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THE PAST AS LAW OR HISTORY? THE RELEVANCE OF IMPERIALISM FOR MODERN INTERNATIONAL LAW

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**The past as law or history?
The relevance of imperialism for modern international law**

Anne Orford

Critical international legal scholars, including a number of scholars associated with the Third World Approaches to International Law (TWAIL) movement, have been important players in the ongoing debate about the relevance of the history of imperialism to modern international law. The question of whether – and how – the imperial past is relevant to international law remains hotly disputed. For many international lawyers, decolonisation has successfully taken place, international law and the international community are essentially anti-colonial, and the real political question should now be how this truly universal international law can best end human suffering, while not falling prey to abuse by powerful states. In the words of Brad Roth, 'colonialism is a legal aberration' and '[c]haracterizing contemporary international law as essentially continuous with patterns of past Western domination' is of no use politically and belittles 'the hard-won achievements of anticolonialist struggles'.¹ Roth's comments illustrate a tendency amongst contemporary international lawyers to draw a line between yesterday's imperialism and today's international law.² In contrast, TWAIL scholars have argued against the willed forgetting of international law's imperial past, and asserted that imperialism is 'ingrained in international law as we know it today'.³

The stakes of the debate about the legacies of the imperial past in the multinational present are high. In part this is because the authority and legitimacy of modern international law rests on its claim to have transcended its European heritage and to operate today as a universal law capable of representing humanity. The suggestion that international law may still operate in a differentiated fashion undermines that claim to universality. In addition, the idea that imperialism is of no relevance to the contemporary global order plays a significant part in justifying the status quo. Many international legal regimes are based on the assumption that current extremes of uneven development, inequality, mass movement of peoples, civil war, food insecurity and poverty are the consequence of the inherent characteristics or failed leadership of post-colonial states, rather than the effects of a historically constructed global political and economic system that can be challenged. Rather than analyse the possible continuity between imperial and multilateral systems of exploitation and control, many internationalists have assumed that it is desirable to develop more expansive legal bases on which to intervene in order to educate, improve, develop, or save the peoples of the

¹ Brad R. Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii' (2000) 98 *Michigan Law Review* 2056 at 2065.

² For a detailed development of this analysis, see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), pp. 40-51.

³ James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996 at 2020.

decolonised world.⁴ Questioning the extent to which decolonisation has ever fully taken place thus remains a critical intervention in contemporary global politics.

This paper explores the role that the past plays in these contemporary legal debates about the relevance of imperialism for modern international law. As it will seek to show, that is not quite the same thing as exploring the role that *history* plays in those debates. Although international lawyers and historians at times look to the same texts from the past, the way the two disciplines approach such texts is quite different.⁵ Historians, particularly those influenced by the contextualist school of intellectual history associated with Quentin Skinner that dominates Anglophone history today, argue that historical texts must not be approached anachronistically in light of current debates, problems and linguistic usages or in the search for the development of canonical themes, fundamental concepts or timeless doctrines.⁶ In his classic statement of this position and his reasons for adopting it, Skinner stressed the need to attend instead to the meaning of texts in their historical ‘context’ involving the ‘genres, schools, traditions and shared beliefs’ of the time in which they were written.⁷

Yet identifying the proper ‘context’ for a particular text can be complicated. Is it self-evident that a text is primarily relevant to or in conversation with texts of its historical period, or even those texts that are part of a tradition within which an author intended to intervene? Is the meaning of a ‘context’ fully transparent to its interpreter in the way that the meaning of a ‘text’ is not?⁸ Can and should a text be understood in the context of texts that appear much later than it in time? Is its contemporary meaning shaped by the conditions of its reception? And how would we tell? While these questions have been raised by historians, they are unavoidable for lawyers. Law and history stand on the opposite sides of the dividing line between present obligations and archaic traditions. The self-imposed task of today’s contextualist historians is to think about concepts in their proper time and place – the task of international lawyers is to think about how concepts move across time and space. The past, in other words, may be a source of present obligations. Similarly, legal concepts and practices that were developed in the age of formal empire may continue to shape international law in the post-colonial era.

In order to illustrate the methodological divisions that inform debates about the relevance of past texts to present law and politics, this paper focuses in particular on critical responses to the scholarship of Antony Anghie, the TWAIL scholar who has made the most significant contribution to rethinking the relationship between history, international law and empire

⁴ See further Orford, *Reading Humanitarian Intervention*; Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Oxon: Routledge Cavendish, 2007); Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

⁵ For a related argument about the need to attend to the potentially incommensurate visions of the past that underpin international law, international relations and international history, see Anthony Carty, ‘Visions of the Past of International Society: Law, History or Politics?’ (2006) 69 *Modern Law Review* 644.

⁶ Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’ (1969) 8 *History and Theory* 3.

⁷ Mark Goldie, ‘The context of the *Foundations*’ in Annabel Brett, James Tully and Holly Hamilton-Bleakley (eds), *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006), p.3 at p.9.

⁸ On this point, see Dominick LaCapra, *Rethinking Intellectual History: Texts, Contexts, Language* (Ithaca and London: Cornell University Press, 1983).

through studying the influence of authors such as Vitoria.⁹ Anghie can be grouped with scholars such as David Armitage, Martti Koskenniemi and Richard Tuck who during the 1990s began to rethink the intellectual history of internationalism.¹⁰ Anghie's work is at the vanguard of attempts to rethink the place of the scholastics in the shaping of international law, the implications of civilisation as an organising category in nineteenth century international law, and the relationship of international organisations to the management of decolonisation in the American twentieth century. Yet although Armitage, Koskenniemi and Tuck have all been welcomed as originators of the historical turn in international law and relations, or else an internationalist turn in the history of ideas, Anghie's work has had a more ambivalent reception in the history of ideas and amongst lawyers who align themselves with contextualist approaches such as those of Skinner.¹¹ This paper seeks to show that in order to understand Anghie's scholarship (and that of TWAIL scholars more generally), it is necessary to see it as an intervention that challenges the place of the past and the work of history in international legal arguments. This paper concludes, in other words, that TWAIL scholarship can only be understood 'in context'.

