

# INTRODUCTION TO SYMPOSIUM ON INTERNATIONAL LAW AND THE POLITICS OF HISTORY

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Disputes between lawyers and historians, including over the role history does or should play in determining law's meaning, are hardly new. Yet they have reached a fevered pitch in recent years, at least within the invisible college of international lawyers. Anne Orford's *International Law and the Politics of History* (ILPH) is a comprehensive and sophisticated exploration of the intellectual and political puzzles raised by the disciplinary encounter between law and history.<sup>1</sup> ILPH deftly traverses a range of topics, including the causes of lawyers' turn to history, the representation of law and lawyers in the work of influential historians, and the essentially contested nature of legal argument. Drawing upon and extending arguments Orford has developed elsewhere, ILPH brims with fresh insights and opens up new avenues of scholarly inquiry. The book is brilliantly conceived, meticulously researched, and masterfully executed.

The papers in this special Symposium issue of the *Temple International and Comparative Law Journal* engage, explore, extend, and challenge arguments Orford develops in ILPH. These papers were presented at the 2022 Laura H. Carnell Chair seminar, where they were the subject of intensive discussion and critique among an outstanding interdisciplinary group of scholars.<sup>2</sup> This Symposium issue represents the latest collaboration among the Carnell Chair, this journal, and the Institute for International Law and Public Policy, which co-sponsored the seminar.<sup>3</sup>

It is entirely appropriate that this Symposium takes as its focus Anne Orford's most recent monograph. Orford is Melbourne Laureate Professor and Michael D Kirby Chair of International Law at Melbourne Law School; during spring 2022 she is also Visiting Professor of Law and John Harvey Gregory Lecturer on World

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\* Laura H. Carnell Professor of Law, Temple University Beasley School of Law. Successful academic projects are often team efforts, and this one is no exception. I am grateful to Ben Heath, Duncan Hollis, Karen Knop, and Mark Pollack for their invaluable input and support during the organization of this event. Thanks are also due to TICJL's editorial board and staff for superb editing under difficult circumstances. Finally, I am deeply grateful to Anne Orford, not only for writing the remarkable book that was the occasion for this project, but also for displaying grace and insight in responding to searching and, at times, pointed critique of her work.

1. ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* (2021).

2. Due to the covid pandemic, the event was held virtually. In addition to those publishing papers in this volume, seminar participants included Olabisi Akinkugbe, Gilat Bachar, Jane Baron, Meg deGuzman, Craig Green, Ben Heath, Mohamed Helal, Karen Knop, Trang (Mae) Nguyen, Paolo Palchetti, Mona Paulsen, Mark Pollack, Jaya Ramji-Nogales, Matiangai Sirleaf, Geir Ulfstein, and David Zaring.

3. For an earlier symposium arising out of a Carnell Chair event, see *Engaging the Writings of Martti Koskenniemi: The 2013 Laura H. Carnell Chair Workshop*, 27 *TEMP. INT'L & COMPAR. L.J.* 207 (2013).

Organization at Harvard Law School. She is a prolific and influential scholar across the fields of international law, the history and theory of international law, international dispute settlement, international economic law, and the politics of international law. She has previously authored a number of prominent monographs,<sup>4</sup> and has edited or co-edited several important volumes.<sup>5</sup>

Symposium authors were not assigned a specific theme or question, but rather invited to draft a short response to ILPH.<sup>6</sup> Nonetheless, the papers can usefully be divided into four groupings, corresponding to four broad themes discussed in ILPH. The first group of papers explores the book's conceptualization of the discipline of history; the second group examines ILPH's conceptualization of the discipline of international law; the third group addresses questions of empiricism, epistemology, and disciplinary knowledge; and the fourth group discusses questions of disciplinary identity and the politics of the law/history encounter. Both individually and in the aggregate, the contributions provide incisive and wide-ranging commentary. In the pages that follow, I briefly introduce these papers.

