HISTORY AND INTERNATIONAL LAW: A REAPPRAISAL OF A DIFFICULT RELATIONSHIP

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Australian lawyer and legal scholar Anne Orford has long been among the most prominent voices in the field of international law. Her research has focused on a number of diverse topics, including human rights and humanitarian intervention, international economic law and dispute settlement, and—perhaps most relevant for this special issue—the history and theory of international law.[1] In recent years, however, she has used her sharp pen to criticize the inroads made by historians into the field of the legal history of international law in the last two decades.[2] To Orford, it is crucial that legal scholars are allowed to use history for present purposes as an important tool to establish intellectual coherence within the discipline.[3] The methodology of contextual intellectual history, according to Orford, considers such a use of history as an inadmissible anachronism and thus poses a potentially subversive threat to the legitimacy of international law in a contemporary world where it is sorely needed.[4]

Orford is not the only voice that has expressed concerns about the methodology of historians when working on legal history. Another dominant researcher of the field, Finnish legal scholar Martti Koskenniemi, initially supported Orford; he argued that the "validity of our histories lies not in their correspondence with 'facts' or 'coherence' with what we otherwise know about a 'context', but how they contribute to emancipation today."[5] More recently, the critique by historians of the

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1. *See* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 9 (2021) (introducing her most recent scholarship as an examination of role of empiricist histories in modern international law).

2. *See id.* at 9–10 (outlining Orford's argument about limitations of particular turns to empiricist history—and importantly, the politics involved in such turns).

3. *See* Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L. L. 166, 171 (2013) (suggesting that history is critical in discipline where nature of present legal responsibilities is dictated in large part by past texts).

4. *See* Anne Orford, *International Law and the Limits of History*, *in* THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 297, 309 (Wouter Werner et al. eds., 2017) (describing how linking past to present subverts idea of anachronism yet allows students of the past to influence contemporary practice).

5. Martti Koskenniemi, *Vitoria and Us: Thoughts on Critical Histories of International Law*, 22 RECHTSGESCHICHTE LEGAL HIST. 119, 129 (2014). This followed logically from his statement

historical methodology of legal scholars has led Koskenniemi to rethink his position on the importance of historical context, anachronism in historical analysis, and the importance of archival sources.[6] Yet, he still agrees with Orford in her condemnation of contextual history since these scholars "rely on a 'positivist' separation between the past and the present that encourages historical relativism and end up suppressing or undermining efforts to find patterns in history that might account for today's experiences of domination and injustice."[7] Essentially, both scholars believe a key feature of law—its existence beyond time and context—is what gives it legitimacy and its aura of progressive transformation. However, this belief in law's capacity to exist outside of history requires constant work by lawyers and legal scholars and an engagement with the past that liberates law's normative content from the trappings of context and time.[8] Contextual historians are thus perceived as a serious threat to the very essence of what law is about—which must be addressed.

This is exactly what Orford does in her new book, *International Law and the Politics of History*, where she finally delivers her ultimate argument of why (what she now terms) "empiricist history" poses a danger to the discipline of international law.[9] The book is not, according to Orford, addressed to historians who use their contextual and archive-based methodology to write histories about the past but do not engage actively in the present work of developing international law.[10] Instead, her book is written to the legal scholars and historians who use "empiricist history" to challenge the ongoing creative work to renew the field of international law.[11] The ambition of Orford is indeed to make those scholars more aware of the political stakes involved in writing legal history for the development of international law by developing a theoretical and conceptual foundation for a new discussion of how to engage with the past of international law.[12] The aim is that scholars can develop

about the methodology underlying one of his major monographs: "The essays do not seek a neutral description of the past 'as it actually was'—that sort of knowledge is not open to us—but a description that hopes to make our present situation clearer to us and to sharpen our own ability to act in the professional contexts that are open to us as we engage in our practices and projects. In this sense, it is also a political act." MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 10 (2001).

6. *See, e.g.*, Martti Koskenniemi, *Epilogue: To Enable and Enchant – on the Power of Law*, *in* THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 393, 393–94 (Wouter Werner et al. eds., 2017) (acknowledging ability of law to be creative and "enchant" in service of examining international relations).

7. *Id.* at 406.

8. *See* Natasha Wheatley, *Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines*, 60 HIST. & THEORY 311, 326–28 (2021) (detailing required labor to contextualize any reference to history in international law).

9. *See* ORFORD, *supra* note 1, at 10 (setting foundation for her argument challenging that empiricist historians offer correct methods for interpreting *all* past texts while lawyers offer politically motivated analyses).

10. *See id.* at 12–13 (providing an overview of her argument about the politics of turning to history in international law and the intended recipients of that argument).

11. *See id.* at 10 (explaining that combined moves made by historians and lawyers, both using empiricist histories, allow them to avoid admitting creative liberties they take in making past and present international law).

12. *See id.* (calling empiricist historians and lawyers to think more critically about relation

methods that contribute to the fruitful development of international law, instead of being imprisoned by the methodology of historians.[13] Orford underlines that the book is not intended to build new walls but is an attempt to rethink the relations between law and history—two disciplines that she argues are already intimately related.[14]

This may all sound constructive, but in Orford's book, these aims are reached through a wholesale attack against contextual history and its methodology—although the examples given by the author almost exclusively concern merely one genre of history, namely intellectual history.[15] It seems clear that the rhetoric used by historians to promote their work—such as claims that they have produced an original history based on new primary sources or traced the origins of international law or international institutions—have been perceived by the author as positivist postulates.[16] What is even worse to Orford, who is a stern defender of the realist understanding of law as "made" not "found," is the fact that contextual history is now used in contemporary legal debate to promote a neo-formalist approach to law, citing the alleged objectivity of historical research and methodology.[17] To counter neo-formalism, she attempts to destroy the reputation of the historical discipline as being able to offer empirical accounts that can be used to trace the original meaning(s) of law and international institutions.

