

‘The Most Neglected Province’

British Historiography of International Law

DAVID ARMITAGE AND IGNACIO DE LA RASILLA

Introduction

In 1908, the German émigré Lassa Oppenheim (1858–1919), soon to take up the Whewell Professorship of International Law at Cambridge, remarked, that ‘The history of international law is certainly the most neglected province of it. Apart from a few points that are dealt with in monographs, the history of international law is virgin land which awaits its cultivators.’¹ Until recently, it might have been argued that the *British* history of international law was peculiarly neglected as a province of the historiography of international law. Yet defining and discerning specific historiographical traditions in international law can be difficult as well as problematic. In the British case, isolating such traditions is especially fraught because neither the anglosphere nor even the common-law world has ever been coterminous with any British state, empire or commonwealth. The boundaries of these communities shifted often – to exclude the Thirteen Colonies that became the United States after 1783, for example, or to include Ireland after 1800 and then to exclude much of it again after 1922. The problem is exacerbated by the dominion status and de facto independence of Canada, Australia and New Zealand and still more so by waves of decolonisation in the mid- to late twentieth century, especially, but not only, in South and South East Asia and Africa. These constraints have to be borne in mind in the context of the abridged modern history that follows histories of international law in and beyond Britain, the British Empire and parts of the Commonwealth.

Broadly speaking, ‘British historiography of international law’ encompasses writings about the history of international law produced by British subjects throughout the different phases of the British Empire, as well as

¹ Lassa Oppenheim, ‘The science of international law: its task and method’, *American Journal of International Law*, 2 (1908) 313–56, at 316.

those written by nationals of countries that once belonged to it. Considering the global reach of the British Empire throughout its different historical manifestations since the sixteenth century, such an understanding would encroach on the scope of other treatments offered in this book; furthermore, it would obscure the distinctiveness of many other national and regional historiographical traditions of international law around the world. This is why we use the terminology of 'British' historiography of international law in a more limited sense. As well as Britain and Ireland, it covers the British world broadly from the emancipation of the American colonies up to the present, with the caveat that the synoptic account of international legal historiography offered for the period since the Cold War also refers to literature produced in some particular other parts of the Commonwealth, namely Australia, New Zealand and Canada. Accordingly, before approximately 1948, we generally use 'British'; after that point, 'British and Commonwealth'. And at least until we reach the most recent generation, the chapter focuses mostly on White and male actors, as does the historiography of international law more generally. Future research may redress this imbalance, as it has done in adjacent areas, such as the disciplinary history of women in international relations or the history of Black women's internationalism, for instance.²

Every periodisation of the history of international law is inherently problematic.³ With this in mind, we use the general periodisation scheme of *The Cambridge History of International Law* to divide this chapter into five parts. First, we treat the so-called period of Western international law, 1776–1870, which parallels the first age of the British historiography of international law. This extends from Robert Ward's *Enquiry into the Foundation and History of the Law of Nations in Europe* (1795) to Thomas Erskine Holland's Oxford inaugural lecture on Alberico Gentili (1552–1608) in 1874, although, as we shall see, the nineteenth-century cultivation of the subject in Britain was nourished

² Patricia Owens, 'Women and the history of international thought', *International Studies Quarterly*, 62 (2018) 467–81; Patricia Owens and Katharina Rietzler (eds.), *Women's International Thought. A New History* (Cambridge: Cambridge University Press 2021); Keisha N. Blain and Tiffany M. Gill (eds.), *To Turn the Whole World Over. Black Women and Internationalism* (Urbana: University of Illinois Press 2019); yet see Immi Tallgren (ed.), *Portraits of Women in International Law. New Names and Forgotten Faces?* (Oxford: Oxford University Press forthcoming).

³ Oliver Diggelmann, 'The periodization of the history of international law' in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press 2012) 997–1011; Ignacio de la Rasilla, 'The problem of periodization in the history of international law', *Law and History Review*, 37 (2019) 275–308.

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by the convergence of earlier eighteenth-century streams of historical literature. The second part of this chapter examines the intellectual underpinnings of the British international legal historiography at the height of empire, which was also the great age of historicism in British international law, from roughly 1870 to 1920. The third part, in turn, examines the symbolic coming of age of the academic cultivation of the history of international law in the UK experienced from the establishment of the *British Yearbook of International Law* in 1920 up to Hersch Lauterpacht's enunciation of the Grotian tradition of international law in the aftermath of the Second World War. The fourth part explores the influence that the following 'age of Lauterpacht' in the decades up to 1960 had on the study of the history of international law and how historiographical advances during the Cold War hiatus were to come increasingly from the semi-periphery rather than the centre and from disciplines other than international law. Finally, the fifth part briefly takes stock of the large impact that the trans-disciplinary 'turn' to the history of international law had in challenging the traditional horizons of the British historiography of international law. The conclusion offers some reflections on the nascent field of comparative international legal history in the light of some characteristic features of its British strains over the *longue durée*.

History and the Law of Nations before 1870

The early story of history and the law of nations in Britain has often been told as beginning in the 1790s, with the publication of Robert Ward's (1765–1846) *Enquiry into the Foundation and History of the Law of Nations in Europe* (1795) and later pivoting around Thomas Erskine Holland's (1835–1926) inaugural lecture on Alberico Gentili in 1874.⁴ Ward claimed – incorrectly, as we shall see – that his work was the first history of the law of nations in any language; Holland's lecture was certainly the first such historical pronouncement from an established chair of international law in Britain, in this case the Chichele Professorship at Oxford, created in 1859. By the last third of the nineteenth century, historical scholarship had begun to merge with professional identity.

⁴ Robert [Plumer] 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. (London: J. Butterworth 1795); Thomas Erskine Holland, *An Inaugural Lecture on Alberico Gentilis* (London: MacMillan 1874); Peter Haggemacher, 'Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations* (Oxford: Clarendon Press 1992) 133–76.

In the eighty years between Ward's and Holland's interventions, a distinct canon of key thinkers, cases and texts, transmitted through lectures, textbooks and journals, had emerged to define a self-confident intellectual community around the academic specialism known as international law, with disciplinary history gradually becoming one of its defining features. Ward and Holland provide convenient bookends for the first age of the British historiography of international law, as the field moved from the law of nations to international law, from amateurism to professionalism, and from the margins to the centre of British public life, while also being informed by distinct visions of history at each stage of its development.

Despite these convenient termini, the historiography of the law of nations in Britain before the 1870s was hardly linear; rather, it was composed of false starts and tangled ancestries that stretched back at least a century before Ward published his *Enquiry* and were not confined to Britain. Ward's claim to originality – 'it has never yet been the fortune of the annals of the world (at least not within my knowledge) to produce, from any commentator, A HISTORY OF THE LAW OF NATIONS' – overlooked many predecessors and antecedents.⁵ Most obviously, it ignored the German historical literature on *Völkerrecht*. Ward was likely unaware of this, despite his cosmopolitan background, with roots in Spain and Gibraltar, education at Oxford and the Inner Temple and time spent in revolutionary France. Other works have a stronger claim to be the first history of the law of nations 'in any language', notably the neglected *Historia del derecho natural y de gentes* (1776) by Joaquín Marín y Mendoza (1725–82) and the more influential *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (1785) by Dietrich H.L. von Ompteda (1746–1803). Unlike Ward's cultural account of the law of nations from the ancient Mediterranean to the French Revolution, Marín y Mendoza's *Historia* was a synoptic compendium addressed to students, and Ompteda's *Litteratur* was mostly an annotated bibliography.⁶ Georg Friedrich von Martens's (1756–1821) *Précis du droit des gens en Europe* (1789) had also briefly recapped the history of the law of nations before Ward; an English

⁵ Ward, *An Enquiry*, vol. 1, xiv; Diego Panizza, *Genesi di una ideologia. Il conservatorismo moderno di Robert Ward* (Padua: Pubblicazioni della Facoltà di scienze politiche dell'Università di Padova, Istituto di scienze politiche 1997); Randall Lesaffer, 'Roman law and the early historiography of international law: Ward, Wheaton, Hosack and Walker' in Thilo Marauhn and Heinhart Steiger (eds.), *Universality and Continuity in International Law* (The Hague: Eleven International Publishing 2011) 149–84, at 154–60.

⁶ Joaquín Marín y Mendoza, *Historia del derecho natural y de gentes* (Madrid: Manuel Martín 1776); Dietrich H.L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, 2 vols. (Regensburg: Johann Leopold Montag 1785).

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translation appeared in Philadelphia the same year as Ward’s *Enquiry*, but it seems not to have circulated widely in Britain. Martens’ extensive bibliography in Latin, French, German and English for the study of the law of nations suggested other sources for its history, some of which Ward himself relied upon.⁷ Then and later, British and English-speaking international law was porous to other national traditions and languages.

For much of the eighteenth century in Britain and Ireland, normative approaches to the law of nations eclipsed historical considerations. The only chair of the law of nations in Britain, founded as the Regius Professorship of Public Law and the Law of Nature and of Nations at the University of Edinburgh in 1707, was held mostly by mediocrities and time-servers with no interest in the history of their subject.⁸ Conversely, although George I (r. 1714–27) had created the Regius Professorships of History at Cambridge and Oxford in 1724 with the aim of educating gentlemen diplomats in the wake of the Peace of Utrecht (1713), their incumbents’ teaching focused on modern history and languages rather than on the law of nations.⁹ The eighteenth century’s towering legal academic in Britain, Sir William Blackstone (1723–80), the Vinerian Professor of Law at Oxford, did engage with the canonical figures of the modern law of nations such as Hugo Grotius (1583–1645) and Samuel von Pufendorf (1632–94) in his *Commentaries on the Laws of England* (1765–9), especially in its second and later editions, but he did not treat them historically. The same was true of Blackstone’s admirer in Dublin, Arthur Browne (1756?–1805), the American-born Regius Professor of Civil and Canon Law at Trinity College, who was the first – and, until the late nineteenth century, probably the only – scholar to lecture on the law of nations in Ireland, in the late 1780s.¹⁰ Not long after

⁷ Georg F. von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (transl. William Cobbett, Philadelphia: Thomas Bradford 1795) 4–20.

⁸ John W. Cairns, ‘The first Edinburgh chair in law: Grotius and the Scottish Enlightenment’ in John W. Cairns, *Enlightenment, Legal Education, and Critique. Selected Essays on the History of Scots Law*, 2 vols. (Edinburgh: Edinburgh University Press 2018) vol. 2, 82–110.

⁹ H.M.A. Keens-Soper, ‘The French Political Academy, 1712: a school for ambassadors’ in H.M.A. Keens-Soper and Karl W. Schweizer (eds.), *The Art of Diplomacy. François de Callières* (Leicester: University of Leicester Press 1983) 189–218, at 214–5.