## TABLE OF CONTENTS

I. CONCEPTUALIZING THE DISCIPLINE OF HISTORY .....	2
II. CONCEPTUALIZING THE DISCIPLINE OF INTERNATIONAL LAW .....	4
III. EPISTEMOLOGICAL CLAIMS/EPISTEMOLOGICAL FOUNDATIONS OR, WHAT'S WRONG WITH A LITTLE EMPIRICISM?.....	5
IV. DISCIPLINARY IDENTITIES AND THE POLITICS OF DISCIPLINARY ENCOUNTERS .....	6
V. CONCLUSION .....	8

### I. CONCEPTUALIZING THE DISCIPLINE OF HISTORY

ILPH is centrally about the encounter between law and history. Analyzing this encounter necessarily involves a conceptualization of the discipline of history and an examination of how historians treat international law. ILPH's analysis has a descriptive strand and a methodological strand. The descriptive strand details how, over decades, "[a] particular vision of law and a particular figure of the lawyer has been central to the work of empiricist historians of political thought . . . ."<sup>7</sup> The unflattering picture that emerges is "of the lawyer as scholastic apologist for power

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4. These works include ANNE ORFORD, *PENSÉE CRITIQUE ET PRATIQUE DU DROIT INTERNATIONAL* (2020); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011); ANNE ORFORD, *READING HUMANITARIAN INTERVENTION* (2003).

5. *REVOLUTIONS IN INTERNATIONAL LAW: THE LEGACIES OF 1917* (Kathryn Greenman, et al eds., 2021), *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* (Anne Orford & Florian Hoffmann, eds. 2016); *INTERNATIONAL LAW AND ITS OTHERS* (Anne Orford, ed. 2006).

6. The one exception is Natasha Wheatley's contribution, which is an excerpt from a longer paper: Natasha Wheatley, *Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines*, 60 *HIST. & THEO.* 311 (2021).

7. ORFORD, *supra* note 1, at 13.

or as moralising judge . . . .”<sup>8</sup> The methodological strand of ILPH’s analysis focuses, in particular, on the work of historians associated with the Cambridge School of History, and details how their methodological claims have influenced debates over international law’s engagements with history. ILPH summarizes the core of the Cambridge School approach: “context determines meaning. All past texts are essentially historical, and their meaning can only be understood by locating them within the temporal context in which they were authored.”<sup>9</sup> Several of the Symposium contributions explore Orford’s characterizations of the discipline of history. These papers offer numerous extensions, clarifications, and challenges to Orford’s account.

The Symposium opens with a contribution from Natasha Wheatley, a historian at Princeton University.<sup>10</sup> Wheatley’s paper lucidly sets out the dominant framing of the law/history debates that ILPH explores, explains Orford’s central role in reshaping these debates, and explains what is at stake in the law/history encounter. To say that Wheatley accurately sets out the dominant understanding of law/history debates, however, is not to say that this is the only understanding, or that the dominant understanding is uncontroversial. Indeed, as is clear in Orford’s response, ILPH is in large part an attempt to subvert the conventional framing that Wheatley offers and to resituate and recharacterize the encounter between history and law.<sup>11</sup>

The next contribution is from Afroditi Giovanopoulou, of Columbia University, who is trained as both a lawyer and a historian.<sup>12</sup> Her paper reads Orford’s book as, in part, a story of the erasure of a strand of critical legal historiography, and she calls for a deeper examination of how this erasure came about. Giovanopoulou also identifies various debates among historians over the empirical history that Orford criticizes. In this and in other ways, Giovanopoulou offers an understanding of the contemporary discipline that is more methodologically diverse than that which appears to be on offer in ILPH.

Kunal Parker, a Professor of Law and Dean’s Distinguished Scholar at the University of Miami Law School, focuses on Orford’s discussion of the methodologies used by historians.<sup>13</sup> Parker, who is trained as both a historian and a lawyer, joins with Giovanopoulou in taking issue with Orford’s description of the contemporary discipline of history. Moreover, Parker questions whether Orford’s rejection of empirical history should be read as an implicit defense of the methodological status quo in international legal scholarship, and highlights potential problems with lawyers’ eclectic embrace of different methodological tools at

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8. *Id.* at 110.

9. *Id.* at 82.

10. Natasha Wheatley, *Genealogy of a Battlefield*, 36 TEMP. INT’L & COMPAR. L.J. 9 (2022).

11. Anne Orford, *The Politics and Protocols of Interdisciplinary Encounters*, 36 TEMP. INT’L & COMPAR. L.J. 173 (2022).

12. Afroditi Giovanopoulou, *Who Owns the Critical Vision in International Legal History? Reflections on Anne Orford’s* INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 36 TEMP. INT’L & COMPAR. L.J. 19 (2022).

