journal of the History of International Law 1). See also IJ Hueck 'The Discipline of the History of International Law' (2001) 3 Journal of the History of International Law 194–217; A Kemmerer 'The Turning Aside: On International Law and its History' in RM Bratspies and RA Miller (eds) *Progress in International Law* (Martinus Nijhoff Leiden 2008) 71–93.

[110] *Time, History and International Law* (n 66); T Marauhn and H Steiger (eds) *Universality and Continuity in International Law* (Eleven The Hague 2011); A Orakhelashvili (ed) *Research Handbook on the Theory and History of International Law* (Edward Elgar Cheltenham 2011). See also International Law (n 6) 22–45 ('The historical evolution of the international community') and 'A Short History' (n 59) 3–31.

An eminent historian of international law remarked that 'one cannot learn anything from the histories of international law, at least nothing in concrete terms'.[111] We respectfully disagree. It is true that it is difficult to 'learn' from history in the sense that one could avoid making the same mistakes as in the past because situations and constellations always change so that experience can hardly be carried over from one time to another. But, we believe, studying the history of international law can help better to understand the character of that particular legal order, its promise and its limits. If we are not mistaken, we live right now in a period of fundamental change of international relations, a process instigated by the collapse of the Soviet Union and the communist bloc of states, and the end of the Cold War. If the history of international law since the 16th century has been characterized by a global expansion of Western ideas, and with it of Western domination, many signs today suggest that this history is drawing to a close. To know, in this situation, a bit of the law of nations of the past can help us to see the larger picture, and incite informed curiosity about how the histories of international law will continue.

[111] H Steiger 'Was heisst und zu welchem Ende studiert man Völkerrechtsgeschichte?' in I Appel, G Hermes and C Schönberger (eds) *Öffentliches Recht im offenen Staat: Festschrift für Rainer Wahl zum 70. Geburtstag* (Duncker & Humblot Berlin 2011) 211–23 at 221 (trans by the authors).