

INTRODUCTION: INTERNATIONAL LAW AND ITS HISTORIES

INTRODUCTION

In an article written in the second volume of the *American Journal of International Law* in 1908, Lassa Oppenheim was to reflect upon the various tasks that he believed needed to be undertaken in the development of the 'science of international law',¹ foremost amongst which was the 'exposition of existing recognized rules of international law'.² He was to maintain, however, that in order to satisfactorily fulfil that task, scholars necessarily had to have 'a knowledge of the history of the rules concerned'.³ But on this score there was much to be done:

[I]n spite of the vast importance of this task it has as yet hardly been undertaken; the history of international law is certainly the most neglected province of it. Apart from a few points which are dealt with in monographs, the history of international law is virgin land which awaits its cultivators. Whatever may be the merits of the histories and historical sketches which we possess, they are in the main mere compilations. The master-historian of international law has still to come.⁴

The main task, as he saw it, of the 'expected master-builder' was the elaboration of a history of dogmatics ('Dogmengeschichte') the purpose of which would be to explain from where each rule of international law originated, how it developed and how it gradually became recognized in practice. This was, however, only part of the picture as the history of dogmatics would merely supply the 'building materials' of a broader 'history of international law' understood as a 'branch of the history of Western civilization'. The historian of international law would also be expected to recount the 'ultimate victory of international law over international anarchy' and 'bring to light the part certain states have played in the victorious development of certain rules'. In the process they would have to expose 'the economic, political, humanitarian, religious, and other interests which have helped to establish the present rules of international law'.⁵ The task, in other words, would be both celebratory and instructive, it would not only stand as testament to what had come about (the disciplining of politics through law), but also provide a means whereby international lawyers could work with more precision and knowledge, and with a clearer sense of their social role. It would involve both an

¹ Oppenheim L., 'The Science of International Law: Its Task and Method', 2 *American Journal of International Law* (1908) 313.

² *Ibid.* p. 314.

³ *Ibid.* p. 316.

⁴ *Ibid.*

⁵ *Ibid.*, p. 317.

engagement with the genealogy of specific rules (assisting thereby in the precise delineation of those rules, their limits and exceptions), and the articulation of a grand historical narrative that placed the evolution of international law alongside the evolution of international society. This was not, furthermore, merely a historical endeavour, but would be such as to make clear where the future lay: in the development of a powerful international organization governed by international law.

Oppenheim would be surprised, and perhaps somewhat disconcerted, to learn that a century later no one had answered his call. Histories of international law have certainly been written⁶ but none so comprehensive as to combine a full history of doctrinal development with an account of the place of international law within a broader history of Western civilization.⁷ The moment for such an undertaking, furthermore, appears to have passed. Two intervening World Wars put firmly in doubt Oppenheim's momentary celebration of the triumph of international law over 'anarchy' or lawlessness, and decolonisation only rendered more problematic his idea of a history of the discipline written in terms of European civilization.⁸ More fundamentally, however, the task for which he saw such a history to be written – the furtherance of the 'science of international law' – bespoke of a commitment to a positivist conception of law which, almost from the moment it was articulated, was seen to be incapable of fulfilling its own promises.⁹

Even if the type of history Oppenheim advocated is unlikely now to be undertaken, his observation that the history of international law is the 'most neglected' aspect of the field,¹⁰ is one that can surely no longer be maintained. In recent years, there has been an extraordinary outpouring of articles and monographs written on the history of the discipline (or history and the discipline).¹¹ Indeed quite apart from the emergence of new

⁶ See e.g., Redslob R., *Histoires des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre* (1923); Verzijl, *International law in Historical Perspective* (1979); Nussbaum A., *A Concise History of the Law of Nations* (1954); Koskenniemi M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002).

⁷ For an attempt of something of this kind see Carr E., *The Twenty Years' Crisis 1919-1939* (1939); Grewe W., *The Epochs of International Law* (Trans Byers M., 2000).

⁸ But see, Anghie A., *Imperialism, Sovereignty and the Making of International Law* (2005)

⁹ For an account of Oppenheim's positivism as that of a 'Noble Lie' see Perreau-Saussine, 'A Case Study on Jurisprudence as a Source of International Law: Oppenheim's Influence' in this volume, p. ???. See also, Kennedy D., 'International Law and the Nineteenth Century: History of an Illusion' 17 QLR (1997) 99

¹⁰ A view echoed in Grewe, supra, n. 7, p. 1.