¹⁰ Arthur Browne, *A Compendious View of the Civil Law, Being the Substance of a Course of Lectures Read in the University of Dublin* (London: J. Butterworth 1798) 55–75 (‘Of the LAW of NATIONS’); Joseph C. Sweeney, *The Life and Times of Arthur Browne in Ireland and America, 1756–1805. Civil Law and Civil Liberties* (Dublin: Four Courts Press 2017) 117–23; Paul O’Higgins, ‘The study of international law in Ireland’, *Annuaire de l’Association des auditeurs et anciens auditeurs de l’Académie de droit international de la*

that, Blackstone's great antagonist, Jeremy Bentham (1748–1832), thoroughly dismissed the entire tradition of 'the professors of natural law ... the Grotiuses and the Pufendorfs, the legislators of the human race ... each one sitting in his armchair'. Bentham's vision of what he was the first to call 'international law' consigned his predecessors to history without any attempt to historicize them.¹¹ None of these tendencies indicated that Britain or Ireland would ever become fertile ground for cultivating the history of international law.

By the end of the eighteenth century, three streams of historical literature were nonetheless converging to nourish the history of international law in Britain. The first comprised treaty collections, a genre of European historical scholarship that had emerged in the mid-seventeenth century and that, in Britain at least, found its most expansive expression in the *Foedera* (1704–17) edited by the poet–antiquary Thomas Rymer (1641–1713).¹² A positive conception of the law of nations rested on such documentation. The second strand was the so-called 'history of morality', a pan-European genre of philosophical history that retailed a history of the modern natural-law tradition within which Grotius appeared as the innovator who founded modern ethics. This literature traced the emergence of the law of nations from the law of nature in its ancient and modern versions. In this vein, Ward traced the law of nations from its barbarous infancy under the Greeks and Romans up to the defining moment in the early seventeenth century, when 'the philosopher of Delft rose like a star amid the surrounding darkness' and 'gave to the world a Treatise [*De jure belli ac pacis*] which has stood the test of time'.¹³ The third stream was the so-called 'Enlightenment narrative', elaborated by, among others, David Hume (1711–76), William Robertson (1721–93) and Edward Gibbon (1737–94), as a progressive account of the emergence of modern 'civilisation' out of barbarous feudalism by way of the

Haye, 29 (1957) 68–72. We are grateful to David Fennelly for advice on the history of international law in Ireland.

¹¹ Jeremy Bentham, 'Pannomial fragments' (1820s), British Library Add. MS 33550, f. 92r, transl. in *The Works of Jeremy Bentham*, ed. John Bowring, 11 vols. (Edinburgh: William Tait 1843) vol. 3, 211–30, at 220; yet on Bentham's historicism, see Callum J.A. Barrell, *History and Historiography in Classical Utilitarianism, 1800–1865* (Cambridge: Cambridge University Press 2021) Chapter 1, 'Bentham on historical authority'.

¹² Thomas Rymer (ed.), *Foedera. Conventiones, Literae, et Cujuscunq[ue] Generis Acta Publica, Inter Reges Angliae, et Alios Quosvis Imperatores, Reges*, 20 vols. (London: A. & J. Churchill 1704–17).

¹³ Ward, *An Enquiry*, vol. 2, 614–15; Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press 2000).

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tempering effects of Christianity, chivalry and commerce.¹⁴ This narrative also informed the Irish-born Edmund Burke’s (1729–97) use of the law of nations as a universalistic standard against which to judge the alleged depredations in Bengal of Warren Hastings (1732–1818), governor general of the East India Company, during Hastings’ impeachment trial in the 1790s: Burke’s critique provided an index of what might be called the vernacular law of nations in Britain and Ireland at the time.¹⁵ A similar explanatory story underpinned Ward’s history of the law of nations and also provided the historical structure for the first philosophical account of the law of nations in English, the *Discourse on the Study of the Law of Nature and Nations* (1799) by Ward’s contemporary, Sir James Mackintosh (1765–1832).¹⁶ Ward and Mackintosh diverged in their conceptions of the universality of the law of nations, with Mackintosh offering a more Eurocentric vision than Ward’s cosmopolitan argument for a ‘different Law of Nations for different parts of the globe’. Despite their differences, Ward and Mackintosh have been plausibly held to herald the ‘advent of historicism’ in the British study of the law of nations in the 1790s.¹⁷

At least until the 1830s, students of the law of nations worked in Bentham’s long shadow and scholars such as James Mill (1773–1836) and John Austin (1790–1859) continued to define the field deductively rather than empirically.¹⁸ For decades, even historically minded students of the law of nations would feel the need to rebut Austin’s divisive contention that international law was not law at all but instead a species of positive international morality.¹⁹ There are good reasons to argue that in this period international law was made not in the metropole but on the peripheries, and not by professional lawyers but by agents of the British Empire, its

¹⁴ Karen O’Brien, *Narratives of Enlightenment. Cosmopolitan History from Voltaire to Gibbon* (Cambridge: Cambridge University Press 1997); J.G.A. Pocock, *Barbarism and Religion*, 6 vols. (Cambridge University Press, 1999) vol. 2, *Narratives of Civil Government*.

¹⁵ Jennifer Pitts, ‘Legal pluralism and Burke’s law of nations’ in Jason Peacey (ed.), *Making the British Empire, 1660–1800* (Manchester: Manchester University Press 2020) 178–96.

¹⁶ James Mackintosh, *A Discourse on the Study of the Law of Nature and Nations* (London: T. Cadell et al. 1799).

¹⁷ Ward, *An Enquiry*, vol. 1, xiv, original emphasis; Jennifer Pitts, *Boundaries of the International. Law and Empire* (Cambridge, MA and London: Harvard University Press 2018) 124–33.

¹⁸ Robert Schütze, ‘British utilitarianism after Bentham: nineteenth-century foundations of international law II’, *Journal of the History of International Law* (2023) 1–42, doi:10.1163/15718050-bja10090.

¹⁹ Wilfrid E. Rumble, *Doing Austin Justice. The Reception of John Austin’s Philosophy of Law in Nineteenth-Century England* (London: Continuum 2005).

subjects and subalterns.²⁰ Nonetheless, historicism did begin to take root in the context of the Napoleonic Wars and their aftermath, when Ward, for one, returned to the fray with historical works on belligerent and neutral powers and the law of contraband, for instance.²¹ This tendency accelerated as study of the law of nations was recognised as a lacuna in English legal education: ‘there does not exist a single elementary or systematic treatise upon the subject, written in English, by an Englishman’, lamented Peter Stafford Carey (1803–86), professor of English law at University College, London, in 1838.²² British lawyers also experienced provincialism in the metropolis when they perceived that American authors such as Chancellor James Kent (1763–1847), and especially Henry Wheaton (1785–1848), had already overtaken them in both the systematic study of international law and its historical treatment.

To remedy such ‘perverse insularity’, William Oke Manning (1809–78) prefaced his *Commentaries on the Law of Nations* (1839) with a ‘Definition and History of the Law of Nations’ from the ancients via the natural-law tradition and from the major treaty collections to the late eighteenth-century efflorescence in Europe represented by, among others, Gabriel Bonnot de Mably (1709–85) Immanuel Kant (1724–1804), Jean Louis Klüber (1762–1837), Martens and Ompteda.²³ Shortly afterwards, James Reddie (1775–1852), a Scots lawyer deeply indebted to Scottish Enlightenment historiography and German legal scholarship, particularly to Friedrich Carl von Savigny (1779–1861), published his *Inquiries in International Law* (1842). Like Manning’s *Commentaries*, Reddie’s *Inquiries* deployed the past in the service of system by retailing the history of the subject from the Greeks to the present, using a periodisation derived from Ompteda that parcelled modernity into the ages of Grotius to Pufendorf (from 1625 to 1673), Christian Wolff to Johann Jacob Moser (from 1673 to 1740) and thence to Ompteda’s own

²⁰ Lauren Benton and Lisa Ford, *Rage for Order. The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA and London: Harvard University Press 2016).

²¹ Robert Plumer Ward, *A Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers, in Maritime Affairs* (London: J. Butterworth 1801); Robert Plumer Ward, *An Essay on Contraband* (London: J. Wright 1801).

²² P. Stafford Carey, *An Introductory Lecture on the Study of English Law, Delivered in University College, London, on Monday, December 17, 1838* (London: Taylor and Walton 1839) 22.

²³ Sir Frederick Pollock, quoted in D.H.N. Johnson, ‘The English tradition in international law’, *International and Comparative Law Quarterly*, 11 (1962) 416–45, at 422 (‘perverse insularity’); William Oke Manning, *Commentaries on the Law of Nations* (London: S. Sweet 1839) 6–56.

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times (from 1740 to 1785).²⁴ Like Ward and Macintosh, Manning and Reddie did not hold chairs; unlike their predecessors, they were in open dialogue with European writing on the history of the law of nations. With their work, the stage was set for the first generation of British professional – that is, professorial – scholarship in the history of international law.

The decades between the 1830s and the 1870s witnessed the decline of the civil lawyers, the rise of the academic jurists and the continuity of the natural-law tradition, all developments that shaped relations between history and international law in Britain. The Admiralty courts and Doctors’ Commons were the fora within which William Scott, Lord Stowell (1745–1836), Sir Robert Phillimore (1810–85) and Sir Travers Twiss (1809–97) deployed their knowledge of the civil law in international litigation: indeed, when Phillimore produced the first brief history of international jurisprudence in England, as a preface to his *Commentaries on International Law* (1854–61), it consisted entirely of the history of civil law since the Reformation.²⁵ Stowell’s opinions became canonical for a generation of English international lawyers;²⁶ Phillimore and Twiss, the successive incumbents of the Regius Professorship of Civil Law at Oxford, produced more systematic treatises that carried a naturalist perspective forward into mid-century, as did James Lorimer (1818–90) from the revived chair of the law of nature and nations in Edinburgh. Lorimer would also be a founder member of the Institut de droit international in 1873.²⁷

The most conspicuously historically minded among this trio of naturalists, or semi-naturalists, was Twiss. In his earlier position as Drummond Professor of Political Economy at Oxford, he had lectured on the history of population and the progress of political economy in Europe since the sixteenth century. His work on international law was based on the historicism of Savigny that Lorimer, for one, had explicitly rejected. For instance, in

²⁴ James Reddie, *Inquiries in International Law* (Edinburgh: William Blackwood and Sons 1842) 7–87.

²⁵ Robert Phillimore, *Commentaries on International Law*, 4 vols. (London: W.G. Benning 1854) vol. 1, v–xxiii.

²⁶ Henry Bourguignon, *Sir William Scott, Lord Stowell. Judge of the High Court of Admiralty* (Cambridge: Cambridge University Press 1987).

²⁷ Michael Lobban, ‘English approaches to international law in the nineteenth century’ in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff 2007) 65–90, at 66–70; Andrew Fitzmaurice, ‘The resilience of natural law in the writings of Sir Travers Twiss’ in Ian Hall and Lisa Hill (eds.), *British International Thinkers from Hobbes to Namier* (Basingstoke: Palgrave 2009) 137–59; Martti Koskeniemi, ‘Race, hierarchy and international law: Lorimer’s legal science’, *European Journal of International Law*, 27 (2016) 415–29.

