

Theorising the Turn to History in International Law

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‘The historical trait should not be founded on a philosophy of history, but dismantled, beginning with the things it produced.’¹

It is a commonplace that the past two decades have been marked by a resurgence of interest in the history of international law.² Whether or not this may warrant the grandiose title of a ‘turn to history’, it is a departure which might prompt a certain level of theoretical reflection: why this sudden interest in the historical at the expense of other forms of analytical or critical endeavours? What might the causes be? What theoretical or intellectual frames have opened up, that were not otherwise available? How might it relate to the themes, interests, or pre-occupations of mainstream international legal thought up until that time? Whilst these are undoubtedly interesting and important questions, they pose, in turn, two more general questions as to the relationship between theory and history in international legal discourse. One of these, of course, concerns the theoretical and methodological conditions underpinning the representation of something as the past of international law: what is the relationship between the text and the past? How might one understand the act of ‘representation’? What kind of international law is being represented? If such questions are concerned with placing ‘history’ within the ambit of theory, it is also clear that one must attend to the historical (and spatial!) specificity of the theoretical and methodological analytics through which that history is enunciated or disclosed.³ What serves as

¹ M Foucault ‘Nietzsche, Genealogy, History’ in P Rabinow (ed) *The Foucault Reader* (1984) 76–100 at 93

² See e.g. M Koskenniemi ‘Why History of International Law Today’ (2004) 4 *Rechtsgeschichte* at 61; A Kemmerer ‘Turning Aside: On International Law and its History’ in R Miller and R Bratspies (eds) *Progress in International Law* (2008) at 71; T Skouteris ‘Engaging History in International Law’ in J Beneyto and D Kennedy (eds) *New Approaches to International Law* (T.M.C. Asser press The Hague 2012) 99–122 at 103; G Galindo ‘Martti Koskenniemi and the Historiographical Turn in International Law’ (2005) 16 *European Journal of International Law* at 539

³ M De Certeau *The Writing of History* (Columbia University Press New York 1988) at 20

‘history’ at any one moment—including its boundaries and conditions — also has its historical place.

With such thoughts in mind, I want to try to do two things in this essay. In the first place, I intend to look back beyond the immediate causes and explanations of the recent turn to history, and focus instead upon their more general conditions of possibility: what was required in order for the productive representation of the past of international law as ‘history’ to be a meaningful activity? This might appear a somewhat abstruse question were it not for the fact that one may specify with considerable precision the moment at which the law of nations was to acquire an historical hue, requiring its discourse and practice to be organized in temporal terms, and its past ‘found’ or ‘uncovered’. The significance of this, I argue, is not merely confined to an acknowledgement that publicists and jurists suddenly became interested in the past in a way that wasn’t apparent before, but that this historical consciousness fundamentally re-shaped the conceptualization of what was to become known as ‘international law’, and placed at centre-stage the problem of historical method. In the second place, and following from this, I want to suggest that not only did the emergence of this historical consciousness have specifiable theoretical and practical dimensions, but that it would become, as Foucault puts it, a ‘privileged and dangerous’ site, both providing theoretical sustenance to the discipline, and a space for critical engagement. I will conclude with certain reflections upon problems of method associated with contemporary critical international legal history.

1. Turning to History

1795. Robert Plummer Ward, a British author and politician publishes, with encouragement from Lord Stowell⁴, what he proclaims to be the first history of the law of nations ever written: *An Enquiry into the Foundation and History of the*

⁴ Then a judge at the consistory court and advocate-general, later additionally appointed judge at the high court of admiralty.

Law of Nations.⁵ His claim may be doubted, given the earlier accounts provided by de Martens⁶ and Ompteda in 1785⁷ and, indeed, of Moser in 1764.⁸ But there is little doubt that there was something inaugural about this late 18th Century moment in the sense that from that time onwards all international lawyers were compelled to conceive of their subject matter as ‘being in time’ and as possessed of ‘a history’. Not only would the historical account become an important literary genre in the 19th Century (from Wheaton⁹ through to Nys¹⁰) but every general textbook on the subject of international law would, almost by compulsion, begin with an historical account of one form or another. And to a large extent, this remains the model to this day.