¹¹ See generally Hueck I., 'The Discipline of the History of International Law', 3 Journal of the History of International Law (2001) 194.

specialist journals on the topic, or journals such as the *European Journal of International Law* which, as a matter of editorial policy, have dedicated special issues to prominent international lawyers from the past (e.g. Scelle, Verdross, Anzilotti), one also finds other prominent journals devoting a significant portion of their space to such issues. One example suffices. In the 2002 edition of the *British Yearbook of International Law* - a journal whose engagement with history has characteristically been confined to the obituary - one finds articles on the Grotian tradition,¹² the work of the Advisory Committee of Jurists in 1920,¹³ the Prize Court in the 1914-18 War,¹⁴ the terrorism and International Criminal Court Conventions of 1937,¹⁵ a history of Britain's engagement with the Genocide Convention¹⁶ and an account of Thomas Baty's life and work in Japan.¹⁷ In total, three quarters of the Yearbook's pages are filled with such historical renditions and, when compared to the output of the journal a decade earlier, the current propensity to look backwards rather than forwards is clearly evident.

THE TURN TO HISTORY

This immediately prompts the question: why this recent engagement with history? Why now? Presumably there is something more at work here than merely a millennial retrospection. Presumably also, this is not merely a manifestation of what Bloom called the 'anxiety of influence' - a sense of dispirited 'belatedness' that instils in the author (or in his case the poet) a belief that novelty and innovation are no longer possible, but yet drives them to look back and reinterpret the past for purposes of finding imaginative space for their own creative work.¹⁸ Even if such a psychological drive were to be identified, it still doesn't answer the question as to why history appears to have become important at this particular juncture.

¹² Lesaffer R., 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', 73 *British Yearbook of International Law* (2002) 103.

¹³ Spiermann O., 'Who Attempts too Much does Nothing Well: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice', 73 *British Yearbook of International Law* (2002) 187.

¹⁴ Foxton D., 'International Law in Domestic Courts: Some Lessons from the Prize Court in the Great War', 73 *British Yearbook of International Law* (2002) 187.

¹⁵ Marston G., 'Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937' 73 *British Yearbook of International Law* (2002) 293.

¹⁶ Simpson B., 'Britain and the Genocide Convention', 73 *British Yearbook of International Law* (2002) 5.

¹⁷ Murase S., 'Thomas Baty in Japan: Seeing Through the Twilight' 73 *British Yearbook of International Law* (2002) 315

¹⁸ Bloom H., *The Anxiety of Influence: A Theory of Poetry* (1973)

In his contribution to this volume, Lesaffer suggests that the sudden boom in the historiography of international law is, in fact, 'easily explained'.¹⁹ He suggests that at all critical moments in the history of international relations, all moments of momentous political change (whether that be the revolutionary era ushered in after 1795, or the aftermath of World conflict in 1919 or 1945) scholars have typically turned back to revisit the discipline's past as part of an 'enquiry into the foundations of the law of nations'.²⁰ The present climate, marked by the end of the Cold War and the new 'War on Terror', is of similar character and it is the pervasive sense of uncertainty or turmoil that has, once again, propelled scholars into historical reflection as a way of locating some secure foothold for an understanding of those contemporary dilemmas.

Elsewhere, Koskenniemi offers a similar explanation.²¹ For him, the period up until 1990 at least, the increasing specialisation of international law in the fields of human rights, trade and the environment left little room for historical reflection: '[f]or a functionally oriented generation, the past offered mainly problems, and few solutions'.²² After 1989, however, he identifies two possible reasons for the developing interest in international law's history: one being associated with the possible resumption of the liberal internationalist project of the early 20th Century following the end of the cold war, the other identifying that juncture as an inaugural one - giving rise to a total break with an outmoded diplomatic system which had hitherto 'obstructed progressive social transformation'.²³ Each of these conceptions of the 'new era', in Koskenniemi's view, provided reason for return to the past – either to rediscover or 'dust off' debates which had been shelved in the 1930s for their re-deployment in the present context, or to provide a historical setting for the emergence and identification of an altogether different type of international law.

¹⁹ R. Lesaffer, 'International Law and its History: The Story of an Unrequited Love', in this volume, p. ??.

²⁰ Ibid.