Just as those legal scholars who use legal history to bolster their neo-formalist claims, Orford believes that historians themselves think they deliver objective, verifiable, contextual accounts in the positivist tradition.[18] To Orford, this mistaken belief in the objective nature of contextual history is easily rejected simply by the fact that legal historians, when engaging with international law, have to give some form and meaning to their object of study through abstraction and generalization.[19] This is done, Orford claims, by drawing on contemporary definitions of international law, and as a result, historians—whether they like it or not—"throw their hat into the presentist ring."[20] All history of international law is consequently to be considered political and "intrinsically polemical."[21] Indeed, Orford insists that the history of international law is as much conditioned by the insights of realism as is

between law and history).

13. *See id.* (explaining framework through which scholars can make such a contribution to international law).

14. *See id.* ("This book seeks to show that law is already shot through with history, that history is already shot through with law, that the two are intimately related, and that the advocacy of a particular kind of historical method is inevitably bound up with a particular struggle for the meaning of law.").

15. *See id.* at 71–72 (establishing the turn to global intellectual history to inform current debates on international law and relations).

16. *See id.* at 287–88 (critiquing practice of finding legal arguments rather than making them).

17. *See id.* at 319 (elaborating on idea that turn to history as method for legal thinking is strongly neoformalist).

18. *Id.* at 255.

19. *Id.* at 255–56.

20. *Id.* at 256.

21. *Id.* at 257.

the legal discipline.[22] Since historical research depends on the definition of international law, it is just as subjective, partisan, and political as the various ways lawyers and legal scholars use the past[23] (so much for leaving historians who focus on historical scholarship in peace!). It is politics all the way through.[24]

Claiming victory over contextual history and its neo-formalist potential, Orford concludes that the methodology of history cannot resolve the dilemma faced by law due to "[t]he ambiguous or indeterminate nature of past legal texts, practises, cases, or decisions" by providing "more evidence and a better understanding of the context in which texts were authored, institutions created, or adjudicative bodies constituted."[25] The classical historical arguments about motives, ideological understandings, and origins "turn out to be part of the political struggle for the law rather than above it."[26] Indeed, "[t]here are no historical methods that can save us from the political character of international legal interpretation."[27] History is simply not the master discipline for interpreting the past.

To exemplify this concept, Orford takes no prisoners in an acid test of three prominent books of legal history by, respectively, Laureen Benton and Lisa Ford, Samuel Moyn, and Quinn Slobodian.[28] However, Orford's sample of historical work is exceptionally thin and, despite its impact in the field, is taken predominantly from intellectual history considered then to be representative for the entire discipline of history. Moreover, given her harsh critique of Slobodian's book, one cannot help wondering why she insists using it as representative example of the historical discipline.

Orford also counters the critique by historians of legal scholarship for using history in a selective and ideological way.[29] Historians have not understood the complex and intertwined nature of legal practice and scholarship, as she explains in chapter 5.[30] Lawyers are in fact much better at working with the past than historians tend to think. Lawyers and legal scholars use history in their arguments in many different contexts—from legal advice to international organizations and governments, to arbitration, to adjudication, to legal scholarship. As she writes, to "creat[e] legal work involves creating plausible patterns, analogies, or narratives by

22. *See id.* at 285 (arguing for influence of realism in history of international law).

23. *See id.* (arguing for inherent subjectivity, partisanship and politics of international historiography).

24. Or, as Orford terms it, "politics all the way down." *Id.* at 315.

25. *Id.* at 178.

26. *Id.* at 284.

27. *Id.* at 285.

28. For her analysis, see ORFORD, *supra* note 1, at 253–84 (demonstrating subjectivity of international historical interpretation to critique contextualist historians' methods). For the books analyzed, see LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850 (2016); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018).

29. *See* ORFORD, *supra* note 1, at 9 (debating argument that lawyers' interpretation of history should be presented as ideological).

30. *See id.* at 178–252 (explaining that lawyers routinely use historical scholarship in their legal practice).

assembling past material from disparate sources in ways that are persuasive to legal audiences."[31] The key ambition for lawyers is seldom history in itself but the way that arguments about the past can help persuade the audience of the merits and authority of their legal argument.[32] A return to legal formalism based on falsely claimed objective historical research on the precise meaning of international law or the true nature of international institutions will consequently, according to Orford, stifle the creativity that marks the ways lawyers and legal scholars work with the past in creating new international law for the twenty-first century.[33]

Although I belong to the first category of historians—who do not actively contribute to the development of international (or European) law and apparently, according to Orford, should ignore her book[34]—this is hard to do, due to the serious misunderstandings about historical writing and methodology that underpin her argument. Before addressing these crucial flaws in the book, let me first make clear that I do not question Orford's impressive analysis of contemporary debate and practice in the field of international law. Her realist claim that law is "made," not "found," certainly corresponds to my own research in the legal history of European integration—although with the caveat that the process of law-making in most cases was constrained by both written law and informal disciplinary methods and practices of lawyers.[35] Likewise, I fully accept that lawyers and legal scholars, both when practicing law and contributing to academic scholarship, use examples from the past—just like they may use philosophical arguments or social science research to make their case or construct a convincing empirical basis for their normative choices.