13. Kunal M. Parker, *Professional and “Amateur” Historians: Contribution to a Symposium on Anne Orford*, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 36 TEMP. INT’L & COMPAR. L.J. 31 (2022).

different times.

This cluster of papers closes with a contribution from Morten Rasmussen, an Associate Professor in the History Section of the Saxo Institute at the University of Copenhagen, who also challenges ILPH's conceptualization of the discipline of history.<sup>14</sup> Rasmussen argues that because the book's focus is on intellectual historians, to the exclusion of social, economic, or political historians, its description of "empiricist history" mischaracterizes how contemporary historians work. In addition, Rasmussen sharply distinguishes the international lawyer's task of making or interpreting international law from the historian's task of constructing plausible empirical accounts of historical events based upon the full range of relics or archival sources available. Rasmussen highlights these disciplinary differences by analyzing the "uses of history" by a cadre of professional historians who engage in the field of identity and memory studies.

## II. CONCEPTUALIZING THE DISCIPLINE OF INTERNATIONAL LAW

A second cluster of papers addresses ILPH's conceptualization of international law. This group of papers opens with a contribution from Megan Donaldson, a member of the law faculty at University College London.<sup>15</sup> Donaldson provides a subtle and wide-ranging set of reflections on ILPH, which highlight the many dimensions of laws' argumentative practices, the blurry distinctions among lawyers' varied professional roles, and the challenges that confront lawyers who wish to "live within the apparatus and vocabulary of law," yet seek to undermine law's ideological orientation.<sup>16</sup> Donaldson raises the intriguing question of whether lawyers face a tradeoff between deploying argumentative forms that will be more intelligible, and received more persuasively, *within* law, and using argumentative forms that will enhance their ability to be understood by audiences *external* to law.

The next paper is co-authored by Francisco-José Quintana, a Gates Scholar at the University of Cambridge, and Sarah Nouwen, a Professor of Law at the European University Institute.<sup>17</sup> Their contribution, like Parker's, reads ILPH as setting out a defense of international law, and they question whether this defense is overly generous. In particular, they argue that Orford paints an unduly rosy picture of the discipline's methodological sophistication and awareness, and they suggest that formalist approaches to teaching and researching international law are still dominant in many universities around the world. Elaborating on a point that Donaldson also raises, Quintana and Nouwen explicitly invite international legal thinkers to consider positioning themselves less as participants in inward-looking professional debates, and instead bring their knowledge to bear on public conversations over alternative international institutional orders.

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14. Morten Rasmussen, *History and International Law: A Reappraisal of a Difficult Relationship*, 36 TEMP. INT'L & COMPAR. L.J. 37 (2022).

15. Megan Donaldson, *The Figure of the Lawyer in Orford's INTERNATIONAL LAW AND THE POLITICS OF HISTORY*, 36 TEMP. INT'L & COMPAR. L.J. 53 (2022).

16. *Id.* at 59.

17. Francisco-José Quintana & Sarah M.H. Nouwen, *In Defence of International Law*, 36 TEMP. INT'L & COMPAR. L.J. 65 (2022).

David Schneiderman, a Professor of Law and Political Science at the University of Toronto, examines international investment law's encounter with history.<sup>18</sup> *Pace* Orford, Schneiderman argues that dominant approaches in this field do not rely upon history, but instead argue that investment law's past has been displaced by a modern regime based on consent and reciprocity. Schneiderman provocatively suggests that this self-understanding may reflect the embarrassment scholars and practitioners experience from the continuity between international investment law's colonial origins and its present operations. He then argues that investment arbitrators rely upon formalistic modes of reasoning, as illustrated by structural similarities between arguments found in founding era U.S. constitutional law cases and modern investment disputes. Finally, Schneiderman claims that the hermeneutic of suspicion is prominent in the investment field, with reference to heated charges by investment law elites that critics of the regime are ideologically motivated, while denying that their own legal positions could be self-interested.