²¹ Koskenniemi M., 'Why History of International Law Today?', 4 *Rechtsgeschichte* (2004) 61

²² Ibid, p. 64-5

²³ For an example see Marston, *supra*, n. 15, p. 313, in which following an account of the Terrorism and International Criminal Court Conventions of 1937, he observes that the UK's potential participation foundered upon the perception of the law officers that Parliament was unlikely to tolerate amendments to national criminal law insofar as they would have extra-territorial effect. In noting that the UK is now party to the European Convention on the Suppression of Terrorism 1977 and that the Terrorism Act 2000 created several extra-territorial crimes, he concludes that '[t]hese considerations are no longer constraining'.

Whilst both Koskenniemi and Lesaffer foreground the end of the Cold War as a moment of significance for purposes of explaining the historical turn, where they might be thought to differ is in their tone. For Koskenniemi, it is a matter of a newly-found optimism in the possibilities for the progressive development of international law; for Lesaffer, by contrast, the contemporary era seems to be one marked by anxiety and discomfort – a sense that we are now occupying a moment of transition, but with little sense of what the future might hold. Each of these ‘moods’ are well reflected in recent literature concerning international law. On the one hand, a sense of optimism appears to be expressed both in the emergence of new discourses predicated upon the evolution of international law (the right to democratic governance for example²⁴) and in the revitalisation of projects from earlier eras (humanitarian intervention²⁵ and international criminal law²⁶ perhaps). On the other hand, a sense of anxiety may also be perceived in recent works concerning the rise of unilateralism,²⁷ the persistence of hegemonic influence²⁸ and a re-emergence of the rhetoric of ‘Great Powers’.²⁹

Whether the contemporaneous mood is one of anxiety or optimism is perhaps not that significant, but it is evident that such moods may well affect how the history of international law is conceived. On the one hand, a spirit of confidence would appear to encourage the view that the past is firmly behind us (no longer exercising a strangle-hold over the present), and that historical reflection may be useful as a way of ‘situating’ the present or enlivening contemporaneous debates, but that in other regards it is pretty much a dispensable part of international legal practice. A sense of ‘novelty’, in other words, might allow an exploratory space for new endeavours unburdened by the restraints of a ‘traditional’ international law that insisted upon respect for sovereignty or domestic jurisdiction – all is to be invented anew. On the other hand, however, a spirit of anxiety may either lead to a sense that something important has been left behind (and

²⁴ See e.g., Fox G. and Roth B., *Democratic Governance and International Law* (2000)

²⁵ Wheeler N., *Saving Strangers: Humanitarian Intervention and International Society* (2000); Chesterman S., *Just War or Just Peace* (2001)

²⁶ E.g., Kittichaisaree K., *International Criminal Law* (2001); Schabas W., *Genocide in International Law: the Crime of Crimes* (2000)

²⁷ E.g., Farer T., ‘Beyond the Charter Frame: Unilateralism or Condominium?’, 96 *American Journal of International Law* (2002) 359; Franck T. and Yuhan S., ‘The United States and the International Criminal Court: Unilateralism Rampant’ 35 *New York University Journal of International Law and Policy* (2002-3) 519.

²⁸ Byers M and Nolte G. (eds), *Hegemony and the Foundations of International Law* (2003); Krisch N., ‘International Law in times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *European Journal of International Law* (2005) 369

²⁹ Simpson G., *Great Powers and Outlaw States* (2004)

hence the need to look back to rediscover it),³⁰ or a sense that contemporaneous discourse remains shackled in the discipline's history such that the only way to move on (or 'out' or 'away') is to look back.³¹ Here an engagement with a history of the discipline becomes a more urgent and important enterprise.

THE TELLING OF HISTORIES

Whichever way one looks at the issue, there is clearly a range of different ways in which an international lawyer might engage with the history of international law, and a range of question that might arise therefrom: some histories might be written as 'upper-case' Histories – histories written for purposes of discovering meaningful trajectories and teleologies within the discipline – histories of progressive development, codification and institutional design. Others may, more narrowly, concern themselves with intellectual lineage – the persona, their obsessions and anxieties, their works and 'contributions'.³² Yet other histories may be written about institutions – the Permanent Court of International Justice,³³ the League of Nations,³⁴ the European Convention on Human Rights,³⁵ – or particular ideas such as war,³⁶ conquest³⁷, diplomatic immunity,³⁸ or title to territory.³⁹ All, no doubt, will have an intellectual framework that locates the past in the present either in terms of a diachronic narrative of progress or change, or synchronically (by way of the identification within present rules, past practice or judicial precedent). In