Modernity and revolution: the past as history

In April 2010, then World Bank President Robert Zoellick announced to an audience at the Woodrow Wilson Centre for International Scholars that the Third World is passé:

If 1989 saw the end of the "Second World" with Communism's demise, then 2009 saw the end of what was known as the "Third World".¹²

Zoellick is, of course, not the first to argue that we have witnessed the demise of the Third World. Such arguments have been made at least since the ending of the Cold War, when scholars suggested that the demise of the Second World signalled the demise of the Third World as well.¹³ For Zoellick, as for earlier critics of the outmoded character of the category

⁹ See particularly Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹⁰ David Armitage, 'The Fifty Years' Rift: Intellectual History and International Relations' (2004) *Modern Intellectual History* 97; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

¹¹ See, as examples, Georg Cavaller, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 *Journal of the History of International Law* 181; Ian Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (New York: Palgrave Macmillan, 2010), p. 11; Annabel S Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton and Oxford: Princeton University Press, 2011), pp. 14-15

¹² Robert B Zoellick, 'The End of the Third World? Modernizing Multilateralism for a Multipolar World', Woodrow Wilson Center for International Scholars, April 14, 2010, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22541126~pagePK:34370~piPK:42770~theSitePK:4607,00.html>. Thanks to Emmanuelle Jouannet for drawing this speech to the attention of the participants at the *Tiers Monde: Bilan et Perspectives* workshop held at the Sorbonne Law School in July 2010.

¹³ See the discussions in S D Muni, 'The Third World: Concept and Controversy' (1979) 1 *Third World Quarterly* 119; Mark T Berger, 'The End of the "Third World"?' (1994) 15 *Third World Quarterly* 257; B S

‘Third World’, modern internationalism could not afford to waste time on such ‘outdated’ categorizations or inflexible abstractions. According to Zoellick, the global financial crisis had ushered in ‘a new, fast-evolving multipolar world economy’. Developing countries no longer formed a unified or coherent group – some were ‘emerging as economic powers’, others were ‘moving towards becoming additional poles of growth’ and some were ‘struggling to attain their potential within this new system’. As a result, ‘North and South, East and West, are now points on a compass, not economic destinies’. The history of colonialism did register in Zoellick’s speech, but only implicitly in his recognition that the rebalancing of the world economy was in part a ‘restoration’, as ‘Asia’ had ‘accounted for over half of world output for 18 of the last 20 centuries’. (Zoellick discreetly passed over the missing two centuries). Africa, too ‘had missed out on the manufacturing revolution’, but this was the fault of its ‘past failed efforts to favor import-substitution interests behind protectionism’, rather than a consequence of colonial economic systems or the decisions imposed upon states in Africa by the international institutions that saw it as their role to manage decolonisation.¹⁴ The past imposed no constraints and had little to offer those involved in the process of ‘modernizing multilateralism’.

Zoellick made it clear that the question of responsibility was at the heart of his attempt to dismiss the category of the Third World. In his vision of the new international order to come, responsibility was to be shared. Throughout his speech, Zoellick stressed the centrality of ‘responsibility’ to his vision of ‘modernizing multilateralism’. According to Zoellick, the ‘New Geopolitics of Multipolar Economy’ must ‘share responsibility while recognizing different perspectives and circumstances’. Both the Doha Round of WTO negotiations and the Copenhagen climate change talks had made clear ‘how hard it will be to share mutual benefits and responsibilities between developed and developing countries’. Nonetheless, developing countries must realise that ‘[w]ith power comes responsibility’. The past has nothing to tell us about such questions of responsibility. Instead it is necessary to abandon the ‘outdated categorizations of First and Third Worlds, donor and supplicant, leader and led’ and move forward together into a better future.

The call to put old concepts behind us has echoed throughout international law in the era of decolonisation. To take one example, during the 1950s then UN Secretary-General Dag Hammarskjöld developed practices of international executive rule, such as fact-finding, peacekeeping, technical assistance, and civilian administration, that were to shape the management of decolonisation. Hammarskjöld explained the need for international executive action in very similar terms to those used by Zoellick. According to Hammarskjöld, the ‘liquidation of the colonial system’ had created new threats to international peace and security.¹⁵ The creation of world order that could address these threats would require abandoning the conception of the UN as a ‘static conference machinery’ – a conception that referred ‘to history and to the traditions ... of the past’.¹⁶ The situation of decolonisation

Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3.

¹⁴ On the role played by international organisations in controlling the policy choices available to states through the management of decolonisation, see further Orford, *International Authority*.

¹⁵ UN Secretary-General, *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, UN Doc. A/4800/Add.1, 1961, p. 7.