### III. EPISTEMOLOGICAL CLAIMS/EPISTEMOLOGICAL FOUNDATIONS OR, WHAT'S WRONG WITH A LITTLE EMPIRICISM?

The next set of papers foregrounds questions of empirical method and epistemology. These issues are central to ILPH's sustained critique of contextualist historical methodologies that claim to produce "verifiable and impartial accounts of international law."<sup>19</sup> ILPH challenges this claim and argues that "[t]he ambiguous or indeterminate nature of past legal texts, practices, cases, or decisions is not a historical problem that can be solved with . . . a better understanding of the context in which texts were authored, institutions created, or adjudicative bodies constituted. Rather, the ambiguity over what past texts, practices, cases, or decisions mean is intrinsic to the structure and practice of international law."<sup>20</sup>

This cluster of papers opens with a contribution from Karen Alter, the Norman Dwight Harris Professor of International Relations at Northwestern University.<sup>21</sup> Alter reads ILPH as offering a critique of empiricism tout court and takes issue with the suggestion that empirical research is inevitably an act of politics. Alter argues that different types of scholars appropriately use history in different ways and highlights an important contrast between empirical scholars who understand themselves as following the data wherever it leads, and those who position themselves as contributing to a "critical" literature that is intended to be theoretical and interpretative—and who use empirical data as heuristic and anecdote. She closes by praising interdisciplinarity as a strategy for refining and recasting conventional understandings.

Daniel Bodansky, the Regents' Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University, endorses Orford's rejection of history

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18. David Schneiderman, *Investment Law and its Others*, 36 TEMP. INT'L & COMPAR. L.J. 77 (2022).

19. ORFORD, *supra* note 1, at 92.

20. *Id.* at 158.

21. Karen Alter, *Making Politics of History and International Law*, 36 TEMP. INT'L & COMPAR. L.J. 95 (2022).

as a master discipline that can provide objective answers to questions of legal meaning.<sup>22</sup> Yet he questions the jump from the claim that history does not provide objective answers to legal questions to the suggestion that the results of historical research are therefore inevitably partisan and political. Elaborating on a theme that Alter also raises, Bodansky argues that the use of historical claims in political argument does not convert historical research into a political act. Rather, he argues, individual legal scholars and historians often inhabit different spaces in the large continuum between objectivity and polemic.

The final contribution in this cluster of papers is from Lauri Mälksoo, a Professor of Law at the University of Tartu.<sup>23</sup> Mälksoo focuses, in particular, on Orford's claim that "[t]he language of facts or of truth is no longer a trump card. There is no authority to which we can appeal and no method that will establish that our account of facts or our version of truth is the correct one."<sup>24</sup> Mälksoo, in contrast, insists on the existence of historical fact, with reference to specific historical events. He notes, for example, that notwithstanding years of Soviet claims that Nazi Germany was responsible for the massacre of over 20,000 Polish officers in the Katyn forest in 1940, the undeniable historical truth is that the Soviet Union committed this crime. Mälksoo also advances his own historical claim regarding the genealogy of ideas: he argues that Soviet international law scholar Evgeny Pashukanis, who emphasized the indeterminacy of international legal doctrine, was the first to argue—as Orford does—that international law is politics all the way down. Mälksoo suggests that the understanding of international law that Pashukanis embraced was useful in efforts to legitimate or justify Soviet violations of international law.

#### IV. DISCIPLINARY IDENTITIES AND THE POLITICS OF DISCIPLINARY ENCOUNTERS

The final cluster of papers addresses issues of disciplinary identities and the politics of the encounter between law and history. This section opens with a contribution by Harlan Grant Cohen, the Gabriel M. Wilner/UGA Foundation Professor of International Law at the University of Georgia School of Law.<sup>25</sup> Cohen's highly creative contribution takes the form of a dialogue between study partners attempting to understand a fragmentary portion of a text that purports to describe a conflict between a historian and a legal scholar. This dialogue—which both expressly refers to and is reminiscent of a *hevrutah*, or partner-based form of studying religious texts common in Jewish communities—defies efforts at summary. Suffice to say that it touches on a dazzlingly wide range of issues, including disciplinary identity, different forms of knowledge, competing theories of meaning,

22. Daniel Bodansky, *The Places in Between*, 36 TEMP. INT'L & COMPAR. L.J. 107 (2022).

23. Lauri Mälksoo, *The Contested Politics of History in International Law: A Reply to Anne Orford*, 36 TEMP. INT'L & COMPAR. L.J. 117 (2022).