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his *Two Introductory Lectures on the Science of International Law* (1856), written under the shadow of the Crimean War, Twiss offered a history of doctrines, not practices, of treatises rather than treaties. This paid as much attention to scholastic antecedents such as Balthazar de Ayala (1548–84) and, unusually for his time, Francisco de Vitoria (c. 1480–1546) as to reconstructing an anglophone tradition of international law from John Selden (1584–1654) and Richard Zouche (c. 1590–1651) in the seventeenth century to Bentham, Austin, Kent and Wheaton in the nineteenth.²⁸ In breaking with the conventional chronology and even geography of international law in this way, Twiss opened the way for Holland's resurrection of Gentili in 1874. Holland's inaugural lecture was partly a tribute to his distant predecessor in Oxford's chair of civil law. Yet it also made a historical claim for an alternative genealogy of international law that traced its modern parentage back not to Grotius, the alleged 'father' of international law, but to the Protestant from Perugia who found his intellectual home in exile in England. In this sense, the conventional periodisation which breaks around 1870 seems apt, not just for its coincidence with the foundation of the Institut de droit international but also for Holland's use of a newly established chair to promote an alternative history of a field that was just coming to professional prominence and maturity.

History and International Law in the Age of Empire, 1870–1920

The fifty years on either side of the turn of the twentieth century were both the great age of historicism in British international law and the zenith of empire, for Britain as for other European powers. The overlap between these two epochs within what Wilhelm Grewe (1911–2000) called 'the English era' (*das englische Zeitalter*) (1815–1914) was no accident.²⁹ On the one hand, historicism – or the 'historical method' – swept the board in the human sciences and became a potent tool to be wielded by the newly chaired professionals at the summits of international law in Cambridge, Oxford and London. On the other, those professionals joined with their European counterparts to project onto the extra-European world a Victorian

²⁸ Travers Twiss, *Two Introductory Lectures on the Science of International Law* (London: Longman 1856).

²⁹ Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos 1984) 499–676.

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confidence in White supremacy as progress and as 'civilisation' by placing their expertise in the service of empire, whether British, French, Belgian or German. The decades following the Crimean War (1853–6) and the Franco-Prussian War (1870–1) and before the First World War seemed to Europeans to be an era of comparative peace secured through law; however, seen from the world beyond Europe, this was perhaps the most violent epoch in world history thus far. Out of this collision of world views emerged the ideas that international law itself was in progress and under development, that it could be a tool for the advancement of non-White peoples towards 'civilisation', and that empire could advance international law just as international law could promote empire: in short, that international law was at once a product and a propellant of history conceived as a temporal reordering of the entire world and its peoples.³⁰

By this moment, fewer British international lawyers would have endorsed Phillimore's view that international law was an emanation of sacred history, 'enacted by the will of God; and . . . expressed in the consent, tacit or declared, of Independent Nations'.³¹ Instead, most would have agreed with Sir Frederick Pollock (1845–1937) that '[t]he historical method . . . is the newest and most powerful instrument, not only of the moral and political sciences, but of a great part of the natural sciences'. For Pollock, writing in the 1880s, the revolution wrought by the publication of Charles Darwin's *Origin of Species* (1859) was a symptom rather than a cause of the explosion of historicism: 'When Charles Darwin created the philosophy of natural history . . . he was working in the same spirit and towards the same ends as the great publicists'.³² Pollock was immediately concerned with the work of Sir Henry Sumner Maine (1822–88), but his account of the rise of the evolutionary paradigm applied more broadly to the field of international law in Britain, and indeed beyond. Savigny and the German historical school had introduced an evolutionary account into the study of law long before Darwin wrote, but such a perspective decisively shaped legal education, the identity

³⁰ Matthew Craven, 'The invention of a tradition: Westlake, the Berlin Conference and the historicisation of international law' in Miloš Vec and Luigi Nuzzo (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt: Klosterman 2012) 363–403; Jennifer Pitts, 'International law' in Mark Bevir (ed.), *Historicism and the Human Sciences in Victorian Britain* (Cambridge: Cambridge University Press 2017) 237–61.

³¹ Phillimore, *Commentaries*, vol. 1, v.

³² Sir Frederick Pollock, *Oxford Lectures and Other Discourses* (London: Macmillan 1890) 4.

of the field, its development as a science and its complicity with empire in the decades before the First World War.³³

By the 1870s, there was general agreement among the professionals that the law of nations was the preserve of ‘civilised’ societies, not those of ‘barbarians’, and therefore that it was characteristic of White Christian, European nations, including those in the Americas that had secured their independence in the late eighteenth and early nineteenth centuries. Their common norms were an index of their evolution together and of their mutual respect and recognition. In the words of Cambridge’s Whewell Professor, John Westlake (1828–1913), ‘The society of states, having European civilization, or the international society, is the most comprehensive form of society among men’.³⁴ ‘Uncivilised’ societies occupied different positions on a moving scale of savagery and barbarism, with sub-Saharan Africans and most indigenous peoples of Oceania and Australasia at one end the spectrum and incipient members of international society – most notably the Ottoman Porte, the kingdom of Siam (Thailand), Japan and China – at the other. Gone was the pluralism of Montesquieu or Ward: there was not an array of distinct, parallel laws of nations, but rather a single conception radiating outwards from Europe to which ‘the various uncivilized or half-civilized races’, as Westlake thought them, might in due course be admitted.³⁵ The evidence for admission was empirical and thus historical and positive in nature, rather than grounded in the universalism of natural law. However, ‘even those thinkers who shunned a natural law framework continued to regard their principles as universally valid, though their universalism was now refracted through the progressivist prism of ostensibly scientific accounts of civilizational progress’.³⁶

The historical turn of the late nineteenth century encouraged a turn to empire among British international lawyers. That movement was, of course, not peculiar to the British legal profession: as Martti Koskenniemi has

³³ Casper Sylvest, ‘International law in nineteenth-century Britain’, *British Yearbook of International Law*, 75 (2004) 9–70; Casper Sylvest, ‘“Our passion for legality”: international law and imperialism in late nineteenth-century Britain’, *Review of International Studies*, 34 (2008) 403–23; Casper Sylvest, *British Liberal Internationalism, 1880–1930. Making Progress?* (Manchester: Manchester University Press 2009) 61–100.

³⁴ John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press 1894) 78.

³⁵ John Westlake, *International Law. An Introductory Lecture Delivered 17 Oct. 1888, in the University of Cambridge* (London: C.J. Clay 1888) 1.

³⁶ Jennifer Pitts, ‘Boundaries of Victorian international law’ in Duncan Bell (ed.), *Victorian Visions of Global Order. Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press 2007) 67–88, at 69.

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argued, it was foundational for the sensibility of modern international law *tout court* among ‘the men of 1873’ who founded the Institut de droit international.³⁷ The first great test of these founding fathers came at the Berlin Conference of 1884–5 to discuss competing European territorial claims in Africa. Westlake and Twiss were among the delegates and each mobilised their historical erudition in the cause of promoting the interests of Great Britain, as Westlake did openly, and of Belgium’s King Leopold, as Twiss did covertly.³⁸ This led, in due course, to Westlake’s publication of *Chapters on the Principles of International Law* (1894), which argued for international law as the rules of a mutually recognising international society, centred on Europe, and in which he subjected the key questions debated at Berlin – the nature of sovereignty, the methods for the acquisition of territory, the status of treaties – to historical analysis. In the hands of eminences such as Westlake and Twiss, international law was a self-consciously progressive science, ever-advancing in its analytical sophistication and practical application (for example, in the laws of war and the promotion of peace), but it also became a discriminatory science of progress, deployed to place dispossessed and colonised peoples in the waiting room of history until European powers deemed them worthy of admission. It would not be until the period after the Second World War that this alliance between history and empire would be undone by the critical application of historical methods to the ideological underpinnings of empire.

International law was the last, and indeed the culminating, interest of the greatest legal evolutionist of the late nineteenth century, Henry Sumner Maine, another lawyer entangled with empire through his position as legal member of the Indian Viceroy’s Council, his studies of *Village Communities in the East and West* (1871) and his inspiration for the policy of indirect rule in the contemporary British Empire.³⁹ Maine’s major contributions to the historiography of international law were to emphasise its European roots in Roman law and to urge the necessity of subjecting it to genealogical inquiry: if ‘international law be not studied historically . . . we lose at once all chance of comprehending that body of rules which alone protects the

³⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press 2002) 98–178.

³⁸ Craven, ‘The invention of a tradition’; Andrew Fitzmaurice, *King Leopold’s Ghost-Writer* (Princeton: Princeton University Press 2021).

³⁹ Carl Landauer, ‘From status to treaty: Henry Sumner Maine’s international law’, *Canadian Journal of Law and Jurisprudence*, 15 (2002) 219–54; Karuna Mantena, *Alibis of Empire. Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press 2010).

European commonwealth from permanent anarchy'.⁴⁰ Maine's predecessors and successors, from Manning to Oppenheim, each of whom included the obligatory chapters on the history of international law in their textbooks and treatises, would have concurred. So would Henry Brougham Leech (1843–1921), the Irish-born Cambridge don and later inaugural professor of jurisprudence and international law at Dublin, who in 1877 produced the first history in English of international law in the ancient world.⁴¹ And so would Leech's fellow Cantabrigian Thomas Alfred Walker (1862–1935), author of an ambitious but truncated *History of the Law of Nations* (1899) which only reached as far as 1648. Walker admired Maine and was inspired by Ernest Nys: like both, he was '[c]onvinced that in the prosecution of the historical method will be found the only really satisfactory way to the right understanding of the character and claims of International Law'.⁴²

While other scholars mostly treated international legal history as a parade of theorists – disagreeing only over the cast of characters and their relative importance – Maine had, since his path-breaking *Ancient Law* (1861), focused on the evolutionary history of institutions and structures, including popular opinion. However, it was only at the very end of his life, with his brief elevation to Cambridge's Whewell Professorship of International Law, created in 1867, that Maine trained his historicism determinedly on international law. In the posthumously published *International Law* (1888), Maine displayed his command of the modern theoretical tradition from Grotius to Vattel even as he deconstructed it by placing it in *longue durée* context from its roots in the Roman *jus gentium* up to the most recent developments in the laws of war and peace after the conflicts of the mid-nineteenth century in North America and Europe.⁴³

Maine's evolutionary historicism proved more influential than his specific contribution to the historiography of international law. His successors in the Whewell Professorship between 1888 and 1919, Westlake (another founder of the Institut de droit international) and Oppenheim, sustained that

⁴⁰ Henry Maine, 'Roman law and legal education' in University of Cambridge, *Cambridge Essays, Contributed by Members of the University* (London: John W. Parker 1856) 12.

⁴¹ Henry Brougham Leech, *An Essay on Ancient International Law* (Dublin: University of Dublin Press 1877); O'Higgins, 'The study of international law in Ireland', 70–1.

⁴² T.A. Walker, *A History of the Law of Nations*, vol. 1, *From the Earliest Times to the Peace of Westphalia in 1648* (Cambridge: Cambridge University Press 1899) v; Lesaffer, 'Roman law and the early historiography of international law', 172–8.