Ward’s account itself is revealing enough in terms of the consequences of this turn to history. He makes clear in the preface to the book, that it had not been his original intention to write a book on the history of the law of nations, but rather a treatise on diplomatic law – an account of sovereignty and of the rights and privileges of ambassadors.¹¹ Having collected the relevant materials, he tells us, he was then prompted to ask himself as to the conditions ‘under which we conceive ourselves bound to obey a law, *independent* of those resources which the law itself provides for its own enforcement’.¹² And at this point, the limits of his original project soon became clear. The received answer to this question, as he understood it, was to be found in the Law of Nature, the content of which was to be found in the universal injunctions of ‘heart and natural conscience’. Yet, to him, this was unsatisfactory:

⁵ R Ward *An Enquiry into the Foundation and History of the Law of Nations* (University of Michigan Library Michigan 1795)

⁶ GF de Martens *Summary of the Law of Nations* (W Cobbet trans)(1795)

⁷ D Ompteda *Literatur des gesamtentatürlichen und positive Völkerrechts* (Scientia Verlag 1785)

⁸ F Moser *Beyträge zu dem Staats und Völker-Recht und der Geschichte* (1764)

⁹ H Wheaton *History of the Law of Nations in Europe and America* (1842)

¹⁰ E Nys *Les origines du droit international* (1893)

¹¹ R Ward, above n. 5 Preface iii-iv

¹² *Ibid.* 5

‘[w]hen I considered how difficult it was *for the whole of mankind* to arrive at the *same* ideas of moral good, from the prejudices of education and habit, in the different stages of society in which they might be; more particularly when I recollected the great difference of opinion there was among very learned men, of the same nations and ages, and who had the same sort of education concerning the law of Nature itself; I was still more staggered in my belief that *all* the world were bound to obey the ramified and definite scheme of duties called the Law of nations.’¹³

He continued by observing that:

‘although I myself could make out the obligation of the Law of Nations as laid down in the *European Codes*, and that others of the same class of nations, and the same religion with myself, could, and were bound to do so too; yet that the law was not obligatory upon persons who had never been called upon to decide upon its ramifications; who might widely differ as to its application, and even as to its general and fundamental principles. The history of mankind confirmed to me that there was such a difference in almost all its extent; that men had the most opposite opinions of their duties towards one another, if not in the great outline and first principles of those duties, yet most certainly in the application of them; and that this was occasioned by the varieties of religion and the moral systems which governed them, operated upon also by important local circumstances which are often of such consequence in their direction.’¹⁴

It was, thus, no longer plausible for him to write a treatise on diplomatic law of universal application. Rather, his attention was drawn towards writing a ‘history of the people of Europe’, not in the ‘old’ sense as he puts it of enquiring into their general manners, customs, politics, arts, or feats of arms, but in order to discern the maxims which governed their intercourse with one another. It was to be a history, in other words, of a distinctively European law of nations.

¹³Ibid. 8-9

¹⁴Ibid. 11-12

Leaving aside, for a moment, the operative conditions under which this historicised account of the law of nations was to emerge, three general features of Ward's enquiry stand out. In the first place, it is notable that his turn to history did not arrive as a consequence of his scepticism towards the universal claims of natural right, but rather the other way round. It was, in part at least, historical enquiry that had led Ward to a position of incredulity in respect of the universal pretensions of natural law (his thesis, as he put it, was 'proved by history'¹⁵). The natural law he encountered was not in its own right alien to him (nor indeed irrelevant), but it was his experience of his own historical subjectivity that led him to the realisation that its prescriptions could not be understood as the *ratio scripta* of a singular divine being or of a universal rational consciousness. Rather they appeared to him as moral and religious injunctions specified by time and place, engendered in particular through education and moral learning. If 'being in time', however, was an existential condition that gave expression to Ward's sense of his own 'European' identity (an 'occidental prejudice' as Nietzsche put it¹⁶), it was also the mode through which that self-knowledge could be both unearthed and transmitted. The search for the 'origins' or 'foundations' of the law of nations thus would not only reveal its point of justification and temporal dispersion, but would also provide active content of what it meant (for Ward) to be a 'modern' European in the late 18th Century. History, in other words, was not only shaped by, but a means of making intelligible, the social or national contexts within which it was to be produced.

In the second place, and as a consequence of this, Ward's understanding of his own historical condition was one that had not only temporal, but also decisively spatial, connotations. If his experience of history was one that placed at its centre the place of human agency in the propagation and dissemination of religious, moral and legal insight (and which, furthermore, understood human

¹⁵ Ibid. 15

¹⁶ F Nietzsche 'On the Uses and Disadvantages of History for Life' in *Untimely Meditations* (Hollingdale trans) (1997) 57–? at 66

agency to be the active product of that process), it was one that had as its complement a spatial differentiation between the cultural field within which this was to take place (Europe), and that which demarcated the space in which different religious, moral or legal insights might hold (non-Europe). Yet the temporal and spatial articulations were related in a more fundamental way. These were not separate modes of analysis, but were analytically of the same register – the distinction between Europe and non-Europe being of the same character as the distinction between the present of Europe and its own past. As he was to put it, they are all ‘foreign countries’.