³⁰ Cf. Sands P. *Lawless World: America and the Making and Breaking of Global Rules* (Penguin, 2005)

³¹ For authors who emphasise historical research as an imaginative resource see e.g., Berman N. 'Between "Alliance" and "Localisation": Nationalism and the New Oscillationism' 26 *New York University Journal of International Law and Politics* (1993-94) 449, pp. 451-2 ('The ultimate goal of my inquiry is to provide historical and theoretical context for critically evaluating current debates about the appropriate international response to nationalist conflicts... This historical approach explores the deep legal and cultural assumptions that underlie seemingly technical doctrinal argumentation and seeks to initiate reflection on the persuasive power and tenacious persistence of certain policy alternatives. Technical legal debates concerning widened U.N. competence under the Charter appear rather differently when one realizes that they replicate strikingly similar arguments concerning the scope of the League competence under the Covenant.'). Koskenniemi, *supra*, n. 6, p. 5 ('I hope that these essays provide a historical contrast to the state of the discipline today by highlighting the ways in which international lawyers in the past forty years have failed to use the imaginative opportunities that were available to them, and open horizons beyond academic and political instrumentalization, in favour of worn-out internationalist causes that form the mainstay of today's commitment to international law.... The limits of our imagination are a product of a history that *might have gone another way.*')

³² E.g. Koskenniemi, *supra*, n. 6.

³³ Spiermann M. *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005)

³⁴ Northedge F., *The League of Nations: Its Life and Times 1920-1946* (1986)

³⁵ Simpson B., *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001)

³⁶ Neff S., *War and the Law of Nations*(2005)

³⁷ Korman S. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, (1996)

³⁸ Frey L and Frey M., *The History of Diplomatic Immunity* (1999)

³⁹ See e.g., Castellino J and Allen S., *Title to Territory in International Law: A Temporal Analysis* (2003)

the latter sense, of course, the appreciation that history forms part of the discipline is such as to make us all ‘historians’ – whether we are so consciously or not.⁴⁰ International lawyers (perhaps lawyers more generally) all trade in history, all engage with events and situations arising in particular historical junctures and a consistent feature of that engagement is not merely a concern to translate what we know of the past into ‘history’, but to translate an idea of ‘history’ into law.

Broadly speaking, it is possible to identify at least three different ways in which the relationship between international law and ‘history’ may be conceived.⁴¹ The first, most common idea, and the one to which Oppenheim referred in the passage cited above is that of a *history of international law*, or a history of parts thereof – a history mapped out in terms of its trajectory or teleology; a history written in narrative form that provides a story about its origins, development, progress or renewal. The second, and equally obvious, representation is that of *history in international law* – of the place that historical events or persona occupy within substantive discussions of law, and of the role they play in arguments about law itself. Any reference to ‘state practice’, to the writings of authoritative publicists, or judicial opinion is a reference to history and, even if resort to those sources is unabashedly instrumental in the sense that it is directed towards the identification of relevant norms or rules of international law, it is clearly an inseparable part of legal activity. The third, and final, way in which that relationship may be understood is in terms of *international law in history* – of understanding how international law, or international lawyers have been engaged, or involved themselves, in the creation of a history that in some senses stands outside the history of international law itself. Here the concern is to identify international law’s relationship to the wider world of politics, economics, or sociology against which it is deployed, or within which it is inserted.⁴²

⁴⁰ One finds recognition of this in diverse places. See e.g. Brownlie I., *Principles of Public International Law* (5th ed. 1998), p. 126 (‘In one sense at least law is history, and the lawyer’s appreciation of the meaning of rules relating to acquisition of territory, and of the manner of their application in particular cases, will be rendered more keen by a knowledge of the historical development of the law.’) Also, Kennedy, p. 88 (‘an argument about a rule or principle, or institutional technique in international law is almost always also an argument about history- that the particular norm proffered has a provenance as law rather than politics, has become general rather than specific, has come through history to stand outside history’.)

⁴¹ Cf. Kennedy D., ‘The Disciplines of International Law’ 12 *Leiden Journal of International Law* (1999) 9, pp. 88-98 (in which he identifies international lawyers as using history in two different types of argument – one as a question of provenance; one as a question of progress).