What I want to address is therefore, firstly, what role context and empirical methodology play in the discipline of history, to dispel some of the misunderstandings promoted by Orford. Secondly, I will introduce the genre called the "use of history" from identity and memory studies to help categorize the way lawyers and legal scholars use the past in their "making" of international law. By differentiating between the different ways the two disciplines approach the past, I believe it is possible to shift the ground of the debate over law and history and to avoid some of the heated arguments that have characterized the interdisciplinary exchange in the last decade. This does not imply, however, as I argue in the final section of the article, that legal scholars working directly with the legal history of international law can safely ignore historical methodology.

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31. *Id.* at 285.

32. *See id.* at 293–94 (explaining that lawyers actively use historical account to persuade their audience or in support of their legal arguments).

33. *See id.* at 10 (finding that use of empiricist histories of international law has repressed creativity among lawyers and historians creating international law).

34. *See id.* at 11 (outlining category of historians for whom this book was not written).

35. *See* Morten Rasmussen, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, 12 INT'L J. CONST. L. 136 (Jan. 2014) (showing how complex process of law "making" vacillates between written law and creative innovation in seminal case consult); *see also* Morten Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law: Some Reflections on How to Study the History of European Law*, *in* EUROPE: THE NEW LEGAL REALISM 639, 652 (Henning Koch et al. eds., 2010) (discussing constructed nature of European law).

I. WHAT IS HISTORY? APPROACH AND METHODOLOGY

The notion of a positivist "empiricist history" is a strawman created by Orford, which bears little resemblance to the way historians work today.[36] By explaining in some detail key features of how historians actually do their research, this section rejects Orford's central claim that historical writing is as subjective and political as when lawyers and legal scholars engage in "making" international law.[37] Instead, it argues that it belongs to an altogether different genre of scientific inquiry.

Taking a closer look at Orford's treatment of what she calls "empiricist history,"[38] a major flaw quickly becomes apparent. Her focus is almost exclusively on a subfield of the discipline of history called intellectual history, in which the Cambridge school led by Quentin Skinner, and the linguistic methodologies associated with this school, as well as Reinhart Koselleck's conceptual history play a prominent role.[39] The reason for this narrow focus is probably best explained by the close affinity between the work of Marrti Koskenniemi and his school of intellectual legal history and the Cambridge school. However, as a result, Orford overlooks the emergence of a new type of legal history of international law in the last two decades written by historians, who do not pursue intellectual history but have a background in the much broader fields of international, social, economic, and political history.[40]

The work of Lauren Benton, for example, on the ways the legal practises of the British empire shaped international law in the nineteenth century, has been cited as spearheading this new group of historians who in the words of Andrew Fitzmaurice apply "full scale contextualism" in their work.[41] However, the movement is actually much broader than realized by most international law scholars and comes from all directions. This new legal history approaches international (or European) law as a social and professional practice that needs to be studied in a much broader political, economic, social, and institutional context than is typically done in intellectual history. Bringing with them the toolbox of political, social, and economic history—

36. This is also remarked upon in a new review article of the Orford book: Alonso Guermendi, *Borderline History at Borderline Jurisprudence: Some Thoughts on Anne Orford's International Law & the Politics of History (Part 1)*, OPINIO JURIS (Oct. 21, 2021), http://opiniojuris.org/2021/10/21/borderline-history-at-borderline-jurisprudence-some-thoughts-on-anne-orfords-international-law-the-politics-of-history-part-i/.

37. *See* ORFORD, *supra* note 1, at 16 (stating that historical scholarship of international law is as partisan and political as international law produced by lawyers).

38. *See id.* at 9–10 (stating that empiricist history is described as a method for correctly and professionally interpreting historical text and challenging basis of that suggestion).

39. For an example, see QUENTIN SKINNER, VISIONS OF POLITICS VOLUME I: REGARDING METHOD (2002). For an excellent biography on Reinhart Koselleck, see NIKLAS OLSEN, HISTORY IN THE PLURAL: AN INTRODUCTION TO THE WORK OF REINHART KOSELLECK (2012).

40. This has also recently been argued in Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics*, 21 J. HIST. INT'L L. 7 (2019).

41. Andrew Fitzmaurice, *Context in the History of International Law*, 20 J. HIST. INT'L L. 5, 16 (2018); *see* BENTON & FORD, *supra* note 28 (describing how international law emerged as new field in nineteenth century); *see also* LAUREN BENTON, A SEARCH FOR SOVEREIGNTY LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900 (2010) (combining study of geography, legal politics, and international law).

arguably the mainstream approach and methodology of the discipline of history—these historians build their narratives on systematic archival studies and contextualisation. The publications have been pathbreaking in several ways. A group of European integration historians have established a whole new field of legal history dealing with European integration.[42] Other historians have redefined and enlarged the scope of the legal history of human rights.[43] Also, the legal history of international law of the first half of the twentieth century has recently seen the publication of a number of new books and articles that go significantly beyond intellectual history and place international law in a much broader institutional, political and societal context.[44] All these publications have been setting a new