¹⁶ *Ibid*, p.5.

required a new conception of the UN as ‘dynamic instrument’ of ‘executive action’ that could meet ‘the needs of the present and of the future’.¹⁷ If peace and protection were to be guaranteed, the UN must be able to take decisions with speed and efficiency. The UN was the vehicle through which ‘the world community might, step by step, grow into organized international co-operation within the Charter’.¹⁸ Hammarskjöld’s vision was revolutionary, not only for international relations, but also for the occupied states that were to be remade by the new practices of peacekeeping and international administration.¹⁹

International lawyers proved that they too were capable of being flexible and dynamic in their response to this expansion of executive power. As international experiments in executive rule by universal institutions progressed, international lawyers insisted on the need to direct attention away from anachronistic concerns with juridical status and instead to focus on the functions of sovereignty. Far from being constrained by ‘the now dated sovereignty question’,²⁰ international lawyers have accepted the legitimacy of the expansion of international executive rule. The fact that the Charter does not explicitly authorise practices of international executive rule has never been treated as a constraint on UN involvement in this activity.²¹ Instead, the approach has been to ask whether such practices are necessary to the performance of the function of maintaining international peace and security entrusted to the UN and not explicitly prohibited in the Charter. In an approach endorsed by the International Court of Justice early in the history of the organisation, the UN has been ‘deemed to have those powers, which, though not expressly provided in the Charter, are conferred on it by necessary implication as being essential to the performance of its duties’.²²

In their different ways, both Zoellick and Hammarskjöld, as part of a tradition that is deeply ingrained in Western thought, imagine that ‘we who are presently alive are not compelled to repeat the past’.²³ Instead, the project of modernisation is one of invention, in which human beings have the capacity and indeed the responsibility to create societies, laws and institutions that are efficient, just and rational. Unlike our medieval ancestors, we do not harbour the illusion that destiny constrains our freedom to invent and create new worlds. The past is gone and it cannot change. The present is now and ‘it opens to the future’.²⁴ The legislators of the present are not bound by ‘ancestral traditions’ or ‘archaic obligations’.²⁵ The occupants of the modern world ‘could not imagine life if their present were cluttered by the laws of ancient

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Anne Orford, ‘International Territorial Administration and the Management of Decolonisation’ (2010) 59 *International and Comparative Law Quarterly* 227; Orford, *International Authority*.

²⁰ Gregory H Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008), p. 32

²¹ *Charter of the United Nations*, Article 78. It is interesting to recall that Article 78 was included in the Charter at the urging of Syria and Lebanon, both founding members of the UN. Those states were particularly concerned to ensure that the UN trusteeship system could not be used by France as a basis for exercising trust powers over independent states that had been former French colonies. See further Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002), p. 1117.

²² ICJ, *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 182.

²³ Constantin Fasolt, *The Limits of History* (Chicago: University of Chicago Press, 2004), p. 7.

²⁴ *Ibid.*, p. 6.

²⁵ *Ibid.*, p. 7.

Rome, the science of Aristotle, and the morals of Saint Augustine'.²⁶ Zoellick's speech can thus be understood as one in a long line of modernist manifestos, declaring 'our freedom to change the present into the form that we desire for the future'.²⁷

Just as modernisers claim that the past has no claim upon the present, so too may historians argue that the present should have no claims upon the past. One of the most regularly denounced sins of historical scholarship is that of anachronism – allowing 'the unreflective intrusion of present-day concerns ... to distort the way in which the history of political thought' is written.²⁸ This clear demarcation between past and present provides historians with their 'most basic principle of method', consisting of one command: thou shalt place everything in the context of its time'.²⁹ The historian should be concerned only with recovering 'past meanings'.³⁰

This keeps historians from committing anachronism. It places the past under a great taboo in order to prevent a kind of chronological pollution. No one who violates that great taboo may claim to be a true historian. The past is sacred; the present is profane. Anachronism profanes the past by mixing past and present. That is the worst offence historians qua historians can commit. All other sins can be forgiven, but not this one. Anachronism is the sin against the holy spirit of history. Show that a historian has unwittingly infected the interpretation of the past with some particle of the present, and you have shown the historian not only to have failed at the task, but to have failed shamefully.³¹

The claim that proper historical method depends upon a clear separation of past and present is not new. Yet the idea that 'political thinkers, in order to be interpreted properly, need to be placed in their original historical context' was received as 'an exhilarating, provocative programme for Cambridge history' during the 1960s and 1970s, due to the dominance of figures such as Herbert Butterfield and later Quentin Skinner.³² As a result, the influence of the Cambridge school has seen a cultivated 'sensitivity to anachronism' shape much Anglophone history of political thought over the past forty years.³³

This sensitivity to anachronism has also been apparent in prescriptions about the writing of international legal histories. While the turn to history has on the one hand been celebrated, on the other legal historians have sternly cautioned international lawyers against adopting a 'purely functional' relation to history.³⁴ They argue that the history of international law has

²⁶ *Ibid*, p. 9.

²⁷ *Ibid*, p. 7.

²⁸ Francis Oakley, *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought* (Leiden: Brill, 1999), p. 7.

²⁹ Fasolt, *The Limits of History*, p. 6.

³⁰ Oakley, *Politics and Eternity*, p. 7.

³¹ Fasolt, *The Limits of History*, p. 6.

³² Emile Perreau-Sassine, 'Quentin Skinner in Context' (2007) 69 *The Review of Politics* 106.

³³ Oakley, *Politics and Eternity*, p. 9.

³⁴ Randall Lesaffer, 'International Law and its History: The Story of an Unrequited Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Leiden and Boston: Martinus Nijhoff Publishers, 2007), pp. 27, 33.

suffered from the ‘pragmatic interest’ taken by international lawyers who ‘look at history because they need it to better understand current issues and trends’.³⁵ This approach to historical research ‘is still to a large extent based on broad and vague assumptions that bear witness to present-day concerns rather than to historical reality’.³⁶ The scholar ‘tries to find the historical origins of a present-day phenomenon by tracing back its genealogy’.³⁷ Such work falls into the trap of anachronism.