⁴² Cf. Allott P., ‘International Law and the Idea of History’ 1 *Journal of the History of International Law* (1999) 1 (in which he describes international law as having its own history which is both ‘intrinsic and extrinsic’. Its intrinsic history is the history of its structures and systems, its legal substance and its

It is evident enough that any particular text will tend not to distinguish these three types of historical account, and in most cases will seek to conjoin two or more within the framework of a single project. A history of international law will presumably contain something about the role international law may have played more generally in international relations, and perhaps something about the part that (historical) practice may play in the various constructions of sources doctrine. Similarly an analysis of history in international law will not merely content itself with a discussion, for example, of the contemporaneous significance of the *Lotus case* in the development of rules of jurisdiction, but would necessarily engage, at the same time, with the general development of international law and its place in international relations. That each type of engagement with history and international law will interweave various different types of historical narrative is not such as to obviate analysis by reference to these categories – which remain, for the most part, useful categories of analysis – rather it points to the typically multi-layered nature of international lawyers’ engagement with the past.

THE HISTORY OF INTERNATIONAL LAW

A history of international law, if it is to be written in singular terms (‘a’ history, as opposed to a plurality of histories of the various ‘people and their projects’ who are regarded, or regard themselves as part of that history⁴³), makes an unflinching demand for the elaboration of some grand narrative – a narrative that somehow captures ‘international law’ on broad canvass as a singular idea or set of ideas tied together in some coherent manner. At the time at which Oppenheim was writing, few would have had any doubts as to the subject or nature of that history. Yet to think about international law as having *a* history is to make all sorts of assumptions as to the identity of the participants in that history (sovereign states? legal advisors? international organisations?), the sense of what interests international law serves to preserve (the ‘rule of law’? ‘peace and security’? ‘human dignity’?) and how that history might relate to our contemporary understanding of international law. To write *a* history (or more emphatically *the* history⁴⁴) of international law necessarily involves, in other words, setting

philosophy. Its extrinsic history is the history of its relationship to ‘all other social phenomena, other social structures and systems’).

⁴³ Cf. Kennedy, *supra*, n. 41, p. 83.

⁴⁴ It has frequently been observed that the translation of Grewe’s *Epochen der Völkerrechtsgeschichte* was erroneously retitled in its English version bearing the definitive article ‘*The Epochs...*’. This, despite Grewe’s insistence that he was not actually writing *the* history of international law or describing *the* epochs.

out in advance the parameters of the discipline (in terms of its subjects and sources, its actors and modes of engagement) and the narration of a story in which the identity of the discipline itself is held relatively constant and in which varied and opposing voices are, for purposes of the narrative itself, silenced or pushed to one side.

As Lesaffer notes, the unifying gesture that is signalled by the idea of ‘a’ history of international law necessarily reduces the historiography of the law of nations in both time and space. The association of international law with the emergence of the modern ‘sovereign state’, for example, is such as to locate it within a temporal frame that begins, on most accounts, with the Treaties of Westphalia of 1648. For all the significance of the Westphalian treaties, it is hard not to regard 1648 as anything other than an arbitrary date the choice of which not only ignores the possibility that ‘systems’ of international law might have existed at earlier points in time⁴⁵ but also is such as to render any such history principally European or ‘Northern’ in character – pushing to the margins the experience of African, Asian or South American societies.⁴⁶ Lesaffer argues, in contrast, that ‘the modern law of nations in its relation to the sovereign state should not define “international law” in its historical setting’.⁴⁷ Rather, it should be studied in its multiple guises in all historical periods.⁴⁸

One of the central reasons Lesaffer identifies for the limited nature of international legal histories, in this regard, is their overtly pragmatic in orientation:

‘Today as in the past, the popular view among international lawyers is still to a large extent based on broad and vague assumptions that rather bear witness to present-day concerns than to historical reality.’

This, he suggests, is particularly redolent in case of ‘evolutionary’ histories that seek to present the history of international law as a smooth process of progress and development (or ‘renewal and restatement’ to use Berman’s felicitous phrase). For Lesaffer, this is most egregiously represented in the form of genealogical historicising that seeks to trace contemporaneous ideas back in time:

‘This genealogical history from present to past leads to anachronistic interpretations of historical phenomena, clouds historical realities that bear no fruit in our own times and gives no information about the historical

⁴⁵ See, Bederman D., *International Law in Antiquity* (2001)

⁴⁶ For an early critique of the Europeanization of international law in the 19th Century see Alexandrowicz C., *An Introduction of the History of the Law of Nations in the East Indies* (1967).