42. For a selective sample of this new historiography, see generally Bill Davies & Morten Rasmussen, *Towards a New History of European Law*, 21 CONTEMP. EUR. HIST. 305 (Jun. 13, 2012); BILL DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW 1949-1979 (2012); Bill Davies & Morten Rasmussen, *From International Law to a European Rechtgemeinschaft: Towards a New History of European Law, 1950-1979*, *in* THE INSTITUTIONS AND DYNAMICS OF THE EUROPEAN COMMUNITY 1973-83, at 97, 97–130 (Johnny Laursen ed., 2014); Anne Boerger & Morten Rasmussen, *Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993*, 10 EUR. CONST. L. REV. 199 (2014); Anne Boerger, *At the Cradle of Legal Scholarship on the European Union: The Life and Early Work of Eric Stein* 62 AM. J. COMPAR. L., 859 (2014); Morten Rasmussen, *How to Enforce European Law? A New History of the Battle over the Direct Effect of Directives, 1958-1987,* 23 EUR. L. J. 290 (2017); Rebekka Byberg, *The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe*, 18 GERMAN L. J. 6, 1531 (2017); Vera Fritz, Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972), (2018); Morten Rasmussen & Dorte Sindbjerg Martinsen, *EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies*, 25 EUR. L.J. 251 (Feb. 22, 2019); Morten Rasmussen, *Agents of Constitutionalism: The Quest for a Constitutional Breakthrough in European Law, 1945-1964*, *in* CRAFTING THE INTERNATIONAL ORDER: PRACTITIONERS AND PRACTICES OF INTERNATIONAL LAW SINCE C. 1800, at 249, 249–75 (Marcus M. Payk & Kim Christian Priemel eds., 2021).

43. *See generally* SARAH B. SNYDER, HUMAN RIGHTS ACTIVISM AND THE END OF THE COLD WAR, A TRANSNATIONAL HISTORY OF THE HELSINKI NETWORK (2011); STEVEN L. B. JENSEN, THE MAKING OF INTERNATIONAL HUMAN RIGHTS, THE 1960S, DECOLONIZATION AND THE RECONSTRUCTION OF GLOBAL VALUES (2016); KIM CHRISTIAN PRIEMEL, THE BETRAYAL: THE NUREMBERG TRIALS AND GERMAN DIVERGENCE (2016); MARCO DURANTI, THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION (2017); JAN ECKEL, THE AMBIVALENCE OF GOOD, HUMAN RIGHTS IN INTERNATIONAL POLITICS SINCE THE 1940S (Rachel Ward trans., 2019); RASMUS SINDING SØNDERGAARD, REAGAN, CONGRESS, AND HUMAN RIGHTS (Stefan-Ludwig Hoffmann & Samuel Moyn eds., 2020); Dzovinar Kévonian, La danse du pendule, les juristes et l'internationalisation des droits de l'homme, 1920-1939 (2021).

44. For these key works, see generally LORNA LLOYD, PEACE THROUGH LAW: BRITAIN AND THE INTERNATIONAL COURT IN THE 1920S (1997); MARK LEWIS, THE BIRTH OF THE NEW JUSTICE: THE INTERNALIZATION OF CRIME AND PUNISHMENT, 1919-1950 (2014); Natasha Wheatley, *New Subjects in International Law and Order*, *in* INTERNATIONALISMS: A TWENTIETH-CENTURY HISTORY 265 (Glenda Sluga & Patricia Clavin eds., 2017); MARCUS M. PAYK, FRIEDEN DURCH RECHT?: DER AUFSTIEG DES MODERNEN VÖLKERRECHTS UND DER FRIEDENSSCHLUSS NACH DEM ERSTEN WELTKRIEG (2018); MAARTJE ABBENHUIS, THE HAGUE CONFERENCES AND INTERNATIONAL POLITICS, 1898-1915 (2019); Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AM. J. INT'L L. 575 (2017); PETER BECKER ET AL., REMAKING CENTRAL EUROPE: THE LEAGUE OF NATIONS AND THE FORMER HAPSBURG LANDS (Peter Becker & Natasha Wheatley eds., 2020); Karin Van Leeuwen

standard for empirical work on the legal history of international law, emphasising in particular the importance of systematic archival work. Although this new body of legal history shares a focus on context and archival documentation, it is also relatively diverse. It nevertheless shares with the broader fields of social, economic, and political history some core features in terms of approach and methodology. Below I will attempt to explain these, conscious that it will not cover all nuances and almost certainly underestimate the diversity at play.[45]

At the very core of social, economic, and political history is a focus on primary sources, most often found through systematic archival research. Since we cannot go back to the past, what we have in order to reconstruct history are relics or primary sources (typically in the shape of documents, artifacts, or memories) that have been preserved by institutions, associations, and individual actors. This is the basis for any kind of analysis of the past, and it requires that the historian allows for the fact that most sources from the past do not survive, and thus there are important events and processes that we cannot easily describe.[46] When exploring a topic historians will go to great length to identify the best possible primary sources to reconstruct and explain it. This is what is meant when historians talk about *systematic* archival research, a research strategy that is not satisfied with using one or two archives, but systematically makes sure that all relevant archives are explored ranging from institutional archives (states and international organisations), transnational archives (transnational associations, networks, etc.), and private papers (which can often be very difficult to identify but are often exceptionally revealing).[47] It is this focus on producing new empirical knowledge about the objects of study that is behind the seemingly arrogant claims by historians (in the eyes of lawyers and social scientists) that a historical analysis presents a more accurate or "new" history of a topic.[48] Most historians are content with the claim that this offers a different perspective, that calls into question some of the established interpretations in historiography. However, is this focus on empirical research simply untenable positivism, as Orford claims,[49] that is used to disguise that historical analysis is just as subjective and political as the creative process of "lawmaking" by lawyers? This I contend is a fundamental misunderstanding of how history is practiced today and what historical methodology offers.