⁴³ Henry Maine, *Ancient Law. Its Connection to the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray 1861); Henry Maine, *International Law* (London: John Murray 1888).

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evolutionary perspective on international law alongside the more conventional narrative of their field's doctrinal development. As we have already seen, Westlake's historicism served his commitment to both British and European imperialism as an instrument of civilisation, as the condition of a regional culture and as a process of uplift for the extra-European world. Oppenheim, meanwhile, was a modernist to the extent that he was a positivist, a statist and above all a historicist: 'If anything is dependent upon gradual historical development', he wrote, 'it is that delicate body of rules which is called international law.'⁴⁴ He might lament that the history of international law was still a 'neglected province', but he laboured to overcome this desuetude in his *Treatise on International Law* (1905), which contained the now obligatory chapter on the 'Development and science of the law of nations' in each edition during his lifetime and in subsequent editions for fifty years afterwards.⁴⁵ By this means, the profession's 'Victorian tradition' of evolutionary historicism yoked to liberal progressivism was transmitted from the age of high imperialism to the era of early decolonisation.⁴⁶

Historiography of International Law in the Early Days of the Rise of Academic Professionalisation (1920–1945)

The comparatively late arrival of *The British Yearbook of International Law* to the global history of international-law journals in 1920 marked a symbolic coming of age for the academic cultivation of international law and, by extension, although in a more limited sense, for the British history of international law *tout court*.⁴⁷ As the offspring of what James Leslie Brierly (1881–1955) called 'a quickening of interest in the subject in this country and

⁴⁴ Oppenheim, 'The science of international law'; Amanda Perreau-Saussine, 'A case study on jurisprudence as a source of international law: Oppenheim's influence' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff 2007) 91–117; Oppenheim quoted in Sylvest, 'British liberal internationalism', 201.

⁴⁵ From Lassa Oppenheim, *International Law*, 2 vols. (London: Longmans, Green and Co. 1905) vol. 1, 44–96; to Oppenheim, *International Law. A Treatise* (8th edn, ed. Hersch Lauterpacht, 2 vols., London: Longman 1955) vol. 1, 72–114.

⁴⁶ Martti Koskenniemi, 'Lauterpacht: the Victorian tradition in international law', *European Journal of International Law*, 8 (1997) 215–63; Koskenniemi, *Gentle Civilizer*, 353–412.

⁴⁷ Ignacio de la Rasilla, 'A very short history of international law journals, 1869–1918', *European Journal of International Law*, 29 (2018) 137–68.

others' following the First World War and the founding of the League of Nations, the *British Yearbook* regularly welcomed writings on the history of international law in the 1920s and 1930s and beyond.⁴⁸ The *Journal of Comparative Legislation and International Law*, which replaced *The Journal of the Society of Comparative Legislation* in 1918 and two new legal journals, the *Cambridge Law Journal* (1921) and the *Journal of the British Institute of International Affairs* (1922), were also added to the *Law Quarterly Review* (1885) as venues for the occasional publication of contributions by British international-law academics, although these remained almost entirely confined to the tackling of contemporary international legal developments. To identify a more sustained line of British contribution of works of historical character to legal periodicals one must turn, instead, to the establishment in 1915 of the Grotius Society for 'the promotion and study of international law in Great Britain' in London and the publication of its homonymous *Transactions* since 1918.⁴⁹ These became a venue for the publication of a number of studies about international law and some of its classic writers in historical perspective by British authors and, in particular, an ample series of articles on Grotius' life and works.⁵⁰ This line of studies was broadly coterminous with the publication of the collection of the Classics of International Law series in twenty-two volumes under the patronage of the Carnegie Endowment from 1911 to 1950. Spearheaded by the American James Brown Scott (1866–1943) with the declared aim of making the works of 'the predecessors of Grotius, a proper edition of the masterpiece of Grotius himself, [and] the works of the chief successors of Grotius' available in English, British contributors to the series included Holland, who edited the

⁴⁸ James L. Brierly, 'International law in England', *Law Quarterly Review*, 51 (1935) 24–35, at 34–5. See e.g. Percy H. Winfield, 'The history of intervention in international law', *British Yearbook of International Law*, 3 (1922–3) 130–49; Orby Howell Mootham, 'The doctrine of continuous voyage, 1756–1815', *British Yearbook of International Law*, 8 (1927) 62–80; Hersch Lauterpacht, 'Spinoza and international law', *British Yearbook of International Law*, 8 (1927) 89–107; D.J. Llewelyn Davies, 'Enemy property and ultimate destination during the Anglo-Dutch wars 1664–7 and 1672–4', *British Yearbook of International Law*, 15 (1934) 21–35.

⁴⁹ G. Tracey Watts, 'Forty years of the Grotius Society', *Transactions of the Grotius Society*, 42 (1956) 193–205. The journal first appeared under the name of *Problems of War* (1915–17) and then as *The Transactions of the Grotius Society* until 1959.

⁵⁰ See e.g. E.G. de Montmorency, 'The barbary states in international law', *Transactions of the Grotius Society*, 4 (1918) 87–94; W.S.M. Knight, 'A mediaeval pacifist: Pierre du Bois', *Transactions of the Grotius Society*, 9 (1923) 1–16; F.W. Sherwood, 'Francisco Suarez', *Transactions of the Grotius Society*, 12 (1926) 19–29. On Grotius see e.g. W.S.M. Knight, 'Grotius in England: his opposition there to the principles of the *Mare Liberum*', *Transactions of the Grotius Society*, 5 (1919) 1–38; C. John Colombos, 'Lord Finlay', *Transactions of the Grotius Society*, 31 (1945) xxix–xxxi.

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first issue of the collection, devoted to Richard Zouche.⁵¹ The translator of Zouche’s book from Latin into English was Brierly, who also translated Holland’s edition of Giovanni da Legnano’s Bologna manuscript some years later.⁵² Although several of the books in the series were translated by British authors, in particular by John Pawley Bate (1857–1921) of the Inns of Court in London, only two other British authors collaborated as authors with the series. These were Westlake, who edited Balthazar Ayala’s *De jure et officiis bellicis* and, introducing Gentili’s *De iure belli*, Coleman Phillipson (1875–1958).⁵³ Phillipson was a barrister-at-law of the Inner Temple who had authored *The International Law and Custom of Ancient Greece and Rome* (1911) and went on to edit the fifth English edition of Wheaton’s *Elements of International Law* (1916).⁵⁴

However, despite the spurt of new British academic publishing venues for international legal scholarship, the academic study of international law still remained a fairly marginal professional occupation in England in the early interwar period.⁵⁵ In 1923, Alexander Pearce Higgins (1865–1935), Oppenheim’s successor as Whewell Professor at Cambridge, offered a series of recommendations addressed to nurturing the status of international law both in university studies and in the British diplomatic service, regretting that ‘it was extraordinary that, in a country with so many worldwide commitments, so few people were trained in international law’.⁵⁶ The academic profession still remained semi-peripheral to a dominant nineteenth-century international-law tradition of imperial and commercial practice. According to James Crawford, the ‘local focus was the Foreign Office and the embassies and lawyers’ chambers in London rather than the universities’, and this

⁵¹ Editorial comment, ‘The classics of international law’, *American Journal of International Law*, 3 (1909) 701–7, at 706. See Richard Zouche, *Iuris et iudicii feialis, sive, iuris inter gentes, et quaestionum de eodem explication*, 2 vols. (The Classics of International Law, Washington, DC: Carnegie Institution of Washington 1911).

⁵² Giovanni da Legnano, *Tractatus de Bello, de Represaliis et de Duello* (The Classics of International Law, Washington, DC: Oxford University Press 1917).

⁵³ Balthazar Ayala, *De jure et officiis bellicis et disciplina militari libri iii* (The Classics of International Law, Washington, DC: Carnegie Institution of Washington 1912); Alberico Gentili, *Three Books on the Law of War* (The Classics of International Law, Oxford: Clarendon Press 1933).

⁵⁴ Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols. (London: Macmillan and Co. 1911); Henry Wheaton, *Elements of International Law. With a Sketch of the History of the Science* (5th edn, revised, enlarged, and rewritten by Coleman Phillipson, London: Stevens and Sons 1916).

⁵⁵ E.A. Whituck, ‘International law teaching’, *Transactions of the Grotius Society*, 3 (1917) 43–59.

⁵⁶ A. Pearce Higgins, ‘Present position of the study of international law in England’, *Law Quarterly Review*, 39 (1923) 507–16, at 510.

accounts for the new drive for professional relevance among British international-law academics in the interwar years.⁵⁷ This orientation, which Anthony Carty has termed the British ‘practitioner’s approach’ to international law, coincides with what Koskenniemi considers to be the common programme that Arnold McNair (1885–1975) and Hersch Lauterpacht (1897–1960) ‘shared: to bring international law out of its isolation as a branch of suspect moral or jurisprudential theory by presenting it as an object of legal technique no different from the domestic’.⁵⁸ The ultimate embodiment of this orientation was the *Annual Digest of Public International Law*, which from 1929 began to publish a digest of cases in international tribunals and in national tribunals on points of international law. A similarly oriented effort to stress the significance of international law within the quintessentially court-ridden British common-law system underlay Brierly’s survey of almost four decades of British judicial practice on international law in 1935, which he concluded in typical fashion by noting that this ‘would be stronger . . . if the interest of English lawyers in it were more widespread than it yet is’.⁵⁹ As the interwar period drew to a close, William Eric Beckett (1896–1966) echoed Oppenheim in offering a rather dismal image of ‘the position in England of international law as a subject of scientific study and practice’ as one characterised by ‘little general interest in, and much general ignorance of, international law – public and private’.⁶⁰ Still, in 1943, McNair, by then vice chancellor of the University of Liverpool, saw fit to deliver an address to the Grotius Society on the need to widen the teaching of international law in England.⁶¹

Against this background, the production of book-length general treatments of the history of international law by British authors in the interwar period remained fairly limited. The best-regarded effort in this genre among

⁵⁷ James Crawford, ‘Public international law in twentieth-century England’ in Jack Beatson and Reinhard Zimmermann (eds.), *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford: Oxford University Press, 2004) 681–93, at 691–2.

⁵⁸ Anthony Carty, ‘Why theory? The implications for international law teaching’ in British Institute of International Law (ed.), *Theory and International Law. An Introduction* (London: British Institute of International Law, 1991) 75–99, at 77; Martti Koskenniemi, ‘Hersch Lauterpacht (1897–1960)’ in Beatson and Zimmermann, *Jurists Uprooted* 602–62, at 617.

⁵⁹ Brierly, ‘International law in England’, 34–5.

⁶⁰ William E. Beckett, ‘International law in England’, *Law Quarterly Review*, 55 (1939) 257–72, at 258.

⁶¹ Arnold D. McNair, ‘The need for the wider teaching of international law’, *Transactions of the Grotius Society*, 29 (1943) 85–98.