In the third place, Ward was conscious that the writing of history was ultimately an interpretive activity governed by the ‘bent of mind’ of the historian in bringing understanding to bear on what might otherwise be a ‘dry series of events’. ‘History may be compared’ he suggests, in continuing his spatial theme, ‘to a vast and diversified country, which gives very different sorts of pleasure to different travellers, or to the same traveller if he visits it at different times’.¹⁷ Thus, from the same facts, he suggests ‘one has drawn a history of man; another, of the progress of society; a third, of the effects of climate; a fourth, of military achievements; a fifth, of laws in general; a sixth, of the laws of a particular state’.¹⁸ The ‘past’ for Ward, in other words, was a vast, heterogeneous, field of experience within which one could identify a range of different historical lineaments dependent upon the field of study with which one is engaged. And his particular project was one of bringing into view a history proper to the law of nations itself, with its own temporality, chronology and moments of continuity and change. If, for Ward, this was a chronology that began in Rome and ended with Grotius¹⁹ (after which not much happened, apparently), it was a chronology conditioned by an ongoing process of disciplinary dispersion (in which ‘law’ was to be differentiated from politics, economics, sociology, anthropology and so on), the ‘truth’ of which

¹⁷RWard, above n. 5

¹⁸Ibid. 19

¹⁹Ibid. 47

would be disclosed in the identification of each discipline's own peculiar moment(s) of origin.

The historical consciousness that Ward brought to bear in his account may thus be thought to have three key features: a critique of universal metaphysics in favour of an emphasis upon the spatial and temporal conditions of social and cultural production (of law, ethics, faith etc); a belief that each of these orders of knowledge - the temporal and the spatial - were of the same analytical character; and a belief in the specificity of international legal history as a disciplinary sub-field. Yet, if these are the main methodological assumptions that might be said to inform the content of his work, they are also assumptions that have a bearing upon how that work itself might be received or understood. For, if the history he was to narrate was a history of a contingent historical consciousness, it was one that necessarily posed the same questions of itself: what made it possible for Ward to write this history? What was available to him, in terms of received forms of knowledge or understanding, that made the writing of a history of the law of nations both plausible and necessary? My contention, here, is that Ward was working in a social and intellectual environment in which 'history' as a field of knowledge and a form of social and political consciousness, was not only actively changing shape, but organising itself around new temporal categories of considerable significance.

2. The *Neuzeit* of Modernity

In the most obvious sense, the emergence of a new historical medium within the discourse of international law in the early 19th Century, may be seen to align with two, specifically European, historiographical developments. On the one side was the emergence, of a critical, source-based, methodology that had its roots in the long-standing analytics of erudition (concerned with examining the veracity of sources), diplomatics (the textual examination of documents), paleology (an analysis of antiquities), and philology (concerned with placing a text within its

historical and cultural context), and which was to become the hallmark of early 19th Century 'professional' historiography.²⁰ On the other hand, was the emergence of linear, progressive, histories, that were to mark, in particular, the stadial theories of the Scottish enlightenment²¹ and which supplanted the repetitive, cyclical, or providential Biblical chronology that characterized historiography until that time.²²

In Koselleck's terms, these historiographical developments were key characteristics of what he called the 'new time' (*Neuzeit*) of modernity that was to emerge within Europe in the 'saddle period' of the late 18th Century, the critical features of which being fourfold: 1) it was a conception in which 'history no longer takes place in time, but rather through time'; 2) in which the future was seen to be radically 'open' rather than cyclical or repetitive; 3) in which the diversity of the world could be brought together under the umbrella of a singular chronology (its 'non-simultaneous simultaneity'); and 4) in which 'the doctrine of the subjective position, of *historical perspective* gained cogency'.²³

Each of these characteristics of Koselleck's analysis had particular consequences for the construction of international legal knowledge over the ensuing century or more. In its first and most immediate sense, a consciousness of history moving through time was a development that had obvious significance for purposes of the identification and characterisation of the sources of international law. The

²⁰ See L Ranke *Theory and Practice of History* (G Iggers ed) (Routledge London 2010); J Michelet *Histoire de France* (Smith trans) (1847)

²¹ A Ferguson *An Essay on the History of Civil Society* (1763); J Millar *Historical View of the English Government* (1787). See also N de Condorcet *Sketch for a Historical Picture of the Progress of the Human Spirit* (1795).

²² See E Iggers and A *Global History of Modern Historiography* (Pearson Education limited Harlow 2008) at 22. As Foucault puts it, the classical conception of history (whether in the form of a Stoic cosmic chronology or a Christian Providentialism) was one that viewed the past as a 'vast historical stream, uniform in all its points, drawing within it in one and the same current, in one and the same fall or ascension, or cycle, all men, and with them things and animals, every living or inert being, even the unmoved aspects of the earth'. M Foucault *The Order of Things* (1989) at 401

²³R Koselleck *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford University Press Stanford 2002) 165-169

natural lawyers who came to be represented, by Ward and his successors, as representatives of the discursive 'tradition' of international law, had worked with a remarkably limited sense of temporal specificity. Grotius, for example, had argued that:

'History in relation to our subject is useful in two ways: it supplies both illustrations and judgements. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred ancient examples, Greek and Roman, to the rest. And judgements are not to be slighted, especially when they are in agreement with one another; for by such statements the existence of the law of nature, as we have said, is in a measure proved, and by no other means, in fact, is it possible to establish the law of nations.'²⁴

For Grotius, in other words, history was a flat, limitless, field of insight that imposed no order, in its own right, over the marshaling of relevant sources of authority. No sense of temporal proximity operated here as a way of estimating the value of judgment and/or illustration – if anything, authority seemed to be associated with temporal distance (towards the 'better' times of Rome) or with the repetitive reoccurrence of the same (as a means by which 'common agreement' might be discerned²⁵). If, in the ensuing century, one may note the subtle appearance of various historical and temporal themes (e.g. in Pufendorf's account of the development of natural sociability²⁶) even as late as Vattel, who wrote very self-consciously about his own 'modern' times, there is no meter, other than judgement of necessity or nature, that separates the opinions of Justinian or Cicero from those of Wolff.²⁷

²⁴H Grotius *de Jure Belli ac Pacis*(1646) (Kelsey trans) (1925) Prolegomena at 26

²⁵Ibid, Bk I, ch.i, s. xii, 1, 2.

²⁶ For a discussion see I Hont 'The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the "Four Stages" Theory' in A Pagden (ed) *The Languages of Political Theory in Early Modern Europe* (1987) at 253

²⁷E Vattel *The Law of Nations* (1805) Preface at xiv ('I have taken the greatest part of my examples from modern history, as most interesting, and to avoid repeating those which Grotius, Pufendorf, and their commentators, have accumulated').

For the jurists of the 19th Century, the formerly a-temporal field of knowledge and reason was to acquire an historical topography of its own. As de Martens was to put it in 1795, whereas Grotius had formerly relied much on the insights of the poets and orators of Rome,

‘[the] political situation of Europe is so much changed, since the fifth century in particular, the introduction of the Christian Religion, and of the hierarchical system and all its important consequences, the invention of gunpowder, the discovery of America and the passage to the East Indies, the ever-increasing taste for pomp and luxury, the jealous ambition of powerful states, the multiplication of all sorts of alliances, and the introduction of the custom of sending Ambassadors in ordinary, have had such an influence in forming our present law of nations, that, in general, it is necessary to go no further back than the middle centuries of the Christian Era. . . . It is, then, in the history of Europe (and of the states of which it is composed) during the last centuries, that we must look for the existing law of nations.’²⁸

Immediately, this was to focus attention on the customs and practices of European states, upon the ‘positive’ or ‘voluntary’ law of nations as exemplified in treaties and diplomatic exchanges, rather than upon the rationalist discourse of the natural law. But it was also to re-shape the way in which the literary tradition of natural law itself was to be received. The figures of Grotius, Pufendorf, Vattel etc. would acquire a new vital resonance: no longer would they simply be the most prominent, or wise, advocates of a universal metaphysics (and represent, in that sense, a textual, literary tradition of judgment and opinion), but would become representatives of a definitively historical tradition of thought and practice located in both time and place. As figures, they would begin to appear from behind the veil of their work –as advisors, philosophers, teachers, advocates – engaged in specified diplomatic, legal and political activity, arguing with greater

²⁸ De Martens, above n. 6 at 6

or lesser distinction as to the nature or content of the law of nations.²⁹ Their work, furthermore, would no longer be valued merely in terms of its precision, rigour, or exhaustive character, but by the extent to which it spoke to a contemporary moral or political consciousness that was aware of its own historical place. The historicist alignment of judgment and social context that informed this, was to add a new evaluative element to all the standard themes: the enslavement of enemies, claims to territory by way of papal grant, or the pursuit of ‘just wars’ were questions that could no longer be answered simply in terms of ideas of abstract justice, but in terms that recognized both the historical relativity of ethical judgment and the changing character of the social and political field within which they were to operate.

In the second place, if international law was to discover its new tradition, so also was it to discover new temporal categories. The ‘present’ would emerge, no longer being a ‘moment of profound forgetfulness’,³⁰ but as the measure by which the past was to be revealed and analysed. Categories of legal knowledge would gain or lose significance for the commentator now critically aware of their own surroundings. New questions would appear (‘recognition’, ‘intervention’, control over the use of weaponry) and old ones be displaced (e.g.: marriage, procreation, education, or filial duty). New distinctions would also emerge – between ‘international’ and ‘national’,³¹ between public and private, between law and political economy. Only now would it become plausible to talk about legal

²⁹ See e.g.: Nippold ‘Introduction’ to C Wolff *Jus Gentium Methodo Scientifica* (Drake trans) (1934) xxvii (‘If we would realize the significance of Wolff to his own age, and perhaps beyond that even to our own, we must needs pay attention above all else to the course of his life. Only from the coign of vantage which a knowledge of his biography supplies can we fully appreciate what we owe to this man or obtain the cultural and historical background upon which the scenes of the work of this philosopher are projected, and against which the figure of Wolff is thrown in extraordinary relief.’)