& Morten Rasmussen, *A Political and Legal History of the Advisory Committee of Jurists and the Foundation of the Permanent Court of International Justice*, *in* TRANSFORMING THE POLITICS OF INTERNATIONAL LAW: THE ADVISORY COMMITTEE OF JURISTS AND THE FORMATION OF THE WORLD COURT IN THE LEAGUE OF NATIONS 69 (P. Sean Morris ed., 2022).

45. For a wonderful guide to historical methodology situated in modern science, see JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST (2002). For what remain the classics, see MARC BLOCH, THE HISTORIAN'S CRAFT (Peter Putnam trans., Manchester Univ. Press, 1953) and EDWARD HALLET CARR, WHAT IS HISTORY? (Penguin Books 1987) (1964).

46. GADDIS, *supra* note 45, at 36.

47. *See* BLOCH, *supra* note 45, at 68 (explaining that historians work with diverse types of evidence to piece together a more accurate picture of the past).

48. *See* ORFORD, *supra* note 1, at 6 (explaining that there is a hermeneutic of suspicion at play between legal and history fields, where lawyers are seen as partisan but empiricist historians are seen as objective and scientific).

49. *See id.* at 255.

Across the discipline of history, the reconstruction of the basic empirical features of an object of study is considered a central task. This process of reconstruction typically involves an empirical exploration of the worldview and thinking of key historical actors, a fine-grained mapping of their agency and relations with other actors, the reconstruction of key events, and the identification and documentation of central causal processes. The historical truth is unreachable due to its infinite complexity and because historians, when they pick which aspects to focus on, as a result, co-create the object of study.[50] Nevertheless, the historian still attempts to create the best fit or the most plausible empirical explanation based on the relics or primary sources available from the object of study. If we can never reproduce the full picture, an accurate sketch is still useful to our understanding of both the past and the present.[51] Historical methodology is thus not unlike the court room where the prosecutor needs to provide enough evidence to get the accused convicted. Similarly, within history, it is quite often possible to establish historical facts, reconstruct events, identify causal links—or establish the meaning(s) of treaty clauses or law—with such high plausibility that it makes little sense to question the empirical conclusions. This does not mean that these conclusions cannot later be changed, even if it may in some cases be highly unlikely. Perhaps new evidence emerges that makes the implausible plausible. Or a new method can be used—such as DNA analysis in criminal law—that can override other types of evidence. In this sense historical empirical analysis is always provisional. However, what is important to note here is that provisional is not to deny that some empirical explanations fit the evidence better than others. To produce the best fit or the most plausible explanation

50. *See* GADDIS, *supra* note 45, at 26–29 (explaining that time and space are infinitely divisible units that force historians to choose a mode of representation for the unit that will not capture the fullest—or certain—detail).

51. Source criticism is at the heart of historical methodology. SEBASTIAN OLDEN-JØRGENSEN, TIL KILDERNE! INTRODUKTION TIL HISTORISK KILDEKRITIK 9–14 (2001). Simply put it deals with how to identify and use the best possible written sources that can help the historian to analyze a particular research question. *Id.* The validity of sources is a fundamental question that sometimes is central to the analysis. *Id.* at 9, 44. Can we trust that the documentation found is original and not a falsification? *Id.* Reliability is a second important question. *Id.* In the British tradition a distinction is made between primary sources and secondary sources. *Id.* at 74. Primary sources are first-hand evidence or accounts of a historical topic that are more reliable when reconstructing a historical fact, whereas secondary sources typically are scholarly work that deal with the same topic. *Id.* at 74–76. The Scandinavian tradition of source criticism has introduced a very useful distinction when working with primary sources that also concerns the reliability of sources. *Id.* at 44, 76. Depending on what topic you study the relevant primary sources can be divided either into "relics" or "narratives." *Id.* "Relics" are typically the paper trail of a particular historical event or process; the administrative documentation of an institutional process or the minutes of meetings that are more reliable when attempting to get an accurate understanding of what happened. *Id.* at 44–47, 74–77. "Narrative" primary sources are for example diaries or letters of involved actors that offer their own account of what happened either simultaneously with or in the case of memoirs a long time after the event. *Id.* at 45, 67–77. These are considered less reliable. *Id.* at 71. When working with the past most topics, but not all, require the use of public or private archives to find the best possible primary evidence. *Id.* at 74–77. This is most certainly the case with legal history because the social processes that produced law normally took place behind closed doors. *Id.* The writing of legal history consequently must rely heavily on archival research in order to capture the full picture. *Id.*

is thus at the very heart of the historical discipline and in this sense the relics temper the subjectivity of the historian. This separates the discipline of history fundamentally from literature—for example, where authors can use relics from the past to spark their imagination and write fiction.[52] Or from the lawyer and legal scholar, who use relics, not as sources on the basis of which to reconstruct the past, but as selective pieces of evidence to bolster a legal argument.

The focus on empirical research does not mean that the writing of history is somehow severed from the present. At any point during the research process will the temporal and spatial positionality of the historian play into the mix. Whether it is the choice of topic, the approach chosen, or the archives selected, all these decisions are partly shaped by the positionality of the researchers.[53] This subjectivity becomes even more evident when the historians go from the phase of empirical reconstructing to constructing a historical narrative, which typically is the final product presented in articles and books. Essentially narratives are complex representations of reality that have gained increasing credence in the social sciences in recent years.[54] They constitute a complex simulation of the development of the object of study over time. But while the theoretical and historiographical toolbox that historians bring to the table, and which depends on their positionality, obviously shape how the empirical research is interpreted, the need to develop a narrative that fits the empirical evidence also limits the way the story can be told.