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its contemporaries was *The Development of International Law* (1928) by Sir Geoffrey Gilbert Butler (1887–1929), a fellow and lecturer of Corpus Christi College, Oxford, who died at a young age a year later, and his former pupil, the historian Simon Maccoby (1896–1971).⁶² Originally divided into the ‘age of the Prince’ the ‘age of the Judge’ and the ‘age of the Concert’, it was appraised as having filled the gap left in the British historical treatment of international law since Walker had left his *History of the Law of Nations* unfinished in 1899. Similarly well noted was *The Religious Foundations of Internationalism* published in 1933 by Norman Bentwich (1883–1971), who also joined, inter alia, Lauterpacht, Becket, Brierly, McNair and Higgins as a British lecturer at the Hague Academy of International Law in the interwar period.⁶³ However, only one of Higgins’ courses, where he reviewed the contribution of Lorimer, Westlake, Hall and Holland to international law, may be counted among the roughly twenty-five courses with an explicit historical focus taught at The Hague from 1923 to 1939.⁶⁴ Also of note is the publication of some histories of international law written by Indian authors in India, where a chair of international law had been established at the University of Calcutta in the early 1920s.⁶⁵ These may be seen as precedents of the early post-colonial historiography of international law spearheaded by Charles Henry Alexandrowicz (1902–75) later in the 1950s.

However, metropolitan British contributions to the history of international law found their way into collective historical works, and international-law textbooks, of which there were some new ones written while some classic ones received new editions.⁶⁶ The most representative of them was Oppenheim’s *International Law. A Treatise*, with consecutive

⁶² Geoffrey Butler and Simon Maccoby, *The Development of International Law* (New York: Longmans, Green & Co. 1928).

⁶³ Norman Bentwich, *The Religious Foundations of Internationalism. A Study in International Relations through the Ages* (London: G. Allen & Unwin Ltd 1933).

⁶⁴ A. Pearce Higgins, ‘La contribution de quatre grands juristes britanniques au droit international (Lorimer, Westlake, Hall et Holland)’, *Recueil des cours de l’Académie de droit international*, 40 (1932) 1–86.

⁶⁵ See Pramathanath Bandyopadhyay, *International Law and Custom in Ancient India* (Calcutta: University of Calcutta Press 1920); Sekharipuram V. Viswanatha, *International Law in Ancient India* (London: Longmans, Green & Co. 1925).

⁶⁶ Alexander Pearce Higgins contributed different chapters to *The Cambridge History of the British Empire*, including Alexander Pearce Higgins, ‘International law and the outer world, 1450–1648’ in J. Holland Rose, A. P. Newton and Ernest Alfred Benians (eds.), *The Cambridge History of the British Empire*, vol. 1 (Cambridge: Cambridge University Press 1929) 183–206. Among the new textbooks see e.g. James L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace* (Oxford: Oxford University Press 1928). Re-editions of classic textbooks include William Edward Hall, *A Treatise on International Law* (8th edn, ed. A. Pearce Higgins, New York: Oxford University Press

editions by Ronald F. Roxburgh (1889–1981) (1920/1) and Arnold McNair (1926/8).⁶⁷ However, these did not expand much on the long chapter about the history of international law beyond what was required for updating the historical coverage to their time of writing. It was the Austrian, then Polish and, finally, nationalised British international-law scholar Hersch Lauterpacht who replaced McNair as Whewell Professor in Cambridge in 1937. He built further on Oppenheim's text far longer than the traditional introductory excursus on the subject normally warranted in other textbooks from the fifth edition (1935 and 1937) up to its eighth edition in 1955.⁶⁸ Some years later, in the aftermath of the Second World War, Lauterpacht delved again in the history of international law by resorting to *De jure belli ac pacis* in the commemoration of the 300th anniversary of Grotius' death in order 'sustain hope by drawing inspiration from works in which principle has asserted itself against makeshifts'.⁶⁹ To fulfil this programme, Lauterpacht extracted eleven tenets, or features, of what he termed the 'Grotian tradition' as a symbol of the traditions of peace and progress through international law and as representative of how Grotius had endowed international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code.⁷⁰ Lauterpacht coloured some of these so-called Grotian tenets in a presentist vein with his own jurisprudential views about the protection, the well-being and the dignity that the individual directly derives from international law at the dawn of the modern age of human rights, to which intellectual foundations he also contributed.⁷¹

1924); Thomas J. Lawrence, *The Principles of International Law* (7th edn, revised by Percy H. Winfield, New York: D.C. Heath & Co. 1923).

⁶⁷ Lassa Oppenheim, *International Law. A Treatise* (3rd edn, ed. Ronald F. Roxburgh, 2 vols., London: Longmans, Green & Co. 1920–1); Lassa Oppenheim, *International Law. A Treatise* (4th edn, ed. Arnold McNair, 2 vols., London: Longmans, Green & Co. 1926–8).

⁶⁸ Lassa Oppenheim, *International Law. A Treatise* (5th edn, ed. Hersch Lauterpacht, 2 vols., London: Longmans, Green & Co. 1935–7); Lassa Oppenheim, *International Law. A Treatise* (8th edn, ed. Hersch Lauterpacht, 2 vols., London: Longmans, Green & Co. 1955), vol. 1.

⁶⁹ Hersch Lauterpacht, 'The Grotian tradition in international law', *British Yearbook of International Law*, 23 (1946) 1–53, at 1–16, 51.

⁷⁰ Lauterpacht, 'The Grotian tradition', 24, 30 and 51.

⁷¹ *Ibid.*, 27; Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford: Oxford University Press 1945).

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Global International Law during the Cold War:
History in Hiatus (1945–1990)

In retrospect, Lauterpacht’s 1945 tercentenary essay on Grotius might seem to mark a turning point as clearly as Leo Gross’s near-contemporaneous 1948 article in the *American Journal of International Law* on the Peace of Westphalia.⁷² Gross had no more originated the identification of Westphalia as pivotal than Lauterpacht had initiated ancestor worship of Grotius, yet each established paradigms that remained largely unshaken for almost fifty years. ‘Victorian’ historicism had led to an attachment to predecessors, the construction of progressive narratives and a search for originary moments, whether in the seventeenth century or the late twentieth. The proliferation of international institutions in the aftermath of the Second World War, and especially the creation of the United Nations and its organs to formalise them, appeared to stabilise history after turmoil and to affirm continuity after historical rupture. The myth of 1648 underpinned a realist conception of international relations among hard-edged, competing sovereign states; meanwhile, Lauterpacht’s canonisation of Grotius promoted his progressivist ‘Victorian’ vision of international law, and of the role of international lawyers and judges within it. It also nourished alternative strains of theory of international relations tied to ideal types drawn from the history of international law. In both regards, international law and its history were displaced onto other disciplines, particularly under the umbrella of political science, while history among British international lawyers fell mostly into abeyance: in this sense, as in others, the Cold War might be considered a ‘hiatus’ in the British historiography of international law.⁷³ Instead, international lawyers from beyond the metropole, in the semi-periphery, would lead to a revival of the history of international law with a critical intent, a history that dismantled the Eurocentric stories familiar to Lauterpacht and his antecedents.

Lauterpacht dominated the study and practice of international law in Britain, as Whewell Professor and, after 1956, as judge at the International

⁷² Lauterpacht, ‘The Grotian tradition’; Leo Gross, ‘The Peace of Westphalia, 1648–1948’, *American Journal of International Law*, 42 (1948) 20–41.

⁷³ Martin Craven, Sundhya Pahuja and Gerry Simpson, ‘Reading and unreading a historiography of hiatus’ in Martin Craven, Sundhya Pahuja, and Gerry Simpson (eds.), *International Law and the Cold War* (Cambridge: Cambridge University Press 2020) 1–24.

Court of Justice.⁷⁴ One consequence of this for the history of international law was, as we have seen, the persistence of the aetiological narrative for the field told in textbooks, especially in Lauterpacht's own editions of Oppenheim's treatises; another was the more general lassitude into which the historical study of international law fell, following Lauterpacht's own lack of interest. His pivotal essay on Grotius was historically well informed and insightful, to be sure, but it placed history in the service of an ideal type. Such an essay was not intended as a contribution to understanding of the past but rather to forge an identity for the field in the present. At around the same time, Lauterpacht's contemporaries in Oxford and London, Sir Humphrey Waldock (1904–81) and Georg Schwarzenberger (1908–91), respectively espoused the practitioners' approach to international law and a realist conception of international 'power politics', neither of which had much room for history, save perhaps for Schwarzenberger's contribution to the resurrection of Jeremy Bentham as an avatar of international law.⁷⁵ In this 'Age of Lauterpacht', the historiography of international law became uncoupled from professional identity within Britain. It appeared instead in other venues, beyond the discipline and outside Britain itself.⁷⁶

Lauterpacht's 'Grotian' tradition of international law fell readily to hand for scholars of international relations as they searched for ancestral traditions to underpin their emergent discipline in the post-war period. Although they contributed little novel scholarship to the field, the members of the so-called 'English school' of international relations (IR) incorporated the historiography of international law into their efforts to theorise an undertheorised field. Martin Wight (1913–72), a student of colonial administration turned theorist, led the way by isolating three traditions of international relations – 'Grotian', 'Hobbesian' and 'Kantian' – and by drawing on Pufendorf's historical and legal writings for his fertile conception of state systems in global international history.⁷⁷ With the rise of realism and the behavioural sciences

⁷⁴ Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: Cambridge University Press 2010).

⁷⁵ Georg Schwarzenberger, 'Bentham's contribution to international law and organisation' in George W. Keeton and Georg Schwarzenberger (eds.), *Jeremy Bentham and the Law. A Symposium* (London: Stevens 1948) 152–84; Stephanie Steinle, 'Georg Schwarzenberger (1908–1991)', in Beatson and Zimmermann, *Jurists Uprooted*, 663–80.

⁷⁶ Generally, see Crawford, 'Public international law'.

⁷⁷ Martin Wight, *Systems of States* (Leicester: Leicester University Press 1977); Martin Wight, *International Theory. The Three Traditions* (ed. Gabriele Wight and Brian Porter, Leicester: Leicester University Press 1991); Gerry Simpson, 'Juridical investigations: Martin Wight as international lawyer' in Robert McCorquodale and Jean-Pierre Gauci

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in the United States, international law and IR seemed irreconcilably estranged. During this fifty-year rift, the abstraction of a ‘Grotian’ tradition, unhistorical though it was, maintained a fragile bridge between the two academic fields, both in Britain and in Australia, the other major bastion of the English school.⁷⁸ In due course, by the academic logic of action and reaction, that alliance would help to inspire a revival of interest in the historical Grotius.⁷⁹ This, in turn, paved the way for the broader revival of interest in the history of international law in the major academic centres of the English-speaking world by the end of the twentieth century.