³⁰ M Foucault *Society Must be Defended* (Macey trans) (2003) at 228

³¹ See e.g.: H Lauterpacht introduction to C Bynkershoek *Questionem Juris Publici Duo* (Franck trans) (1930) xl-xli (‘he disdains the important demarcation between international and national public law and freely intermingles questions of real international relations with those which only concern the constitution of his own country and are ruled by national laws and customs’)

change, or evaluate arguments by reference to the contemporary needs or interests of states or societies. The future, furthermore, would also appear to be radically open: a temporal category towards which energies might be invested (towards liberty, justice, and perpetual peace and away from despotism, absolutism, and war) and around which intellectual and practical projects, programmes and policies might gain their measure and purpose.³² If the theme of ‘self-perfection’ that had run through the work of both Wolff and Vattel, had already opened out the idea of a Telos of social and political organization (the procuring of the necessities of life, of peace, security and well-being), it was in the 19th Century that identifiable nascent ‘futures’—civilization, secularism, humanitarianism and internationalism—were to become the organizing categories of international legal thought, and provide the conditions for thinking about international law in terms of its infinite progress, development or fruition.

Thirdly, if ideas of law and justice were temporally conditioned, so also, as Ward had intuited, were they spatially determined. Just as the ‘present’ of international law, was to be discovered through an analytic that evoked and distinguished past or future, so also did the ‘worldliness’ of abstract historical knowledge necessarily bring into view the diverse conditions and experiences of people in different parts of the globe.³³ As Koselleck puts it:

‘With the opening up of the world, the most different but coexisting cultural levels were brought into view spatially and, by way of synchronic comparison, were diachronically classified. World history became for the first time empirically redeemable; however, it was only interpretable to the extent that the most differentiated levels of development, decelerations and accelerations of temporal courses in various countries, social strata,

³² K Marx *Eighteenth Brumaire* (1852) (‘The social revolution of the nineteenth century cannot take its poetry from the past but only from the future’)

³³D Chakrabarty *Provincializing Europe* (2000) 7 (‘Historicism . . . posited historical time as a measure of the cultural distance (at least in institutional development) that was assumed to exist between the West and the non-West’)

classes, or areas were at the same time necessarily reduced to a common denominator.³⁴

If the subsequent 19th Century treatises organized themselves around the theme of the emergence of a European society of nation states, they typically did so by way of bringing the differentiated temporalities of a non-European world within a unified historical frame through their assimilation into European civilisation's pre-modern past. Just as the conditions of savage existence elsewhere in the world, as Locke had already intimated, provided immediate access to the historic underpinnings of civilised European society, so also were 19th Century jurists to recognize the conditions of savage or barbaric existence elsewhere as being open to the possibility of maturation and change, and to the acquisition of legal subjectivity (of their 'entry into history' as Hegel was to put it). This, of course, was to lend itself to a new rationality of imperial rule - the production of civilization through beneficent colonization, and to the organization of legal knowledge around those categories (from the conduct of warfare through to territorial title and statehood).³⁵ It was also to survive in the diachronic organization of economic thought and practice that we now encounter in the term 'development' or 'developing state'.³⁶

Finally, if, as Koselleck notes, the *Neuzeit* was to focus attention upon perspective and standpoint—upon, amongst other things, the social and intellectual framework that undergirded the production of the literature of history itself—not only would history be always organized around the present (requiring it to be persistently re-written), but it would also be indefinitely plural. The differentiated temporalities that marked the geographic orientation of worldly knowledge, were therefore matched by a simultaneous disciplinary dispersion. If nature had its own rhythm, production its phases of development, capital its modes of accumulation, prices their own laws of fluctuation and change, and languages a chronology

³⁴ R Koselleck, above n. 22 at 166

³⁵ See A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005)

³⁶ S Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011)

associated with their own particular coherence,³⁷ so also would the law of nations have its own history, and one that would be distinct, as Ward noted, from political, economic, social or cultural history. International legal history, thus, was always to be understood in terms of its own generative specificity, with its own moments of inauguration and change, departures and dispersals. The pursuit of its 'origin' would become an important pre-requisite: as being that which enabled its capture as a unified and continuous historical phenomenon, and which disclosed, at the same moment, its fundamental essence.

This was, by no means, to resolve itself in a uniform historiography, but was to bring to the forefront two dynamics. In the first place, it would be conditioned by the simultaneous excision of things impure (politics, ethics, sociology, anthropology, economics etc), and their reintroduction in the field of legal knowledge as background conditions. History, in other words, would always be written by reference to a sense of law's boundaries, or of its specificity *in relation* to other fields of knowledge and practice:³⁸ doctrinal accounts in relation to ethics, institutional or realist accounts in relation to politics, comparative accounts in relation to anthropology or sociology.