Given the positionality of the legal historian and the possible inspiration from contemporary debates on international law, does this imply that a historical narrative is merely a subjective analysis as Orford would claim? Here the answer is both yes and no. There is no doubt that the legal historian will be influenced by their contemporary positionality and probably also from contemporary debates about how international law should be understood. However, at the same time historians do not first define their object of study and then approach their empirical work from that subjective starting point. Central to historical investigations is the so-called hermeneutic circle through which historians test their theories or preconceptions against the empirical evidence they identify and then gradually make sure that their interpretation corresponds to the empirical evidence in the end.[55] This implies that historians will typically avoid defining the precise features of their object of study before they have worked a long time with the primary sources, and they will also

52. *See* GADDIS, *supra* note 45, at 42 (observing distinction that fiction writers may create and change their characters, whereas historians must represent an actual historical person and although they have freedom to represent that person in different ways they may not actually change that person).

53. For an introductory discussion of the multidimensional positionality of historians in a global history perspective, see SEBASTIAN CONRAD, WHAT IS HISTORY? 162–85 (2016).

54. On the scientific qualities of historical narratives, see the illuminating book by Gaddis: GADDIS, *supra* note 45. For an in-depth social science and philosophical analysis of the role of empirical narratives in the social sciences, see BENT FLYVBJERG, RATIONALITY AND POWER: DEMOCRACY IN PRACTICE (Steven Sampson trans., 1998).

55. *See* Dimiter Ginev, *Scientific Progress and the Hermeneutic Circle*, 19 STUD. IN HIST. AND PHIL. OF SCI. 391 (1988) (explaining that the hermeneutic circle arises from interpreting complex wholes as a collection of parts and espying interrelations between the parts to interpret a new whole).

apply a relatively broad approach to a new topic to avoid missing key features of the latter that may be crucial but could be overlooked due to the contemporary positionality of the historian. The use of primary sources and historical methodology thus implies that historical analysis is not fully subjective, even though it is also shaped by the historians' positionality and excellence (or not), and it most certainly means that historical writing is not systematically political.

In addition to the hermeneutics of historical analysis, historians have also over time developed a set of methodological tools to improve the correspondence of their narrative and interpretations with the empirical analysis, focusing in particular on how to mitigate the effects of their positionality and subjectivity. Firstly, it is crucial that all sources are cited so other historians and researchers can test whether the empirical reconstruction is reproducible and corresponds to the narrative and interpretation.[56] Secondly, historians attempt to avoid the most glaring features of presentism such as anachronisms and analogies imposed across time. Thirdly, they work hard to ensure that the historical actors they deal with are not judged on basis of contemporary norms, but instead treated as part of the past society in which they lived with a focus on understanding their motives and values. Finally, historians err on the side of complexity in order for their narratives to accurately correspond to their empirical analysis, rather than simplifying or generalising the historical experience.[57] The positionality of historians still to some degree colors their narratives, but the systematic attempt to avoid normative or political judgments, stands in stark contrast to lawyers and legal scholars, who selectively use examples from the past for present purposes.

Historical research is part of a long scientific tradition that obviously does not represent the last word on how to study the past. Historians and scholars in other disciplines continue to push the boundaries in developing new theory and methodologies of how to study the past. A good example is the recent work on the concept of time in historical analysis.[58] However, all in all, the discipline delivers a body of research that is marked by a high degree of careful empirical studies—the production of new empirical insights as sources are released from relevant archives—as well as multicausal explanations and interpretations that are placed in time and can be used by other disciplines to improve the understanding of how past developments and trajectories form the present. Historical research as a result informs contemporary public debate in a multitude of ways and in this sense all history is potentially political. Not because, as I hope to have made clear above, that historical research is subjective and political all the way through, as claimed by Orford, but simply because historical research often confirms contemporary understandings or brings to light new insights that impact political debates about how to both organise the present and confront the future.

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56. On the dangers of producing an account that is indifferent to context and the verifiability of politician discourse, see Fitzmaurice, *supra* note 41.

57. On the role of complexity, see GADDIS, *supra* note 45, at 71–89.

58. To reflect on the use of time is an ongoing exercise in the discipline. For a recent example, see DAN EDELSTEIN ET AL., POWER AND TIME: TEMPORALITIES IN CONFLICT AND THE MAKING OF HISTORY (Dan Edelstein, Stefanos Geroulanos & Natasha Wheatley eds., 2020).

To conclude this section, history delivers complex narratives about the nature of the past and the historical processes that impact the contemporary world. In the field of legal history of international law, contextual and archive-based history brings about new empirical understandings of the making of international law. It delivers new insights into the origins of international law, treaties, legal norms, and techniques. Occasionally, and depending on the quality of the primary sources, it can even make highly plausible arguments about the original meaning(s) of treaty articles, legal norms, and court judgments. It can explore the history of international institutions in new rich detail, including the constellations of state interests and motives that lay behind their establishment. So, it is simply wrong when Orford claims that careful historical analysis makes no difference to the analysis of all these questions by lawyers who are engaged in the "making" of international law. Instead, contextual history arguably offers lawyers and legal scholars an important font of knowledge about the legal discipline and the history of international law that can only increase their own reflexivity when "making" international law.