The aim is clearly not to understand what happened [in the past], but to give current ideas or practices roots in the distant past. This kind of historiography sins against the most basic rules of historical methodology, and the results are deplorable. This genealogic history from present to past leads to anachronistic interpretations of historical phenomena, clouds historical realities that bear no fruit in our own times and gives no information about the historical context of the phenomenon one claims to recognise. It describes history in terms of similarities with or differences from the present, and not in terms of what it was. It tries to understand the past for what it brought about and not for what it meant to the people living in it.³⁸

That approach to history has not of course gone unchallenged. The approach to interpreting past events or texts only in the context of their time has faced challenges both from within the disciplinary world of practicing historians and from more philosophically-oriented scholarship. To take one example of the former, Francis Oakley has questioned the idea that the ‘context’ shaping ‘linguistic conventions and ideological concerns’ can be confined to a context that is ‘contemporaneous with the lifetime of the historical author under scrutiny’.³⁹ Scholars, being ‘people of the book’, may often have ‘more in common, both intellectually and in terms of linguistic conventions followed, with writers of the past’ (or indeed of the future) than with many of their contemporaries.⁴⁰ The assumptions, questions and concepts that inform an author’s work may well be shaped by ‘some intellectual tradition stretching back, it may be, to a very distant past’.⁴¹ Thus for this historian of ideas, it is essential to recognise ‘the degree to which the authors whose texts are to be interpreted inhabited a world peopled through books with the dead’.⁴² Scholars may respond in their thinking to the urgent promptings of the dead just as directly as they respond to the ‘pressures, limitations and exigencies of their contemporary predicament’.⁴³ If this is arguable for political thought in general, it is even more clearly the case for legal scholarship, with its reliance upon precedent and patterns of argument stretching back, at least in the common law tradition, to ‘time immemorial’.

To take one example of the latter, philosophical challenge to the clear demarcation between past and present, Michel Foucault’s claim to be writing a ‘history of the present’ was a full-

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 34.

³⁷ *Ibid.*

³⁸ *Ibid.*, pp. 34-5.

³⁹ Oakley, *Politics and Eternity*, p. 11.

⁴⁰ *Ibid.*, p. 19.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

scale assault on the idea that history should, and indeed could, be written from a point of view *other* than the present. In *Discipline and Punish*, Foucault famously declared his desire ‘to write a history of this prison, with all the political investments of the body that it gathers together in its closed architecture. Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing a history of the present’.⁴⁴ History, for Foucault, should be written to show not that our current situation is inevitable and had to be this way as a result of past choices. Instead, it is written to show that our current situation is contingent.

The genealogy of the present form of the prison is a criticism of this form because it undermines the claims of the ideology of the prison to being concerned with eternal problems, and because it uncovers the prison’s links with practices it claims to have left behind.⁴⁵

International lawyers are used to thinking critically about the claim that we moderns are sovereign in space, in the sense that our states are free from external obligations. Yet we are less ready with critical responses to the idea that we have sovereign freedom in time. As I will suggest in the next section, it is here that we can see the significance of scholarship that explores the relation between empire and international law today.

Inheritance and obligation: the past as law

The contingency of the present and the legacy of the past are key themes for TWAIL scholarship. Indeed, like Foucault, those international legal scholars who explore the past of empire to understand the present of international law pose a challenge to the idea of the past as history. According to the historian Constantin Fasolt, ‘the invention of history amounted to a declaration of independence from the authority of ancient texts’.⁴⁶ Early modern political thinkers sought to distinguish between law and history, between “‘real” (modern) law and “‘false” (medieval) law, between real lawyers and ... historians of law’. “‘Real” law’ was defined by ‘presence’. History, on the other hand, ‘belongs in the past and springs from no real, that is, no present, source of obligations’. And yet, ‘just where the boundary between history and law ought be to drawn is fundamentally unclear’.⁴⁷ What must be debated is ‘where the past ends and where the present begins’.⁴⁸ The separation of history and law was part of the process through which modern Western subjects came to contemplate a past that was separated from the present, and came to imagine a sovereign state that was independent in time as well as space. The state was the political form in which Western subjects could not only declare their independence from the obligations of external powers, but from the obligations of tradition, religion and the past.

⁴⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (trans Alan Sheridan) (New York: Vintage, 2005), pp. 30-1.

⁴⁵ Michael S Roth, ‘Foucault’s “History of the Present”’ (1981) 20 *History and Theory* 32.

⁴⁶ Fasolt, *The Limits of History*, p. 216.

⁴⁷ *Ibid*, p. 229.

⁴⁸ *Ibid*, p. 227.

For many lawyers, however, the past should not, and indeed cannot, be forgotten. Law is a site not only for the creation of new obligations but also for the transmission of inherited obligations. Law is inherently genealogical, depending as it does upon the movement of concepts, languages and norms across time and even space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation. For a lawyer, relating a concept to a history is not simply about making sense of something that is past and immutable as opposed to a law that is present and freely chosen. While some legal historians identify as historians, and preach against the sin of anachronism, in a sense lawyers are and must be sinners in this sense. Law necessarily has to reckon with obligations that are not solely derived from the current rulers of a state – in that sense whatever the felt urgency of breaking with the past, the past persists in custom and precedent and legal tradition. The difficulty then lies in knowing (or perhaps choosing) which precedents should be invoked to make the present intelligible.