In the second place, the harmony that had formerly characterized the relationship between the voluntary and natural law of nations was broken apart, and a situated ethics of international law was to be placed in a condition of permanent struggle against the 'realism' of historical knowledge. As Hayden White explains, historiography was to function at this time as the very paradigm of realistic discourse, 'constituting an image of a current social praxis as the criterion of plausibility by reference to which any given institution, activity, thought, or even a life can be endowed with the aspect of "reality"'.³⁹ History operated in 19th Century Europe, in other words, in precisely the same way as 'God' or 'Nature' had

³⁷ M Foucault *The Order of Things* (1966) at 401

³⁸ P Allott 'International Law and the Idea of History' (1999) 1 *Journal of the History of International Law*

³⁹ H White *The Content of the Form* (1987) at 101

in earlier centuries. From here, and as a consequence, doctrine would be opposed to practice, realism pitched against idealism, the apologetic against the utopian, policy against law, the law ‘as it is’ as opposed to ‘as it should be’. And these oppositions would all be internalized within a legal discourse that endeavored to both situate itself within the field of power so described, but yet also to transcend it.

3. The Historiography of ‘Modern’ International Law

If, in an immediate sense, the turn to history at the end of the 18th Century opened the ground for the articulation of a European international law, built upon the (historically conditioned) customs and practices of European nation states,⁴⁰ and invested with a teleology that took as its object the advancement of freedom, humanity, peace, and prosperity, it was a consciousness containing within itself, the conditions of its own critique. For the very object that international lawyers took as their task – the creation of a system of rules and institutions of universal character – was confronted, at every moment, by the apparent particularity of its own historical emergence. If this was not immediately apparent for those engaged in writing the histories of the seamless ‘expansion’ of international law in the 19th and 20th Centuries, or indeed for those concerned with the elaboration of analytical or policy-oriented discourses that operated within historically disinterested fields of enquiry, it was to become very much more so for those, either mourning the dissolution of the European nomos,⁴¹ or engaging with the processes of decolonization.⁴²

⁴⁰ As Wheaton was to observe the *jus gentium*, was ‘a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions’. H Wheaton *Elements of International Law* (1836) at 44-45

⁴¹ C Schmitt *The Nomos of the Earth* (Ulmen trans) (2003)

⁴² See e.g.: R Anand *New States and International Law* (1972); C Alexandrowicz *The European-African Confrontation: A Study in Treaty Making* (1973); T Elias *Africa and the Development of International Law* (1988) See generally, A Becker Lorca ‘Eurocentrism in the History of International Law’ in Peters (ed) *Handbook of the History of International Law* (2012) 1034–? at 1042-50

For the new generation ‘Third World’ scholars of the 1960s such as Anand, Elias, Bedjaoui, Umozurike and Alexandrowicz the problem was how to put at centre-stage the concerns and interests of the non-European world in conditions under which it had effectively been written out of the discipline’s own history. The response was diverse. For some, it was to be achieved through the (re)discovery of lost traditions – of those Asian or African systems of international law that pre-existed colonial rule and interacted with it.⁴³ For others, it was to be achieved by way of a critique of the ideology of 19th Century ‘doctrinal positivism’ which had apparently ‘shrunk’ the world of international law, ignoring in the process, the empirical practices (treaties, agreements, diplomatic exchanges) that had marked the relationship between the European and non-European worlds.⁴⁴ Others still embraced the European narrative, confident in the promise of a functionalist analytics that envisaged that changes in the structure of international law would simply ensue as a consequence of the changing shape and character of international society.⁴⁵ All embraced in one form or another, however, a belief in the possibility of the articulation of a universal history of international law ‘in the wake of Empire’ so to speak,⁴⁶ whilst maintaining at the same time, the same formal commitments – to positive law built upon custom and practice, to the idea of progress, or of law ‘responding’ to the common needs and interests of nation states. If the terms of this new historiography, thus, were to provide new content to the history of international law, they did so largely by leaving intact the methodological precepts that had shaped the work of those such as Ward. Europe still remained, in that sense, the ‘silent referent’ of historical knowledge.⁴⁷

⁴³E.g.: Elias, *ibid*; R Anand *Asian States and the Development of Universal International Law* (1972). See further, S Sinha *Legal Polycentricity and International Law* (1996)

⁴⁴C Alexandrowicz ‘The Afro-Asian World and the Law of Nations (Historical Aspects)’ in *Hague Recueil* (1968) I; Empirical and Doctrinal Positivism

⁴⁵E.g.: R Anand ‘The Influence of History on the Literature of International Law’ in R MacDonald and Johnston D (eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) at 341

⁴⁶N Berman ‘In the Wake of Empire’ (1998-99) 14 *American University International Law Review* at 1515

⁴⁷Chakrabarty, above n. 33 at 28. On Eurocentrism in international legal history see Koskenniemi 2011, Becker, above n. 42.