II. THE USE OF HISTORY IN IDENTITY AND MEMORY STUDIES

When compared to the way mainstream history is produced, it becomes clear that the use of the past by lawyers and legal scholars when "making" international law today is fundamentally different.[59] To understand the nature of this difference not only helps us untangle the interdisciplinary battle that has raged over the last decades between lawyers and contextual historians; it also makes it easier to rethink what approach and methodology is best suited to write legal history.

The difference between law and history is best understood with reference to the field of identity and memory studies or more precisely the subfield focused on the different "uses of history" ("historiebrug/historibruk" in Scandinavian) existing in society.[60] Research on the "use of history" has obtained a prominent position in Scandinavia in recent decades.[61] Danish historian, Niels Kayser Nielsen, has defined it in the following way: "[T]he use of history is a concept that covers a combination of the selection, emphasis and omission of persons, events and epochs from the total knowledge about history with the purpose to further certain interests of an often

59. This has already been hinted at in Fitzmaurice, *supra* note 41, at 12.

60. The sub-field focusing on the "use of history" that emerged out of studies on memory and identity in the 1990s has primarily been developed by historians, and is closely related to studies of memory, dating back to the French sociologist Maurice Halbwachs, MAURICE HALBWACHS, LE MÉMOIRE COLLECTIVE (1950), and continued in the famous work: BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983). The terminology of "uses/user of the past" was first fully developed in the pathbreaking work by Roy Rosenzweig and David Thelen in a research project from 1989 to 1998 published as ROY ROSENZWEIG & DAVID THELEN, THE PRESENCE OF THE PAST: POPULAR USES OF HISTORY IN AMERICAN LIFE (1998). For an introduction to the field, see Anette Warring, *Erindring og historiebrug: Introduktion til et forskningsfelt*, 2(1) TEMP – TIDSSKRIFT FOR HISTORIE 5 (2011).

61. *See* Rolf Torstendahl, *Scandinavian Historical Writing*, *in* THE OXFORD HISTORY OF HISTORICAL WRITING: VOLUME 5: HISTORICAL WRITING SINCE 1945, at 311, 329 (Axel Schneider & Daniel Woolf eds., 2011) ("In Scandinavia, as in many parts of the world, the history of historiography has thus become a field of research of increasing importance.").

political, informative, entertaining or identity character."[62] Only a few scholars have until now engaged in defining typologies of the "use of history," however, they tend to differentiate between the scientific history produced by historians and different types of "use of history." The latter range from the existential use of history by all humans to produce memory, the use of history for commercial reasons, the use of history to construct identities, the use of history for educational purposes, which is often intertwined with the latter use, namely the use of history for political or ideological reasons.[63] Danish historian Bernard Erik Jensen comes closer to a definition that is helpful in this context.[64] He argues in favor of a category where the "use of history" is used to clarify or to legitimate or delegitimate principles, interests, and values.[65] This covers quite accurately the way lawyers and legal scholars "use history" when making international law; however, it obviously does not go deeper into the precise techniques used by lawyers and legal scholars when engaging with the past.[66]

This deeper exploration is done in a recent article by Natasha Wheatly, who analyses the techniques that law uses to escape context and time, thereby producing a normative system that exists beyond the social world.[67] To achieve this result, it is necessary for lawyers and legal scholars to make "meaning move across time," according to Anne Orford, or in the vocabulary of Koskenniemi create an "intermingling" of past and present.[68] Since the purpose of the exercise is to escape context and time, it is not so odd that historians have criticised the way lawyers and legal scholars use the past to "make" law because it essentially moves in the exact opposite direction of the discipline of history that is focused on situating history as precisely as possible in context and time in order for their representation. Likewise, it is easier to understand the instinctive reaction of dread that some lawyers and legal scholars feel when confronted with the methodological requirements of contextual history, because they would fundamentally undermine law making. Historians, suggests Wheatley, "are free from the imperative to endorse law's capacity to escape context and shed the all-too-human conditions of its production—free from the imperative to naturalise its time travel as real."[69] Thus, an important task for legal historians is to historicize how lawyers and legal scholars have constructed law beyond context and time in order to better come to grips with the world view,

62. NIELS KAYSER NIELSEN,HISTORIENS FORVANDLINGER – historiebrug fra monumenter til oplevelsesøkonomi 34 (2010).

63. For an example of this typology, see Klas-Göran Karlsson, *Historiedidaktik: begrepp, teori och analys*, *in* HISTORIEN ÄR NU 21–66 (Klas-Göran Karlsson & Ulf Zander eds., 2004).

64. *See* BERNARD ERIC JENSEN, HISTORIE–LIVSVERDEN OG FAG 66–70 (2003) (exploring the definition of "use of history").

65. *Id.*

66. For an interesting analysis of the role of history in international law by an insider, see Martti Koskenniemi, *The Past According to International Law: A Practice of History and Histories of a Practice*, *in* HISTORY, POLITICS, AND LAW: THINKING THROUGH INTERNATIONAL LAW 49 (Annabel Brett, Megan Donaldson & Martti Koskenniemi eds., 2021).

67. *See generally* Wheatley, *supra* note 8, at 311–30 (discussing techniques in which lawyers use history in their practice).

68. *Id.* at 312.