Thus in answer to arguments such as those made by Zoellick, scholars concerned with the relevance of empire for contemporary international law might ask: to what degree is a vision of ‘shared responsibility’ politically plausible or historically just? Is uneven development and marked inequality the responsibility of the Third World? Do post-colonial states really have an obligation to be faithful to an international law that constrains their capacity to industrialise, limits their ability to control their resources, or restricts the movement of their peoples? In this sense, Antony Anghie has urged international lawyers not to accept the view, rehearsed yet again by Zoellick, that ‘colonialism was an unfortunate – but perhaps necessary – historical episode whose effects have been largely reversed by the role that international law has played, particularly through the United Nations system, of promoting decolonisation’.⁴⁹ Instead, he has suggested that imperialism has structured international law and that it is not a matter of past history but of present obligation.

It is in the light of this approach to the continued relevance of the past for the present, and of the idea of history as something alive rather than dead, that the category of the Third World becomes relevant. As BS Chimni has argued:

... once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category “third world” assumes life.⁵⁰

The first generation of Third World international lawyers, while committed to international law, argued that refusing to think about when and how inherited forms and structures are inadequate and insufficient can lead to injustice. We might think for example of the opening comments by Judge Ammoun in his judgment in the Barcelona Traction case:

... the legal questions raised by the case which has been submitted to the Court cannot but feel the effects of the great renovating movement in international law which is evident in the relations between nations and in the activities of international

⁴⁹ Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 *Third World Quarterly* 739, 740.

⁵⁰ Chimni, ‘Third World Approaches to International Law’, 5.

institutions. The development which the modern world is witnessing affects the very structures of international law – including the concept of sovereignty – and even its main sources, namely treaties, custom and the general principles of law recognized by the nations. More than one concept, principle or legal norm of the older classical law has been called into question anew ... since a considerable number of States have acquired independence and sovereignty, or have seized them by main force, and have entered into the world community of nations.⁵¹

Ammoun did not call for the abandonment of existing legal forms altogether. Rather, he suggested the need to rethink the inheritance of international law in light of the new principles expressed in the UN Charter and the ‘great renovating movement’ triggered by decolonisation. His aim was for international law to take account of the dynamism of international life. Inheritance in this view is an active process.⁵²

In a series of lectures presented in the same year as the *Barcelona Traction* judgment, the Indian jurist RP Anand argued even more strongly that international law could not ‘remain immune’ to the changes of decolonisation.

We are entering upon a new age in the history of man ... In a world and age of revolutionary changes of cataclysmic proportions, it is essential to reassess the validity of the present legal order in the light of new experience which embraces wholly new perspectives. It is not possible to imprison this process of legal change in legal traditions which have lost the breath of life. In order to remain effective law must constantly justify itself and readjust itself according to the needs of the changing society. Only a dynamic law can preserve the rule of law in a dynamic society.⁵³

For Anand, international law ‘is not something in existence in perpetuity; it is a perpetual becoming’.⁵⁴ Any law ‘which does not change with the changing life becomes dead driftwood’.⁵⁵ In order to assess ‘what should be done’ to make international law more ‘effective and acceptable’, it was necessary to ‘look at the problem historically’.⁵⁶ For Anand, ‘the present cannot be properly assessed, nor future projected, without an understanding of the past’.⁵⁷

⁵¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 286 (Judge Ammoun).

⁵² In *The Metaphysics of Morals*, Kant writes of the need to investigate the question of whether and how it is possible to inherit, and speaks of the moment when ‘a legacy hovers between acceptance and rejection and strictly speaking belongs to no one’: see Immanuel Kant, *The Metaphysics of Morals* (ed Mary Gregor) (2nd edition, Cambridge: Cambridge University Press, 1996) (first published 1797), p 75. Jacques Derrida, following Kant, argues that an inheritance involves ‘an active affirmation; it responds to an injunction, but it also presupposes an initiative ... To inherit is to select, to sort, to highlight, to reactivate’: Jacques Derrida, *Negotiations* (trans Elizabeth Rottenberg), (Stanford: Stanford University Press, 2002), pp. 110-11.

⁵³ RP Anand, *New States and International Law* (2nd edition, Gurgaon: Hope India Publications, 2008), pp. 2-3.

⁵⁴ *Ibid*, p. 72.

⁵⁵ *Ibid*, p. 72.

⁵⁶ *Ibid*, pp. 4-5.

⁵⁷ *Ibid*, p. 5.

Thus the first generation of Third World international lawyers had already sought to challenge the strong separation between history and law, placing the development of law squarely within a historical context that had to be grasped if law was to continue to be just and effective. For the second generation of TWAIL scholars, among them Antony Anghie, the role played by historical sources in the development or rationalisation of legal obligation itself became a topic for scholarly analysis. This second generation of TWAIL scholarship began to focus squarely on the ways in which past texts have been drawn upon to shape new legal orders and obligations – or put differently, the way in which references to past texts might be used to achieve the kinds of ideological innovation to which Skinner had drawn attention in earlier eras.

Anghie in context: Vitoria, Scott and international law for the American century

Antony Anghie is the TWAIL scholar who has made the most significant contribution to this debate about the relevance of history to international law, through reconceptualising the influence of authors ranging from Vitoria and Vattel to Westlake and Luard. Given the generally enthusiastic reaction to the historical turn in international legal scholarship over the past decade, the ambivalent reception of Anghie's work amongst historians is initially puzzling. In this part, I suggest that recent critiques of Anghie's work on Vitoria represent a failure of contextualist method. In order to understand the contemporary critical intervention that Anghie is trying to make, it is necessary to attend carefully to the context in which he places Vitoria.