In the Age of Lauterpacht, and for at least a generation beyond, advances in the anglophone historiography of international law came from the semi-periphery, not from the centre.⁸⁰ The pre-eminent British historian of international law in this period – British by naturalisation if not by his (Polish) birth – was Charles Henry Alexandrowicz, who made his scholarly career mostly in Chennai and latterly in Sydney. Alexandrowicz had been trained as a canonist in interwar Poland and came to London during the Second World War, where he re-trained in English law at the University of London during Schwarzenberger’s time. He rejected Schwarzenberger’s realist ‘power politics’ and may thereby have frozen himself out of potential employment. Fortunately, McNair’s intervention secured him the position as the first professor of international and constitutional law at the University of Madras after Indian independence.⁸¹ By way of skilful rereadings of classic texts with an eye to their extra-European contexts and by research in Indian archives, Alexandrowicz rewrote the history of the law of nations in South and South East Asia in the early modern period, initially in the form of a course at the Hague Academy in 1960, at Lauterpacht’s recommendation. His *History of the Law of Nations in the East Indies* (1967) viewed treaties as

(eds.), *British Influences on International Law, 1915–2015* (Leiden and Boston: Brill 2016) 484–96.

⁷⁸ David Armitage, ‘The fifty years’ rift: intellectual history and international relations’, *Modern Intellectual History*, 1 (2004) 97–109.

⁷⁹ E.g. Bull, Kingsbury and Roberts, *Hugo Grotius and International Relations*.

⁸⁰ The non-evaluative term ‘semi-periphery’ is borrowed from Arnulf Becker Lorca, *Mestizo International Law. A Global Intellectual History, 1842–1933* (Cambridge: Cambridge University Press 2014) 18–19.

⁸¹ Charles Henry Alexandrowicz, *The Law of Nations in Global History* (ed. David Armitage and Jennifer Pitts, Oxford: Oxford University Press 2017); Carl Landauer, ‘The Polish rider: C.H. Alexandrowicz and the reorientation of international law, part I: Madras studies’, *London Review of International Law*, 7 (2019) 321–52; Carl Landauer, ‘The Polish rider: C. H. Alexandrowicz and the reorientation of international law, part II: declension and the promise of renewal’, *London Review of International Law*, 9 (2021) 3–36.

intercultural agreements in an era when, he claimed, mutually intelligible conceptions of natural law rendered the law of nations universal before it sundered into incommensurability with the rise of a Eurocentric positivism beginning in the late eighteenth century.⁸² He later extended this global history of the law of nations to Africa, with a study of European treaties with local rulers which was also originally delivered at the Hague Academy, making Alexandrowicz the most prominent British historian of international law to address that forum in the post-war period.⁸³ In 1952, he had also founded and edited the *Indian Year Book of International Affairs*, which became a major organ for publishing articles in the history of international law, and he later created the first scholarly organisation specifically for the study of that history, the Grotian Society (1967–2001), not to be confused with the earlier Grotius Society.⁸⁴

Despite these many achievements, Alexandrowicz was largely forgotten until the recent resurgence of interest in the history of international law. When viewed in light of that movement, he emerges as the first scholar to use history critically to deconstruct imperial and colonial conceptions of international law; he therefore stands as an overlooked ancestor of the Third World Approaches to International Law (TWAIL) movement's similar deployment of critical historicism in a post-colonial context. At least with regard to the study of international law, history happened elsewhere: beyond the metropole and far from the traditional British centres of professional study of international law. The defining histories of the field in this period came from the US (by Arthur Nussbaum (1877–1964)); Germany and Switzerland (by Carl Schmitt (1888–1985); Wilhelm Grewe and, later, Wolfgang Preiser (1903–97) and Jörg Fisch, among others. In the British Commonwealth, the most innovative approaches to historiography came in the work of Alexandrowicz's students, as well as scholars such as R.P. Anand (1933–2011), Upendra Baxi and M.K. Nawaz (*fl.* 1966–2000) from South Asia or Taslim Olawale Elias (1914–91) from Nigeria, the first African student to receive a PhD in international law at the University of London, in 1949,

⁸² Charles Henry Alexandrowicz, *A History of the Law of Nations in the East Indies (Sixteenth, Seventeenth, and Eighteenth Centuries)* (Oxford: Clarendon Press 1967).

⁸³ Charles Henry Alexandrowicz, *The European–African Confrontation. A Study in Treaty-Making* (Leiden: A.W. Sijthoff 1973).

⁸⁴ Charles Henry Alexandrowicz, 'The Grotian Society', *American Journal of International Law*, 61 (1967) 1058; Charles Henry Alexandrowicz (ed.), *Studies in the History of the Law of Nations (Grotian Society Papers)*, 2 vols. (The Hague: Martinus Nijhoff 1970–2).

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under the supervision of Georg Schwarzenberger.⁸⁵ Back in Britain, although the professors of international law paid little attention to history, historians were becoming increasingly interested in international law, for example in the Cambridge contributions of Herbert Butterfield (1900–1979) to the British Committee on the Theory of International Politics or in F.H. Hinsley's (1918–98) studies of sovereignty and of power and the pursuit of peace; at the same time, in the same university, Clive Parry (1917–82) was editing the Consolidated Treaty Series, the lineal descendant of Rymer's *Foedera*.⁸⁶ It was on such foundations that the revival of the history of international law after 1989 would be based, not least in the recovery by historians of political thought of the multiple histories of international thought that had been neglected equally by scholars of international relations, of international law and of intellectual history during these years of Cold War hiatus.⁸⁷

Historiography after the Cold War: Challenging Traditional Horizons

The cultivation of the history of international law by British and Commonwealth academics both has been part and parcel of this extraordinary leap in academic production and has, in turn, mirrored the blossoming in its wake of both thematic and methodological diversity, which the field of international legal history has experienced since the much-vaunted 'turn to

⁸⁵ T.O. Elias, 'Nigerian land law and custom' (unpublished PhD thesis, University of London, 1949); Carl Landauer, 'Taslim Olawale Elias: from British colonial law to modern international law' in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law. South–North Perspectives on the Decolonization Era* (Oxford: Oxford University Press 2019) 318–40.

⁸⁶ Brunello Vigezzi, *The British Committee on the Theory of International Politics 1954–1985. The Rediscovery of History* (Milan: Edizioni Unicopli 2005); F.H. Hinsley, *Power and the Pursuit of Peace. Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press 1962); F.H. Hinsley, *Sovereignty* (2nd edn, Cambridge University Press 1986); Clive Parry (ed.), *The Consolidated Treaty Series*, 231 vols. (Dobbs Ferry, NY: Oceana, 1969–81).

⁸⁷ Anthony Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain, and France c. 1500–c. 1800* (New Haven and London: Yale University Press 1995); Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford: Clarendon Press 1999); David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press 2000); David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press 2013).

history' in international law.⁸⁸ Two main factors may account for this. First, the unprecedented rise of methodological diversity in the academic cultivation of international law among scholars of international law themselves, otherwise described as the coincidence of the 'renaissance of historical studies' in international law with a 'certain decline' in 'the methodological primacy of technicism (doctrinalism) and pragmatism in international legal scholarship'.⁸⁹ Second, there is the enhanced appeal of the history of international law among legal historians, historians of international relations, intellectual historians and, more broadly, historians 'engaging with the subject as part of their turn to the international dimension of history'.⁹⁰

In the post-Cold War period, the British historiography of international law variously mirrored the impact of interdisciplinarity and, in its wake, a stricter methodological attention to historical contextualisation and therefore a greater awareness of the pitfalls of anachronism, presentism, the influence of teleological narratives of historical progress and related historiographical fallacies common in earlier accounts. It has also reflected the impact of the turn to global history on its study in both time and space, thus pushing the field beyond its traditional Eurocentric confines. Both post-colonial and critical approaches to international legal scholarship and their companion historiographies have been particularly influential in some of this academic production. These trends have in turn fostered the emergence of historiographical debates hitherto unheard of and furthered a move towards the historical sociology of the profession wherein a revamped cultivation of intellectual historical biography has taken place. Last but not least, the fragmentation of the history of international law as a research field has also left its mark in some of its preferred historiographical foci and *topoi* from the post-Cold War era.⁹¹

⁸⁸ This is often conventionally retraced to the founding of the *Journal of the History of International Law* in 1999 by the Canadian international law professor Ronald St John Macdonald. See Ronald St John Macdonald, 'Editorial', *Journal of the History of International Law*, 1 (1999) 1–6; further, Thomas Skouteris, 'The turn to history in international law', in *Oxford Bibliographies of International Law* (2017), at www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0154.xml.

⁸⁹ Emmanuelle Tourme-Jouanet and Anne Peters, 'The *Journal of the History of International Law*: a forum for new research', *Journal of the History of International Law*, 16 (2014) 1–8, 2.

⁹⁰ Andrew Fitzmaurice, 'Context in the history of international law', *Journal of the History of International Law*, 20 (2018) 5–30, at 6.

⁹¹ The concise description provided in this section partly builds on more extensive and detailed analyses provided in Ignacio de la Rasilla, *International Law and History. Modern Interfaces* (Cambridge: Cambridge University Press, 2021).

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The turn to the history of international law has overlapped temporally with a period of fragmentation of the academic study of international law into niches of specialised scholarship. This is an effect of the expansion and diversification that international law has experienced in the wake of the unprecedented proliferation of international institutions and the influential standing that a large array of non-state actors have gained in international legal processes over the last three decades. The ensuing subdisciplinary fragmentation of the history of international law has been translated at the broader historiographical level into new historical narratives of specialised fields of international law, their related international institutions and international adjudicative mechanisms. Meanwhile, at the more specifically normative level, new literature has contributed to the historicisation of the emergence and evolution of particular legal norms, doctrines and principles, as well as to the legislative history of specialised international treaties containing them. British and Commonwealth authors have participated in this wide-ranging historiographical expansion and corresponding division of labour with new general histories of international legal regimes, the history of specialised international organisations and different experiments in international adjudication.⁹² Their contributions have also extended to particular components in the normative evolution of a wide array of specialised international legal regimes, ranging from international and transnational crimes to landmark related historical trials, as well as more broadly to the history of specialised international conventions, the regional specialised legal systems and the *travaux préparatoires* of several specialised international treaties.⁹³

⁹² On specialised regimes, see e.g. Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge: Cambridge University Press 2005); Kate Miles, *The Origins of International Investment Law. Empire, Environment, and the Safeguarding of Capital* (Cambridge: Cambridge University Press 2013). On international organizations, see e.g. Guy Fiti Sinclair, *To Reform the World. International Organizations and the Making of Modern States* (Oxford: Oxford University Press 2017). On international adjudication, see e.g. Ben Saul, 'The legal response of the League of Nations to terrorism', *Journal of International Criminal Justice*, 4 (2006) 78–102.