69. *Id.* at 327–28.

ideology, and thinking of the legal protagonist analysed.[70]

But what are the implications for lawyers and legal scholars if their disciplinary work with the past can be categorized as a particular "use of history" to clarify and legitimate principles, interests, and values? To Orford this might not make a big difference since her focus is to preserve the aura of law, which she considers crucial to preserve the progressive nature of international law and for reasons of legitimation.[71] After all, the main thrust of her book was to defend her practice by claiming that "empiricist history" was simply as subjective and political as law "making."[72] To other lawyers and legal scholars, it may instead cause pause and force a rethinking about the limitations, distortions and mythmaking that is involved in a selective and ideological use of the past for present purposes. How can lawyers and legal scholars be sure which side they are on normatively, if they engage in mythmaking or the manipulation of the past to create law?[73] History has indeed clearly demonstrated that courts, lawyers, and legal techniques can also serve totalitarian regimes.[74] The problem with the "use of history" for present purposes is that it does not in itself provide a check on the perpetuation of a particular ideological position or the creation of persistent blind spots.

So perhaps the way forward for lawyers and legal scholars is to combine the "use of history" when they "make" international law with an engagement with the broader contextual historiography relevant to the questions dealt with. In this manner, lawyers and legal scholars can make significant gains in reflexivity, allowing them to move beyond the worst blind spots and biases inherent in their discipline or their positionality in the contemporary world. Contextual history should thus serve as a key tool to understand both the past and the way it has shaped the present, just as a good understanding of the social sciences is necessary to obtain a solid understanding of contemporary society and philosophical knowledge can be used to inform normative choices. Contextual history is thus not a threat, but a gift, to lawyers who want to improve the international law of the future.

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70. Here, legal sociology can serve as an important theoretical inspiration for how to approach the double move of censorship of law that allows it to claim universality and separation from politics. For an example of this approach, see Julie Bailleux, *Comment l'Europe vint au droit: Le premier congrés international d'études de la CECA (Milan-Stresa 1957)*, 60 REVUE FRANCAISE DE SCIENCE POLITIQUE 295 (2010).

71. *See* ORFORD, *supra* note 1, at 287–89 (discussing idea that law is social product rather than set of rules handed down over time).

72. *See id.* at 68 (discussing how politics inevitably shapes historical accounts of historians in China).

73. *See* Fitzmaurice, *supra* note 41, at 13 (discussing fractured nature of Western political thought).

74. For an example of this relationship to totalitarian regimes, see MICHAEL STOLLEIS ET AL., DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS TRADITIONS (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

III. BEYOND POLARIZATION: HOW TO DEVELOP A FRUITFUL INTERDISCIPLINARY DIALOGUE IN THE FIELD OF LEGAL HISTORY OF INTERNATIONAL LAW

For more than a decade, legal scholars and historians have engaged in a heated debate about the relationship between law and history to which Anne Orford's new book is the latest contribution. This article has shown why this debate has often deteriorated into a polarized shouting contest. Essentially the way lawyers and legal scholars use the past when "making" international law, in order to detach law as a normative system from context and time, is the exact opposite of the discipline of history that focuses on developing representations of history that is as precise as possible when it comes to context and time. No wonder that some lawyers and legal scholars have felt an existential threat when historians have criticized their use of the past, or that historians have felt genuinely shocked by the seeming disregard for the most basic methodologies of their own discipline.

By establishing that the way lawyers and legal scholars engage with the past should be categorized as a genre within the "use of history" that is fundamentally different from the discipline of history, I have attempted to shift the ground of the debate. This has consequences to both legal scholars and historians. Firstly, it does not mean that lawyers and legal scholars cannot use the past to "make" international law. But it implies that to avoid outright historical mythmaking when creating law, lawyers and legal scholars need to temper their creativity through a solid knowledge of the historiography that deals with the history they exploit. Secondly, by understanding that the way lawyers and legal scholars engage with the past when "making" international law is fundamentally different from the discipline of history, historians can focus their critique not on the fundamental methodology and purpose of legal scholarship, but instead on the results. Is the legal argument based on historical mythmaking or does it manage to reflect some degree of understanding of the historical context that it involves? Finally, the relationship between the two disciplines in the field of legal history also needs to be reconsidered.

In order to do this, let me first try to clarify the disciplinary relationships of the field. At the most fundamental level, the field of legal history of international law belongs equally to the disciplines of history and law. Neither historians nor legal scholars can be said to be outsiders. The legal history of international law is, after all, an integral part of the legal discipline of international law, just like it forms a natural part of the broader international history that historians study. What does this mean for interdisciplinary dialogue? In my view, it is crucial that historians carefully listen to and learn from scholars of international law to improve their understanding of the complexities of international law from the technical and legal details to the broader understanding of the legal discipline and broader normative and ideological worldviews that it entertains. In my own experience, as a legal historian who has never received a legal education, working with the history of European integration law required a strong interdisciplinary dialogue with EU legal scholars to improve my technical and legal understanding of European law without which my publications would have seriously suffered.

However, the interdisciplinary learning process should not only go in one direction. Legal scholars have to systematically differentiate between whether they

engage in the "use of law" or whether they attempt to produce as accurate a representation of the past as possible. If they do the former, they are in the ballgame of directly contributing to the "making" of international law. If they do the latter the discipline of history offers multiple approaches, methodologies, and techniques of how to study the past. Legal scholars would therefore do well to learn from historical methodology when they work in the field of legal history. As contextualist historians have moved into the field of the legal history of international law, the standards of research have also changed in terms of methodology and the demands for archival work. Arguably, therefore, legal scholars who today enter the field cannot escape the need to explore and consult archival resources that relate to their object of study, to have a good grip of relevant context as well as historiography, if they want to produce high quality research.