In more recent years, the problem of how to write the history of international law in a way that does not simply subsume the non-European periphery into an essentially European narrative of progress has been a point of constant attention. And in the process, such histories have gained new inflections. Some, such as Anghie and Becker have sought to re-inscribe the periphery within an account of mainstream legal thought and practice, either by identifying it as the unspoken 'referent' of doctrinal argument (in which the 'standard of civilisation' is seen to invest itself as a trope within the deep structure of legal doctrine⁴⁸), or by bringing to light the critical contribution of scholars from the periphery in appropriating and re-formulating key features of the discipline.⁴⁹ Others, by contrast, have sought to displace entirely, the centrality of European international law by emphasising the distinctiveness of contrasting world views – in Onuma's terms, the Islamocentric and Sinocentric – in such a way such as to problematize any simple account of the 'expansion' of international law, or of its attainment of a condition of universality.⁵⁰

If the main target of such accounts has been the displacement or avoidance of certain facets of the received historical method – denying, for example, the possibility of describing the history of international law in terms of its triumphal, 'progressive', expansion from core to periphery – they have, at the same moment, maintained fealty to the idea that there is a specifiable history of international law whose 'origins' may be traced back to the 19th Century and beyond, and that the central task is one of re-describing that history in a way that inserts the excluded 'other' back into that story. Whilst, in other words, such counter-histories take on, as Nietzsche described it, a 'critical' as opposed to a

⁴⁸A Anghie *Imperialism, Sovereignty and the Making of International Law* (2004)

⁴⁹A Becker Lorca 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harvard International Law Journal* at 475

⁵⁰Y Onuma 'When Was the Law of International Society Born? – An Enquiry of the History of International Law from an Intercivilizational Perspective' (2000) 2 *Journal of the History of International Law*

‘monumental’ cast,⁵¹ they do so nevertheless by leaving intact its basic structure. The problem here, is not so much a lack of determination as to what the content of international legal history might be⁵² - whether, for example, it is a history of doctrine or practice, a history of structures or processes, a history attentive to the non-European as well as the European experience⁵³ – but that the question of content, in this case, is not independent of the historical method by which that content is made legible or meaningful. If I am right in observing that international law was to acquire its specifiable and discrete (disciplinary) content through the articulation of historical accounts of its emergence, then it would seem to follow that international law is not simply something that one can examine through the lens of history as if it were some historical artefact existing independently of the means chosen by which it is to be represented, but a field of practice whose meaning and significance is constantly organised around, and through the medium of, a discourse that links present to past. As such, the specification of its origins must always be treated as an act of intervention rather than one of discovery - even if, as we shall see, it is an act which has its own conditions.

In a critique of what he takes to be certain dominant assumptions of mainstream accounts (specifically, those written in progressive, objective or functionalist terms), Skouteris draws attention to the essentially discursive character of international legal history and to its reducible priority of authorial agency in the ‘production’ of the past. He forefronts, in the process, two ideas. The first is that the past itself is never available to the legal historian ‘as actual events’, but only in the form of mediated representations of those events, whether as official

⁵¹ Nietzsche identified three species of history - the monumental, antiquarian and critical – which served ‘the living man’ in three different respects: ‘to him as a being who acts and strives, as a being who preserves and reveres, [or] as a being who suffers and seeks deliverance’. Above, n. 15 at 67.

⁵² Carty observes acutely that ‘the reason international legal history is almost impossible to write is that there is no consensus on what international law is’. A Carty ‘Doctrine Versus State Practice’ in Fassbender and Peters (eds) *Handbook of the History of International Law* (2012) 972–? at 974.

⁵³ For the varieties of history see M Koskenniemi in Fassbender and Peters (eds) *Handbook of the History of International Law* (2012).

records, the work of commentators, or in some other residual or artifactual form. 'History and the past' as he puts it, 'are two different things'.⁵⁴ The second, and related, observation being that any work of historical reconstruction will always involve acts of selection and arrangement – decisions both as to what is to be represented (state practice, judicial decisions etc), and as to how those past events, once reconstructed, will be organised and related to one another.⁵⁵ In a positive sense, this draws attention to what Hayden White calls the 'content of the form', bringing into view the (ideological) role of aesthetic structure or narrative organisation in the generation of historical meaning. At the same time, however, Skouteris notes that the further one emphasises the constructed character of history, and the centrality of the historian in its production, the more it 'seems to dissolve any possible ground for assessing the historical past' and undermines 'the possibility of performing much for the work that any jurist is expected to perform in her everyday tasks'.⁵⁶ In cutting away the ground from any representation of the past that seeks to 'unveil' meaning or normative insight from the mere fact of its own disclosure, so also, he fears, it seems to cut away the grounds for any kind of historical critique.