⁹³ On international crimes, see e.g. Gerry Simpson, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity 2007); and Jean Allain (ed.), *The Legal Understanding of Slavery. From the Historical to the Contemporary* (Oxford: Oxford University Press 2012). On landmark trials, see e.g. William A. Schabas, *The Trial of the Kaiser* (Oxford: Oxford University Press 2018). On specialised international conventions, see e.g. Ed Bates, *The Evolution of the European Convention on Human Rights. From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press 2010); and e.g. Obiora Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press 2010). On *travaux préparatoires*, see e.g. Ben Saul (ed.), *The International Covenant*

The subdisciplinary fragmentation of the history of international law as a research field has nurtured a renewed study of non-state actors in a historical perspective to which British and Commonwealth authors have contributed. This is apparent in their larger cultivation of the intellectual biography of individuals in their different international legal capacities, such as foreign-policy makers, legal advisers, diplomats, international legal servants, scholars, judges, international norm entrepreneurs and advocates.⁹⁴ This ‘biographical turn’ has encompassed the study of the lives, works and times of British international lawyers and of their British-nationalised counterparts such as Lauterpacht and Alexandrowicz.⁹⁵ The coterminous rise of post-colonial approaches to international law and its histories has also inspired much greater attention to intellectual biography in the context of early post-colonial international lawyers and, in particular, international judges since the aftermath of the Second World War.⁹⁶ This biographical move among international legal histories has further promoted the thickening of the historical context within which pre-war peripheral international lawyers took part in historical international legal processes and contributed to shaping international law from non-Western perspectives.⁹⁷ Similarly concerned with the move to the history of the ‘sociology of the discipline’ across international legal specialised areas is the emerging attention to the role that women as individuals or as a group have played in their historical development.⁹⁸ And, while this latter historiographical area is still very much *in nuce*,

on Economic, Social and Cultural Rights. Travaux Préparatoires 1948–1966, 2 vols. (Oxford University Press 2016).

⁹⁴ See e.g. Anthony Carty and Richard A. Smith (eds.), *Sir Gerald Fitzmaurice and the World Crisis. A Legal Adviser in the Foreign Office 1932–1945* (The Hague: Kluwer Law International 2000).

⁹⁵ Philippe Sands, *East West Street. On the Origins of ‘Genocide’ and ‘Crimes against Humanity’* (New York: Alfred A. Knopf 2016); David Armitage and Jennifer Pitts, ‘“This modern Grotius”: an introduction to the life and thought of C.H. Alexandrowicz’, in Alexandrowicz, *The Law of Nations in Global History*, 1–31; Luíza Leão Soares Pereira and Niccolò Ridi, ‘Mapping the “invisible college of international lawyers” through obituaries’, *Leiden Journal of International Law* (forthcoming), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695028.

⁹⁶ See e.g. Umut Özsü, ‘Organizing internationally: Georges Abi-Saab, the Congo crisis, and the decolonization of the United Nations’, *European Journal of International Law*, 31 (2020) 601–19.

⁹⁷ See e.g. Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press 2004); and Rose Parfitt, *The Process of International Legal Reproduction. Inequality, Historiography, Resistance* (Cambridge: Cambridge University Press 2019).

⁹⁸ See e.g. Karen Knop and Christine Chinkin, ‘Remembering Chrystal MacMillan: women’s equality and nationality in international law’, *Michigan Journal of International Law*, 22 (2001) 523–85.

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the increasing number of women scholars who have turned their attention to the history of international law in the post-Cold War period is worth highlighting. British and Commonwealth authors have also paid greater attention to the history of non-governmental organisations (NGOs) of different sorts, such as faith-based or religious communities and institutions, scientific and epistemological associations and multiple international advocacy groups, and underlying them a variety of both transnational and local grass-roots social movements.

In parallel with the process of increasing fragmentation of the history of international law into subdisciplinary research niches, general international law writ large has also largely continued to be re-historicised at both the micro and macro levels, with British and Commonwealth international legal historians diversely contributing to both. At the micro-normative level, the contemporary literature shows extensive historical coverage of general international legal principles, norms and legal concepts.⁹⁹ At the macro level, there has also been a larger cultivation of general histories of international law that follow in the wake of earlier ones which were written in the mode of 'intellectual history', with attention to the succession of international-law thinkers and international legal theories or, in a realist mode, with a greater emphasis on international legal practice and historical events but, more often than not, as a combination in their historical narrative of both styles of historiography at different scales and to different degrees.¹⁰⁰ In contrast to earlier works, the contemporary historical coverage of these new general histories of international law tends, however, to be more temporally and geographically plural and inclusive, and thus less Eurocentric, than earlier ones.

The historical sections of textbooks written or edited by British and Commonwealth authors have also mirrored the expansion and diversification that the history of international law has experienced in recent decades. This is particularly the case for the more voluminous textbooks addressed to graduate

⁹⁹ See e.g. Anthony Carty and Anna Irene Baka, 'Sources in the meta-history of international law: from liberal nihilism and the anti-metaphysics of modernity to an Aristotelian ethical order' in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press 2017) 245–63; Megan Donaldson, 'The survival of the secret treaty: publicity, secrecy, and legality in the international order', *American Journal of International Law*, 111 (2017) 575–627; Natasha Wheatley, 'Spectral legal personality in interwar international law: on new ways of not being a state', *Law and History Review*, 35 (2017) 753–87.

¹⁰⁰ See e.g. Stephen C. Neff, *Justice among Nations. A History of International Law* (Cambridge, MA and London: Harvard University Press 2014).

courses as opposed to the more concise introductory accounts of the discipline or collections of cases and materials for undergraduate courses.¹⁰¹ Of note is the new breed of multi-authored textbooks of international law including chapters on the history of international law written by international legal historians.¹⁰² However, the impact of the 'historical turn' on the average British textbook treatment of international law should not be exaggerated. Indeed, in several of them, including those that are updated new editions of classic textbooks, references to history of international law remain perfunctory and limited to the past-is-a-prologue approach to theoretical or philosophical traditions (e.g. positivism, natural law or a hybrid Grotian tradition) in international law.¹⁰³ In some cases, the British practitioners' approach has left its mark, as in the ninth edition of Oppenheim's *Treatise*, where the chapter on the history of international law was altogether eliminated.¹⁰⁴ The stress is instead placed on providing an updated analytical description of the vigorous state of the art of international law in the light of new phenomena, areas of regulation and international legal developments. The treatment of the history of international law in these fundamentally positivist accounts of the discipline with a keen eye on the intricacies of international legal practice is generally coincident with what Valentina Vadi refers to as jurist's history, 'mostly interested in the international legal afterglow of past events'.¹⁰⁵

More substantive research-wise has been the contribution of British and Commonwealth authors to a new genus of research handbooks on the history of international law over recent years.¹⁰⁶ The publication of these handbooks has thrived in parallel with the launching of a number of dedicated book series on the history of international law in English, the emergence of specialised

¹⁰¹ See e.g. respectively Malcolm Shaw, *International Law* (8th edn, Cambridge: Cambridge University Press 2018); Martin Dixon, *Textbook on International Law* (7th edn, Oxford: Oxford University Press 2008); and David J. Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, London: Sweet & Maxwell 2015).

¹⁰² Malcolm Evans (ed.), *International Law* (5th edn, Oxford: Oxford University Press 2018). See James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012).

¹⁰³ Andrew Clapham, *Brierly's Law of Nations* (7th edn, Oxford: Oxford University Press 2012).

¹⁰⁴ Mark W. Janis, 'The new Oppenheim and its theory of international law', *Oxford Journal of Legal Studies*, 16 (1996) 329–36.

¹⁰⁵ A paramount example is James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press 2019); Valentina Vadi, 'International law and its histories: methodological risks and opportunities', *Harvard International Law Journal*, 58 (2017) 311–52, at 311.

¹⁰⁶ See e.g. contributions to Fassbender and Peters, *The Oxford Handbook of the History of International Law*.

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journals on the history of international law, and a larger receptivity to contributions revolving around the history of international law in both general international-law journals and those devoted to legal history, intellectual history and general history. The growing popularity of international legal history as a research field has also encouraged British and Commonwealth authors to produce new historical works characterised by their specific temporal coverage.¹⁰⁷ They also contribute to a new historical–bibliographical genre that now extends from early general bibliographies of international law to annotated bibliographies covering specific periods, significant historical events with significance for international law, and even works providing a bibliographical companion to the ‘turn’ to the history of international law itself.¹⁰⁸

It is in this new and more substantive category of contributions to the history of international law that the methodological diversity and the emergence of different – and, on occasion, radically confronted – historiographical trends in history of international law that has characterised the turn to the history of international law, becomes more apparent. Indeed, the vehicular role of English as the modern lingua franca for international law has accrued the influence of the contemporary British and Commonwealth historiography of international law as a central pole for the confluence of, on the one hand, an internal long-incubated process of epistemological renovation among international lawyers, and, on the other, the external methodological impact of scholars trained in the methods of historical research from adjacent disciplines. The latter group has, inter alia, cast new light on the contextual historical use of certain legal doctrines and contributed to a revamped contextualised intellectual history of some of the classical works of the so-called ‘founding fathers’, while, in their turn, British and Commonwealth international lawyers have continued contributing to this *locus classicus* of international legal history increasingly in a revisionist vein.¹⁰⁹ This thematic

¹⁰⁷ Craven, Pahuja and Simpson, *International Law and the Cold War*.

¹⁰⁸ See respectively e.g. Peter Macalister-Smith and Joachim Schwietzke, ‘Literature and documentary sources relating to the history of International Law’, *Journal of the History of International Law*, 1 (1999) 136–212; Rose Parfitt, ‘The League of Nations’ in *Oxford Bibliographies of International Law* (2017), at www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0151.xml; Kristen Sellars, ‘The Tokyo trials’ in *Oxford Bibliographies of International Law* (2017), at www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0182.xml; and Skouteris, ‘The turn to history’.

¹⁰⁹ See respectively e.g. Tuck, *The Rights of War and Peace*; Hugo Grotius, *The Free Sea* (ed. David Armitage, Natural Law and Enlightenment Classics, Indianapolis: Liberty Fund 2004); Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire* (Oxford:

confluence has inspired a methodological debate on the role of anachronism and presentism between intellectual and legal historians ascribed to the (alleged) methodological orientation of the Cambridge school in the history of political thought and, on the other hand, to international lawyers' subscription to the tenets of critical international legal history.¹¹⁰

Indeed, albeit the birth of the 'turn' to the history of international law is conventionally dated to the early twenty-first century, its contemporary critical historiographical dimension largely builds on the intellectual genealogy of the legal-history orientation of critical legal studies (CLS) and the Law and Society movement of the 1970s and 1980s.¹¹¹ Under the banner of the so-called 'New Approaches to International Law' (NAIL), this critical historiographical orientation was transposed in the 1980s and 1990s, along with critical-theory insights and structural, deconstructive and post-structural methods inspired by the 'linguistic turn', to international legal scholarship, where it has continued inspiring many 'critical' historiographical and methodological reflections by British and Commonwealth authors over the last two decades.¹¹² Moreover, the critical/postmodernist matrix of NAIL and its related political agenda, which is oriented to 'emancipatory' aims through international legal scholarship, went on to provide the cradle for TWAIL to emerge and further develop into a 'scientific/intellectual movement', otherwise into a 'collective effort to pursue research programs or projects for thought in the face of resistance from others in the scientific or intellectual community' since the late 1990s.¹¹³ Since then, TWAIL has provided a platform for British and Commonwealth authors actively participating in the slow but steady rise of post-colonial attitudes in international legal history.

Oxford University Press 2010); Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge: Cambridge University Press 2014).

¹¹⁰ Fitzmaurice, 'Context in the history of international law'; Anne Orford, 'On international legal method', *London Review of International Law*, 1 (2013) 166–97.