⁴⁷ Lesaffer, *supra*, n. 19, p. ? .

⁴⁸ *Ibid*, p. ?

context of the phenomenon one claims to recognise. It describes history in terms of similarities and differences from the present, and not in terms of what it was. It tries to understand the past for what it brought about and not for what it meant to the people living it.’⁴⁹

Thus to hold the trial of Peter von Hagenbach of 1474 to be the very first war crimes trial is to draw a unsustainably simplistic parallel between the nature and meaning of that trial in the context of 15th Century society, and the ideas and implications associated with the trial of war criminals occurring in the 20th/21st Centuries.

Lesaffer’s critique of ‘evolutionary’ histories is one that chimes with ‘new stream’ approaches to international law which treat with considerable suspicion the idea that the history of international law may be presented in terms of an enlightenment narrative of progress.⁵⁰ Berman, for example, in advancing his version of a ‘genealogical’ approach to international legal history (informed by the work of Foucault amongst others⁵¹) rejects the account of international legal history presented as an ever-advancing dialectic of restatement and renewal (periodic restatements carrying forward the tradition of modern international law; periodic calls for renewal reframing the tradition ‘in light of the policy innovation and situational flexibility, in the light of every-new versions of modernity’).⁵² Rather, and in his terms, the genealogist views international legal history ‘as pockmarked by a series of catastrophes and mutations, as rocked by the countless forms of colonial conquest and anti-colonial resistance’.⁵³ Where the renewer-restater sees continuity, progress and inclusion (in the abolition of slavery, the prohibition on the use of force, decolonisation, and institution-building for example), the genealogist sees change, regress and exclusion (the continuance of slavery, the authorisation of violence, and the continuity of colonial relations). In contrast to the renewer-restater who sees the

⁴⁹ Ibid, p. He notes that few (with the exception of work such as Bederman’s work *International Law in Antiquity*) have attempted to look at the past for its own sake.

⁵⁰ See Cass D., ‘Navigating the Mainstream: Recent Critical Scholarship in International Law’, 65 *Nordic Journal of International Law* (1996) 341, pp. 354-9. She identifies four reasons for the discomfort: first that the narrative is simply wrong or distorts a far more complex and ambivalent story; secondly that it inhibits proper engagement with contemporary problems; thirdly that it wrongly assumes that the mysticism and universalising ideologies of the past have been effectively displaced; and finally that it buries the colonial heritage that lies at the heart of many doctrinal developments.

⁵¹ See, Foucault M., ‘Nietzsche, Genealogy, History’ (1971) in *The Foucault Reader* (ed. Rabinov, Penguin, 1984) 76. One should note, here, the different meaning ascribed to genealogical legal history by Lesaffer, on the one hand, and Foucault/Berman on the other. Whilst Lesaffer associates ‘genealogical history’ as one concerned with the search for origins, Foucault sees genealogy as explicitly ‘opposed’ to such an endeavour (ibid, p. 77).

⁵² Berman N., ‘In the Wake of Empire’ 14 *American University International Law Review* (1998-99) 1521, p. 1523

⁵³ *Ibid.*

advancement of international law in terms of its normative excision of politics or its systemic unity, Berman the genealogist celebrates the idea of international law as being ‘normatively impure, culturally heterogenous, and historically contingent’.⁵⁴ This is not, he argues, a matter of anxiety or despair for it is precisely because of ‘international law’s *lack of coherence*’ because also of ‘the instability of its transitory configurations of rules and players’, that he is able to identify it as ‘a hopeful enterprise.’⁵⁵

Certain elements of Berman’s genealogical approach to international legal history are to be found in Simpson’s contribution to this book.⁵⁶ To begin with, the subject of his article – Piracy – is one that might have been addressed by way of a narrative about the emergence of the idea of universal jurisdiction in international law: about the historic prosecution of pirates, about the recognition given to that jurisdiction in article 15 High Seas Convention 1958 and subsequently in article 101 of the 1982 Convention on the Law of the Sea, and about the relationship between such initiatives and the development of universal jurisdiction in relation to other international crimes (war crimes, crimes against humanity). Although he begins by nodding in the direction of such a narrative (noting, for example, that ‘piracy is regularly invoked as the first international crime, or the first offence to give rise to universal jurisdiction or the precursor to contemporary offences against the dignity of mankind’⁵⁷) he tells a quite different story – a story about pirates occupying a borderland between ‘respectability and deviance’, about the ambivalent status of the pirate (neither enemy nor criminal, neither within yet not outside the law, neither driven by private gain nor possessed of a political project) and, ultimately about the centrality of the metaphor of the pirate, with all its *aporias*, in contemporaneous debates about terrorism. In the return of the pirate figure in contemporary literature (in the form of the ‘enemy of humankind’⁵⁸) he thus sees as a return to ambiguity