Skouteris's concerns, here, as to the unavailability of a straightforward representative account of history may, in some measure, misconstrue the way in which the past is conceptualised within international legal argument. If what is of concern is the way in which ideas and events from the past may be redeployed to new purpose in the present,⁵⁷ then the problem may not be that of getting the history straight so much as understanding the conditions under which certain

⁵⁴ T Skouteris 'Engaging History in International Law' in Benyeto and D Kennedy (eds) *New Approaches to International Law* (2012) 99–122 at 112. See also Koselleck, above n. 22 at 111 ('the facticity of events established *ex post* is never identical with the totality of past circumstances thought of as formerly real. Every event historically established and presented lives on the fiction of actuality: reality itself is past and gone.')

⁵⁵ *Ibid*, pp. 113–4.

⁵⁶ *Ibid*, p. 118.

⁵⁷ For an elegant statement of this point see A Orford 'On International Legal Method' (2013) 1 *London Review of International Law* 166–176. See also A Orford 'The Past as Law or History: The Relevance of Imperialism for Modern International Law' NYU Institute for International Law and Justice Working Paper 2012/2.

kinds of history appear to make themselves available in contemporary settings. The past, it might be said, only answers the questions we pose of it, but the kinds of questions we might ask, or the styles of analysis we might deploy, are not themselves limitless.

In Foucault's terms, this is to recommend undertaking an analysis of what he calls the 'contemporary limits of the necessary'. What is needed for that purpose, he suggests, is an 'historical investigation into the events that have led us to constitute ourselves and to recognise ourselves as subjects of what we are doing, thinking, saying'.⁵⁸ This may be seen to open out two new avenues of thought. In the first place, it is to give recognition to the idea that the authorial jurist who claims to exercise sovereignty over the literary patterning of the past of international law, is itself a subject inserted within an (historical) and intellectual context. If this works upon Marx's intuition that we make our own history, but not in conditions of our own choosing, the answer is not merely to strip away all superstition about the past (i.e. subject it to a critique of ideology), but seek to identify and specify the historic conditions that both 'produce' the field of professional expertise that enables international lawyers to imagine themselves as interlocutors within a specifiable discourse and practice, and which also serve to delimit the boundaries of what it is possible to say or think in that context. This may be such as to push historiography in the direction of accounts that both situate the emergence of disciplinary expertise within broader social, economic, cultural and political fields at the same time as orienting it towards broader questions of structure (the conditioning place, for example, of class and capital).

In the second place, and in a similar sense, it pushes attention towards thinking about the contemporary world of international law, not in terms of a specified set of actors and agencies, powers and competences, that are already firmly grasped as historically 'given', but as things that are constantly in the condition of being ushered into existence, reinforced and affirmed. If, as Lang points out, one may

⁵⁸M Foucault 'What is Enlightenment?' (1984) at 46

understand the regulatory activities of institutions such as the WTO as contributing to, and shaping, our social, political and economic knowledge of the world (within which it then seeks to insert itself),⁵⁹ so also may one understand the regimes of authority that structure international legal doctrine (states, governments, institutions etc) as simply that – claims to authority, knowledge and truth that pattern behavior through the repeated injunction that we should act ‘as if’ they were somehow more than that. History written in this guise, is history conscious always of its own productive role in making the world appear.

Conclusion

The problem I have been trying to put at centre stage in the course of this essay is one that folds back upon itself: how is one to provide an (historical) account of the emergence of the category of the historical within international law without already presuming its existence? The result, in a sense, is a partial, and imperfect, performance of that which I am seeking to describe, but it is a performance nevertheless concerned with elucidating the consequences of a very simple idea: everything has a time and place. As I have sketched it out, the consequences of that insight may be thought to have taken two forms, or to have operated in two phases. In the first of these the agenda was to place international law itself within the frame of history – to historicise its normative conditions, to identify its origins, and to map out its emergence and evolution over time. If, initially, this was to gesture towards the dispersion of things in space (to a differentiated geographical legal knowledge) it was nevertheless reintegrated by means of its incorporation within a singular chronology. Development, progress, evolution were the principal watchwords of this spatio-temporal conglomerate. In the second phase, historical knowledge itself has become the point of focus, in which the grounds and conditions for speaking about the past of international law have themselves opened up to examination through the lens of time and place. Here, historical knowledge is insistently contemporary and ideologically laden, capable of producing insight and critique, but nevertheless posing always the problem of

⁵⁹A Lang ‘The Legal Construction of Economic Rationalities’ (2013) 40 *JLS* at 155

how to grasp itself in its own historical conditions. If the history of international law today is unavoidably a history of the present, one task may be to understand the patterns of deployment and consumption, attending to the blind-spots and biases in contemporary accounts, yet another and perhaps more arduous task may be to understand the (historic) conditions that delimit the parameters of what may or may not be rendered as the past of international law today.