¹¹¹ Duncan Kennedy, 'Rise and fall of classical legal thought' (unpublished manuscript, 1975, reformatted 1998, published as *The Rise and Fall of Classical Legal Thought* with a new preface by the author, 'Thirty years later' (Washington: Beard Books 2006); Catherine L. Fisk, '&: law _ society in historical legal research' in Markus D. Dubber and Christopher L. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press 2018) 479–96.

¹¹² Matthew Craven, 'Introduction: international law and its histories' in Craven, Fitzmaurice and Vogiatzi, *Time, History and International Law*, 1–25.

¹¹³ Scott Frickel and Neil Gross, 'A general theory of scientific/intellectual movements', *American Sociological Review*, 70 (2005) 204–32, at 205.

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Characterised by Bhupinder S. Chimni as a 'loose network of third-world scholars who articulate a critique of the history, structure and process of contemporary international law from the standpoint of third world peoples, in particular its marginal and oppressed groups', the multinational composition of TWAIL also comprises Australian, Canadian and British international lawyers working at the interstices of the history and theory of international law, as well nationals of other countries who are permanently based in Canadian, Australian or British universities, where they have in large part often been educated.¹¹⁴ They have contributed post-colonial historiographical works on particular legal doctrines (e.g. the standard of civilisation), events (e.g. Bandung), concepts (e.g. Eurocentrism and domination) and also, as mentioned earlier, individual people with significance from the post-colonial historical perspective.¹¹⁵ Their overall historiographical output has contributed to the gradual carving out of a non-Western-centric alternative meta-periodisation of the history of international law from the discovery of the Americas through the age of empire, with particular attention to British imperial history, from the mid- to late nineteenth century up to the decades of decolonisation and, then, towards the global contemporary age.¹¹⁶ In the post-Cold War period, British and Commonwealth authors have also been notably influenced by the rise of global history as a long-incubated reaction against the blind spots 'affecting interactions and connections that have made the modern world', which resulted from the traditional 'compartmentalization of historical reality' into the ruling 'container-based paradigm' of 'national history'.¹¹⁷ This influence may be perceived in historical works focused on different connections and spaces of encounter of Western international law with the peoples and systems in other regions, as well as in

¹¹⁴ Bhupinder S. Chimni, *International Law and World Order* (Cambridge: Cambridge University Press 2017) 15; Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press 2011); Umut Özsu, 'Determining new selves: Mohammed Bedjaoui on Algeria, Western Sahara, and post-classical international law' in von Bernstorff and Dann, *The Battle for International Law*, 341–57; Matthew Craven, 'Between law and history: the Berlin Conference of 1884–85 and the logic of free trade', *London Review of International Law*, 3 (2015) 31–59.

¹¹⁵ Matthew Craven, 'Colonialism and domination' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 862–89.

¹¹⁶ De la Rasilla, 'The problem of periodization'.

¹¹⁷ Sebastian Conrad, *What Is Global History?* (Princeton: Princeton University Press 2017) 5; Daniel Chernilo, 'The critique of methodological nationalism: theory and history', *Thesis Eleven*, 106 (2011) 98–117.

others devoted to the study of international law or historical forms thereof across non-Western traditions, including in the Middle East and East Asia.¹¹⁸

To conclude this bird's-eye historiographical survey, a final mention is due to the study of the British history of international law itself. This has been approached in particular for what regards the twentieth century in terms of British normative and doctrinal 'influences' or, more broadly, British 'contributions' to the carving out of particular international legal doctrines and normative developments.¹¹⁹ This normatively oriented 'contributionist' approach stands in contrast to the renewed contextualised intellectual genre of 'national histories' of international law in other Western countries, including the US, Germany, Spain, Belgium and Italy.¹²⁰ Yet the attention to the specifically *British* history of international law has also included a larger cultivation of the international legal biographical genre and, more broadly, the study of the international legal academic profession in England across different periods.¹²¹ Another particularly distinctive feature of the historical intellectual treatment that the British history of international law has received is that, due to its ample intellectual influence through the nineteenth and twentieth centuries, it has also been largely cultivated by non-British nationals and, as of late, increasingly in a post-colonial historiographical vein.¹²² Particularly remarkable in this context is a series of new works which, under the influence of the tenets of global history, are mining long-neglected archival sources and applying a diverse array of socio-legal historical methods to produce more contextualised perspectives of the role international law played in the day-to-day management of the British Empire.¹²³

¹¹⁸ See e.g. Frédéric Mégret and Pierre-Alexandre Cardinal, 'The other "other": Moors, international law and the origin of the colonial matrix', in Ignacio de la Rasilla and Ayesha Shahid (eds.), *International Law and Islam. Historical Explorations* (Leiden and Boston: Brill/Nijhoff 2018) 165–98; Anthony Carty and Janne Nijman (eds.), *Morality and Responsibility of Rulers. European and Chinese Origins of a Rule of Law as Justice for World Order* (Oxford: Oxford University Press 2018).

¹¹⁹ Robert McCorquodale and Jean-Pierre Gauci (eds.), *British Influences on International Law, 1915–2015* (Leiden and Boston: Brill/Nijhoff 2016); Jill Barrett and Jean-Pierre Gauci (eds.), *British Contributions to International Law, 1915–2015. An Anthology Set*, 4 vols. (Leiden and Boston: Brill/Nijhoff 2020).

¹²⁰ E.g. Giulio Bartolini (ed.), *A History of International Law in Italy* (Oxford: Oxford University Press 2020).

¹²¹ Lauterpacht, *The Life of Hersch Lauterpacht*; Crawford, 'Public international law'; Sylvest, 'International law'.

¹²² Koskenniemi, 'Lauterpacht: the Victorian tradition in international law'; Ignacio de la Rasilla, "'In the general interest of peace?" British international lawyers and the Spanish Civil War', *Journal of the History of International Law*, 17 (2016) 197–238.

¹²³ Benton and Ford, *Rage for Order*.

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Conclusion

The history of international law – both British and more generally – may no longer be a neglected province, but that does not mean it has become a well-mapped territory. It is, rather, something of a borderland that awaits its cartographers. Among their tasks will be investigating how the province of the history of international law has been moulded by its earlier cultivators and, on that basis, how it might be possible to open new paths of exploration. One of the venues promising to shed light on often intuited yet little systematically explored historiographical themes is that of comparative international legal history. This may be defined as a nascent area of studies which examines the differences and similarities in terms of perspectives, methods, techniques, themes, foci and *topoi* existing alongside different national, regional or otherwise culturally and linguistically akin traditions of doing history of international law and thinking about the methods and purposes of international legal historical inquiry.

The survey offered in this chapter shows that the British, and later Commonwealth, historiography has displayed a distinct tendency to research its own national history of international law across the general threefold category of the history of events, concepts and people over time. This solipsistic historiographical feature among British international lawyers and historians is, however, far from being distinctively British, but is in fact shared by all other main historiographical national traditions of international law. What is distinctive about the British case is that because of the large intellectual influence of British international lawyers and the intertwined development of the British history of international law with the national histories of international law of many other communities across the globe since, in particular, the mid- to late nineteenth century, its own development has, as we have seen, largely become a transnational focus of historical study in the post-colonial era. A second general feature that transpires from this brief *tour d'horizon* is that international legal historians, British included, have traditionally made for a transnational and cosmopolitan epistemological community rather than a nationally oriented one. Indeed, the British members of the 'invisible college' of international legal historians have largely been influenced by transnational historical trends of thought, have eclectically relied on works produced mostly by other Western scholars, and have both contributed to and participated in the cultivation of a common and evolving transnational set of perspectives, methods, techniques and themes in the history of international law. Two features may nonetheless be seen as

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distinctive about the British case in this context. The first is the archetypical role that Grotius has occupied in the historiographical imaginary of British international lawyers over generations. The centrality of Grotius in the British historiographical imaginary of international law, which finds parallels in the Netherlands and the United States, has, in turn, largely contributed to the canonisation of Grotius as a global icon for international law and almost as a synonym for the study of its history across the globe.¹²⁴ The second one is the attention British international lawyers have historically devoted to how international law has featured in domestic case law.¹²⁵ This singular characteristic of the historical legal production of international lawyers trained in common-law systems may be identified as a legacy of the British practitioners' approach to the global historiography of international law.

FURTHER READING

- Barrett, Jill, and Jean-Pierre Gauci (eds.) *British Contributions to International Law, 1915–2015. An Anthology Set*, 4 vols. (Leiden and Boston: Brill 2020).
- Crawford, James, 'Public international law in twentieth-century England' in Jack Beatson and Reinhard Zimmermann (eds.), *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford: Clarendon Press 2004) 681–707.
- Craven, Matthew, 'The invention of a tradition: Westlake, the Berlin Conference and the historicisation of international law' in Miloš Vec and Luigi Nuzzo (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt: Klosterman 2012) 363–403.
- Fitzmaurice, Andrew, 'The resilience of natural law in the writings of Sir Travers Twiss' in Ian Hall and Lisa Hill (eds.), *British International Thinkers from Hobbes to Namier* (Basingstoke: Palgrave 2009) 137–59.
- Johnson, D.H.N., 'The English tradition in international law', *International and Comparative Law Quarterly*, 11 (1962) 416–45.
- Koskenniemi, Martti, 'Lauterpacht: the Victorian tradition in international law', *European Journal of International Law*, 8 (1997) 215–63.
- Landauer, Carl, 'From status to treaty: Henry Sumner Maine's international law', *Canadian Journal of Law and Jurisprudence*, 15 (2002) 219–54.
- Lobban, Michael, 'English approaches to international law in the nineteenth century' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff 2007) 65–90.

¹²⁴ Ignacio de la Rasilla, 'Grotian revivals in the history and theory of international law', in Randall Lesaffer and Janne Nijman (eds.), *The Cambridge Companion to Hugo Grotius* (Cambridge: Cambridge University Press 2021) 559–77.

¹²⁵ *Public International Law in the Supreme Court of the United Kingdom. A Selection of Cases from the Court's First Ten Years* (London: Supreme Court of the United Kingdom 2019), at www.supremecourt.uk/docs/public-international-law-in-the-supreme-court-of-the-united-kingdom.pdf.

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- McCorquodale, Robert, and Jean-Pierre Gauci (eds.), *British Influences on International Law, 1915–2015* (Leiden and Boston: Brill 2016).
- Mantena, Karuna, *Alibis of Empire. Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press 2010).
- Pitts, Jennifer, *Boundaries of the International. Law and Empire* (Cambridge, MA and London: Harvard University Press 2018).
- Pitts, Jennifer, ‘International law’ in Mark Bevir (ed.), *Historicism and the Human Sciences in Victorian Britain* (Cambridge: Cambridge University Press 2017) 237–61.
- Sands, Philippe, *East West Street. On the Origins of ‘Genocide’ and ‘Crimes against Humanity’* (New York: Alfred A. Knopf 2016).
- Sylvest, Casper, ‘International law in nineteenth-century Britain’, *British Yearbook of International Law*, 75 (2004) 9–70.

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