Anghie commences his discussion of the relevance of Vitoria for contemporary international law at the beginning of the twentieth century, with the reclamation of Vitoria by the American internationalist James Brown Scott.⁵⁸ In order to understand the implications of Anghie's choice to commence his history of international law with Vitoria as received by Scott, it is necessary to understand the role played by Scott in American international law. Scott was a major figure in early twentieth century American international legal circles, both professional and academic. According to one of his contemporaries, Scott 'was a moralist', for whom 'international law was more than a study or a profession; it was, in fact, a religion'.⁵⁹ Of particular importance for the *practices* of international law developed for the American century was the fact that Scott was a believer in international administration, committed to freedom of trade and commerce and a supporter of the League of Nations and its new mandate system. Of particular importance for the *rationalisation* of those practices and the new forms of international legal authority that they brought into being was Scott's enthusiasm for Vitoria.

In terms of the practices of international law, Scott played an extremely significant role in the establishment of international law as a profession committed to peaceful arbitration,

⁵⁸ Anghie, 'Francisco De Vitoria', opens with a reference to James Brown Scott and the American reception of Vitoria in the early twentieth century.

⁵⁹ Frederic R Coudet, 'An Appreciation of James Brown Scott' (1943) 37 *American Journal of International Law* 559.

international administration and freedom of trade and navigation.⁶⁰ At the Annual Meeting of the Lake Mohonk Conference on International Arbitration held in 1905, while he was a professor at Columbia Law School, Scott proposed the formation of an American society of international law and an American journal of international law. The American Society of International Law was duly established the following year, and the first issue of the American Journal of International Law, personally funded by Scott, was published in 1907.⁶¹ Scott was Recording Secretary of the new American Society from 1906 until 1924 (while Elihu Root was President), Vice-President from 1924 to 1929 and President from 1929 to 1939.⁶² He was Managing Editor and Editor-in-Chief of the American Journal of International Law from its creation in 1907 until 1924, when he was made Honorary Editor-in-Chief. Scott also served as Solicitor (a position now called Legal Advisor) to the Department of State from 1906 to 1911 while Elihu Root was Secretary of State. In that role, he was a delegate and expert in international law on the American Delegation to the Second Peace Conference at The Hague in 1907. He resigned from the Department of State in 1911 to accept the role of Secretary of the newly created Carnegie Endowment for International Peace, which had been gifted by Andrew Carnegie with a budget of \$10,000,000 to be used ‘to hasten the abolition of international war, the foulest blot upon our civilization’.⁶³

Scott continued to act as an advisor to the US administration after his appointment at the Carnegie Endowment. In 1914 he was appointed Special Advisor to the Department of State in matters of international law arising out of World War 1, and was legal advisor to the American Commission to Negotiate Peace that sailed with Woodrow Wilson to Paris in 1918. He was an advisor to then Senator Elihu Root in his work on a committee established to prepare a plan for the Permanent Court of International Justice in 1920, and continued tirelessly advocating for the creation of such a court after 1920. He was instrumental in the creation of the Hague Academy of International Law (the establishment of which was funded by the Carnegie Endowment) and the founding of the American Institute of International Law. He was a member of the *Institut de Droit International* and a Member of the *Association Internationale de Vitoria et de Suarez*.

Scott also had a significant influence upon the teaching of international law. He was at various times Dean of the then Los Angeles Law School, Dean of the College of Law at the University of Illinois, Professor at Columbia Law School, Professor at Georgetown School of Foreign Service and Professor of International Law, Jurisprudence and Roman Law at Georgetown University Law School, as well as Carnegie Exchange Professor to the Universities of Salamanca, Habana, Chile, Buenos Aires and Montevideo in 1927 and

⁶⁰ For the importance of this period more generally for the establishment of international law as a profession, see Koskenniemi, *The Gentle Civilizer*.

⁶¹ George A Finch, ‘James Brown Scott, 1866-1943’ (1944) 38 *American Journal of International Law* 183, 188-94.

⁶² A number of commentators at the Centennial Meeting of the American Society of International Law in 2006 suggested that the creation of Society in 1906 could be understood in part as a conservative response to the threat of revolution in Europe as well as to the perceived need to discipline democratic politics in the US. See in particular the contribution of Anthony Carty in ‘The Legacy of Elihu Root: Panel Discussion’ (2006) 100 *American Society of International Law Proceedings* 203 and the contribution of Nathaniel Berman in ‘War, Force and Revolution: Roundtable’ (2006) 100 *American Society of International Law Proceedings* 261.

⁶³ Finch, ‘James Brown Scott’, 214.

Visiting Carnegie Professor of International Relations at Kiel, Berlin, Munich, Heidelberg, Goettingen and Frankfurt in 1928 (at the height of US-German tensions over the terms of the Treaty of Versailles). Yet perhaps Scott's most enduring influence upon international legal scholarship derives from his role in editing a new series of classic texts of international law. In 1906, Scott approached the President of the Carnegie Institution of Washington (the Endowment was not yet established) to fund the publication of what Scott described as the *Corpus Juris Gentium*. The proposal was accepted by the Carnegie Institution, which undertook to publish a series of 'Classics of International Law', for which Scott would be the General Editor. The series involved the publication of photocopies of original texts accompanied by English translations commissioned for the series. In all, twenty-two titles were published in the series, including treatises by Zouche, Ayala, Grotius, Vattel, Rachel, Textor, Vitoria, Suarez, three by Gentili, three by Pufendorf and one by Wolff.⁶⁴ In suggesting that the new Carnegie Endowment should take over publication of the series after the war, Scott explained his sense of the series' importance:

International law as a system will survive the calamitous and brutal war of 1914, but it will be shattered in the conflict and many of its provisions will be bruised, if not destroyed. The general public appears to regard international law as a modern invention, and looks to the Hague conventions as the source of its authority. It is especially important at this juncture that the general public should know and that the professors and students of international law should be in a position to make it clear that international law is not a thing of convention, and of compromise, to be found in treatises of recent date, but that it is the slow and painful outgrowth of centuries in response to the needs of nations and of peoples, which however distant in space and in thought, must have dealings one with the other, and must have those dealings conformed to law if justice and its perfected fruit, peace, is ever to prevail between nations as it does and as all recognize that it must between the men and women composing them. Desirable in 1906, the series is necessary in 1917 ...⁶⁵