24. ORFORD, *supra* note 1, at 320.

25. Harlan Grant Cohen, *Journeys Through Space and Time While Reading INTERNATIONAL LAW AND THE POLITICS OF HISTORY, Found on a Palimpsest, Translated for You, the Reader*, 36 TEMP. INT'L & COMPAR. L.J. 129 (2022).

the limits of language, and the possibility of plural truths, among other topics.

The next contribution is by Oliver Diggelmann, a Professor of International and Constitutional Law at the University of Zurich.<sup>26</sup> Diggelmann identifies and analyzes several of the distinctive moves in ILPH's critique of empirical history, including Orford's "flipping" of the historian's claim that lawyers do not fully understand history into the retort that historians do not fully understand what lawyers do. Diggelmann also perceptively focuses on the precise terminology that Orford uses, including her self-identification as a "critical" scholar and her labeling her opponents as "revisionist" historians who wish to "impose" a particular methodological "style" on historically minded international lawyers. Diggelmann notes that historians would likely resist these labels and offers subtle reflections on the rhetorical strategy of associating oneself with terms that carry positive connotations and applying terms with negative connotations to one's conceptual or political opponents.

My contribution asks whether it is possible to generalize ILPH's claims about the encounter between law and history to law's encounter with other disciplines.<sup>27</sup> I attempt to locate ILPH in the broader body of legal scholarship that addresses interdisciplinarity, and to highlight the ways in which ILPH both reproduces, and departs from, recurrent moves found in that literature. In particular, I suggest that Orford's account of the politics of the interdisciplinary encounter departs from dominant accounts that highlight disciplinary or partisan politics. Moreover, while much of the literature on interdisciplinarity adopts a comparative approach that has the unintended effect of reifying disciplinary borders, ILPH in contrast insists that "international law" does not refer to a stable referent or fixed object. Thus, ILPH can be read as a critique of dominant approaches to interdisciplinarity that presuppose strong and relatively fixed forms of disciplinary coherence.

This grouping of papers closes with a contribution from Steven Ratner, the Bruno Simma Collegiate Professor of Law at University of Michigan Law School, which compares international law's encounter with history with its encounter with international political morality.<sup>28</sup> Ratner, a leading figure in efforts to promote international law's engagement with political philosophy, acknowledges that a hermeneutic of suspicion is present in the disciplinary encounter. At the same time, his account emphasizes the various ways in which the encounter he is party to has largely managed to avoid the pathologies that have accompanied the turn to history. In brief, it appears that individuals from each discipline have a relatively clear-eyed sense of the purposes and goals of the other, and have developed a relatively productive division of labor that takes advantage of the different forms of expertise that each discipline brings to the encounter.

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26. Oliver Diggelmann, *Historiography as Creative Constructivism? Anne Orford on the Criticism of International Legal Scholarship by Contextualist Historians*, 36 TEMP. INT'L & COMPAR. LJ. 141 (2022).

27. Jeffrey L. Dunoff, *International Law and the Politics of Interdisciplinarity*, 36 TEMP. INT'L & COMPAR. LJ. 151 (2022).

28. Steven Ratner, *Not Just the Historians: Anne Orford's Insights and the Suspicions Between International Law and Philosophy*, 36 TEMP. INT'L & COMPAR. LJ. 163 (2022).

The Symposium closes with a response to these contributions by Anne Orford.<sup>29</sup> It is only fitting that Orford be given the last word. After all, it is her remarkable text that provided the occasion for this project, and she has provided a response that is as thoughtful and measured as the papers she is responding to.

## V. CONCLUSION

When my Temple Law colleagues and I first discussed the possibility of holding a Symposium on a recent monograph on international law, we quickly identified ILPH as a ground-breaking text worthy of sustained attention. We were confident that we could attract an outstanding group of interdisciplinary scholars to respond to ILPH's thoughtful and, at times, provocative claims. While that prediction proved accurate, we underestimated the intellectual energy and dynamism that the group would generate and how stimulating the resulting papers would be. Both individually and in the aggregate, these papers do much to extend a number of important claims ILPH explores and to significantly advance debates over the writings of histories of international law that ILPH so skillfully illuminates. I am honored to have had the opportunity to organize this project and am grateful to all of the authors for their efforts.

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29. Orford, *supra* note 11.