The series included a publication of the two *relectiones* Vitoria gave at Salamanca in January and June 1539: *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*.⁶⁶ These public lectures represented two of the most significant occasions on which Vitoria systematically explored the legitimacy of the Spanish claim to *dominium* in the Indies.⁶⁷ Scott also published his own treatise on Vitoria in 1934, which included as appendices translations of *De Indis* and *De Jure Bellis* as well as Vitoria's earlier *relectione* on civil power and parts of his regular lecture courses on the *Summa theologica* of St Thomas Aquinas.⁶⁸ In the preamble to that book, Scott explained why he believed that Vitoria's time had come:

⁶⁴ *Ibid*, 196-99.

⁶⁵ Finch, 'James Brown Scott', 198.

⁶⁶ Francisco de Vitoria, *De Indis et de ivre Belli Relectiones* (Washington DC: The Carnegie Corporation, 1917).

⁶⁷ See further David A Luper, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003). Luper notes that Vitoria had first addressed this issue a number of times in the course of his regular lectures on Aquinas over the academic year 1534-35.

⁶⁸ James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Union, New Jersey: The Lawbook Exchange Ltd, 2000) (first published 1934).

[T]he publicists of today are disregarding the international law based upon force ... They are leaving the paths marked out by false prophets of international law and turning to Vitoria's law of nations and the Victorian principles which for four hundred years have pointed the path to an international law still of the future, in which law and morality shall be one and inseparable, in which States are created by and for human being, and every principle of international law and of international conduct is to be tested by the good of the international community and not by the selfish standards of its more powerful and erring members. In Vitoria's doctrine the duty of the more powerful is to observe the law as do the weak and, through his conception of the mandate, to lend a helping hand to less favoured people.⁶⁹

Scott offered a detailed history of the Scholastics, related Vitoria to Aquinas and Soto, and traced the influence of Vitoria upon Grotius. The book included as appendices translations of five lectures. Scott read Vitoria as a liberal and a humanist, and welcomed Vitoria's thinking on freedom of trade and navigation and on the need to educate the Indians. In the closing paragraphs of his book, Scott explains the relation of Vitoria's principles to the new projects of internationalism then taking form:

Freedom of navigation upon the high seas and of sojourn within each and every country of the international community is requisite for industry and for commerce and for that highest branch of commerce – the traffic of ideas –embraced within the single word 'missionaries'.

Vitoria recognized that there were peoples in an imperfect state of civilization; but they were human beings, and human beings, to his way of thinking, should not be subject to exploitation, but should be fitted – if they were not already fit – to enjoy the rights of all human beings, as well as to be subjected to their duties. Therefore it was proper – and indeed praiseworthy – for a State in the plenitude of civilization to take, as it were, these children of nature in hand in order to educate them in their rights and in their duties, that their principalities might be admitted to the international community. The action, however, of the enlightened nation was not to smack of self-interest, much less exploitation; it was to be on behalf of the laggards in the march of civilization. This was a nameless principle in Vitoria's system – a principle thought some four centuries later to have been newly created by the Covenant of the League of Nations, and as such christened with the dignified name of mandate.⁷⁰

Anghie does not deal with Scott in any detail in his history. But by opening his reading of Vitoria with a reference to the inclusion of Vitoria's *relectiones* in the Carnegie 'Classics of International Law' series and the monograph by Scott, Anghie draws our attention to the special place that Vitoria played in the new American century. Anghie argues that the overall effect of the lectures published by Carnegie is to suggest that violence is the result of 'the inevitable violation by the Indian of the natural law by which he is bound'.⁷¹ While Vitoria there adopts 'an apparently benevolent approach of including the aberrant Indian within a

⁶⁹ Scott, *Spanish Origin of International Law*, p. 11a.

⁷⁰ *Ibid*, p. 287.

⁷¹ Anghie, 'The Evolution of International Law', 744.

universal order', this nonetheless becomes 'a basis for sanctioning and transforming [and measuring] the Indian'.⁷² The resulting Spanish violence 'is characterised as simultaneously, overwhelming, liberating, transforming, humanitarian'.⁷³ Anghie argues that '[t]he same structure of ideas is evident in the 19th century, the apogee of imperial expansion'.⁷⁴ These ideas re-emerge 'as a prelude to the grand redeeming project of bestowing sovereignty on the dark places of the earth', which we now call decolonisation.⁷⁵ Perhaps more significantly for the new forms of rule being envisaged for the American twentieth century, Anghie suggests that the lectures demonstrate 'the centrality of commerce to international law, and how commercial exploitation necessitates war'.⁷⁶

In addition, Anghie demonstrates how we should understand Vitoria's relevance by placing him in a new series or 'context'. Rather than, as most scholars interested in the internationalist implications of Vitoria's thought have done before and since, placing Vitoria in a 'context' that begins with fifteenth century Scholasticism and ends with the adoption of Vitoria's innovative approach to questions of possession, commerce, war and alliance by the young Hugo Grotius, Anghie places Vitoria in a context that moves from the School of Salamanca to the late nineteenth century when empire and its rationalisation is about to take a radically new form in the aftermath of the Berlin conference, and then on to the mandate system, the creation of the IMF and the World Bank, and the invasion of Iraq.⁷⁷ This series (Scott, Vitoria, Berlin Conference, mandates, the Bretton Woods institutions, the invasion of Iraq) suggests that the humanitarian critique of Spanish empire offered ideological innovators a means of rationalising the form of empire that would triumph in the twentieth century. That form of empire, as Anghie and others have argued, did not depend upon the formal acquisition or occupation of territory. Instead, the normative foundations of this empire were protection (by armed intervention if necessary) of the fundamental private rights to property, navigation, investment and trade, open economies premised upon non-discrimination between trading partners, the end of colonial monopoly privileges over territory and trade relations, and the humanitarian administration of life in the decolonised world by international organisations.⁷⁸

Anghie in some ways leaves it to his readers to make the ideological links between Scott's invocation of Vitoria as the founder of (American) international law in the early twentieth century and the elements of Vitoria's thought that emerge from the lectures published for an American audience in the Carnegie series. It is perhaps for this reason that critics have not done the work of making connections between the material that Anghie has so carefully

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 745.

⁷⁵ *Ibid.*, 741.

⁷⁶ *Ibid.*, 744. For a detailed exploration of the relation between commerce and war, largely in the context of American legal doctrine and scholarship, see further James Thuo Gathii, *War, Commerce, and International Law* (Oxford: Oxford University Press, 2010). For a reading of the relationship of the doctrines developed by the School of Salamanca to Western domination through informal empire, see Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1

⁷⁷ This series is established by the organisation of chapters in Anghie, *Imperialism, Sovereignty and the Making of International Law*.

⁷⁸ See also Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443; Orford, *Reading Humanitarian Intervention*; Orford, *International Authority*.

brought into relation, and have dismissed his reading for ‘assuming a false continuity and connectedness that is in fact the work of the interpreter’s mind’, making ‘fanciful connections between Vitoria and the discipline of nineteenth century international law’ or taking ‘daring jumps’ that destroy the ‘complexity and pluralism of the discourses from various (and often very divergent) centuries’.⁷⁹ In perhaps the most extended critique of Anghie and other critical scholars of international law and empire yet published, Ian Hunter argues that Anghie tries and fails to establish that ‘extra-European colonialism’ provided the ‘unifying ideological essence for natural law and *ius gentium*’ during the classical age of empire. For Hunter, the ‘crucial uses’ of natural law during the seventeenth and eighteenth centuries were instead ‘principally dedicated to supplying the intellectual architecture for intra-European state-building and diplomacy’.⁸⁰

Of course Vitoria’s theses bear an ambiguous relationship to classic European colonialism, but so do the multilateralism, private ordering, and international administration of the twentieth century. That is the point. Attention to the ‘context’ in which Vitoria was reclaimed for modern (American) international law shows that Anghie has not invented a project of modern internationalism that he then ‘anachronistically projects backward onto early modern *ius gentium*’,⁸¹ but rather that early modern *ius gentium* was systematically and carefully reconstructed in the United States of America at the dawn of the twentieth century to make sense of practices and institutions that were already reshaping the world. Anghie is not, in other words, trying and failing to create a false connection between Vitoria and seventeenth or eighteenth century European colonialism, but instead creating a new context within which to understand the relevance of Vitoria today. That context is the American century of free trade, liberalised economies, informal empire, and benevolent humanitarianism.

Conclusion: Vitoria in Washington

To conclude, I want to suggest that the complex ways in which we receive the texts of our ancestors is well illustrated by an anecdote about James Brown Scott, recounted towards the end of a lengthy tribute published in the *American Journal of International Law* after his death.

When the new building for the Department of Justice was completed in Washington, it was decided to adorn the ceremonial entrance leading from the court of honor with a series of mural panels depicting the great law givers of history. Beginning with Menes, a king of ancient Egypt, the panels show the figures of successive epochs as they pass through the ages to the present generation. Unable to locate a likeness from which to paint the features of Victoria, one of the Spanish predecessors of Grotius, for inclusion in the murals, the artist, hearing of Dr Scott's work, sought his advice on a portrait of his subject. Unfortunately, Dr Scott had to tell him that none could be found anywhere in the world. The artist returned to his mural and painted the figure of Victoria garbed true to life as a Dominican friar but with an excellent likeness of the head and hands of James Brown Scott. So there in the halls of justice at Washington, standing among the

⁷⁹ Cavaller, ‘Vitoria, Grotius, Pufendorf, Wolff and Vattel’, 207-9.

⁸⁰ Hunter, ‘Global Justice and Regional Metaphysics’ pp 11-16, 18-20.

⁸¹ *Ibid*, p. 20.

great law givers of the world opposite Hugo Grotius, is a good portrait of Dr Scott disguised in the habit of the Dominican theologian who expounded the law of nations one hundred years before the classic treatise of Grotius.⁸²

It is fitting that the entrance of the US Department of Justice displays a likeness of Scott in the guise of Vitoria, because it is the version of Vitoria created by Scott that would provide the ideological justification for the universal law of the American century. The Vitoria who was reclaimed for twentieth century international law arrived between the covers of a book emblazoned with the name of one of the richest industrialists of the nineteenth century, in a series edited by one of the most influential American international lawyers and moralists of the early twentieth. Scott introduced his fellow Americans to Vitoria as the father of a new kind of international law for a new kind of world order. It is this world order that critical scholars of international law and empire have sought to understand and to critique. We need to understand the appeal of the American Vitoria today precisely because the extremes of wealth and poverty produced over the course of the twentieth century were enabled and rationalised by a new universalist international law that promises a future of global justice and ‘its perfected fruit, peace’.⁸³

⁸² Finch, ‘James Brown Scott’, 199.

⁸³ *Ibid*, 198.