‘because the identity and identification of pirates has always raised difficult questions about war and peace, about sovereigns and non-sovereigns, and about policing and warfare. Pirates turn out to be not enemies of humankind but humankind in its plural guises.’⁵⁹

The sort of history written by Simpson in these pages is thus not a history that has a beginning, middle and end, nor a history of events and ‘state practice’ (as might be

⁵⁴ *Ibid*, p. 1524

⁵⁵ *Ibid*.

⁵⁶ Simpson G., ‘Piracy and the Origins of Enmity’, in this volume p. .

⁵⁷ *Ibid*, p. ?

⁵⁸ *Ibid*, p. ?

⁵⁹ *Ibid*, p. ?

marked, perhaps, by the conclusion of treaties relating to piracy or in the identification of a sequence of seminal cases). Nor, furthermore, is it a structural history (of movements and ideologies, of cause and effect) even if in his discussion of Carl Schmitt he seems to affirm the idea that ‘new international law’ is being constructed in a ‘post-duellist’ international order marked by police action against outlaws and pirates rather than wars between sovereign states.⁶⁰ As in his book *Great Powers*,⁶¹ the story is one of rehearsal or repetition in which old narratives and ideas are seen to be constantly repackaged and redeployed (the pirate, outlaw or terrorist), and in which background constants (the ideas of humanitarianism, social solidarity or imperialism for example) assume far greater importance than the particularities of the social contexts in which those ideas are discussed. He thus able, and in fact more than willing, to discuss the decision of the English High Court in the *Republic of Bolivia case* (of 1909) and its distinction between plunder for personal gain and for political change, alongside the work of Michael Riesman almost a century later - assuming in the process the terms of their generic engagement with international law and legal doctrine to be largely the same.

This is not necessarily a point of criticism (although it will be noted later that at least one school of historiography would find it problematic), but rather an observation about the nature of his historical reflection. For Simpson, the history of international law (understood primarily as a rhetoric about identities such as Great Powers, outlaw states, colonisers, slavers, pirates and the like) is not ‘merely’ history – a past to be told and then displaced by a discussion of ‘current problems’ or contemporaneous concerns - but rather a past marked by ambiguity and ambivalence, rhetorical excess and definitional undecidability, that finds continuing expression in contemporary legal and political discourse.⁶² In this regard, at least, Simpson is decidedly not engaging in the type of historical enquiry that Lesaffer recommends in his contribution⁶³ and may be seen to pose the question (in his methodology if not otherwise) as to whether there is a history of international law that can be meaningfully disinterred without being framed within contemporary linguistic categories.

⁶⁰ *Ibid*, p. .

⁶¹ *Supra*, n. 29.

⁶² For a review of Simpson’s work which appears to miss almost all of these points see, Sellers M., 99 *American Journal of International Law* (2005) 949.

⁶³ Lesaffer, for example, insists upon an appreciation of context, and is critical of excessive reliance upon doctrine rather than practice. *Supra*, n. 19, p. ?.

In his introduction to the *Gentle Civilizer of Nations*, Koskenniemi echoes the authors here in dismissing the possibility of narrating a grand, monological, history of international law.⁶⁴ Any such an endeavour, he remarks, would be ‘burdened with contestable assumptions about what was central and what peripheral, what valuable and what harmful in the past, and [would necessarily fail] to address the question of narrative perspective’.⁶⁵ For him, the alternative might have been to ‘abstract the larger context altogether and to write biographies of individual lawyers’ in the style of La Pradelle or Serra. But here again the project would appear to be problematic, not only by reason of the supposition that the history to be told is a ‘projection of a few great minds’, but also because it would fail to ‘account for the external pressures to which the doctrines of those men sought to provide responses’.⁶⁶ He thus settles on an explicitly ‘non-rigorous’ and ‘experimental’ method that intertwines biographical and contextual (epochal) elements as part of a narrative history of the profession and its ideas (or what he calls its ‘sensitivity’).⁶⁷

There are several obvious tensions within Koskenniemi’s overt method⁶⁸ - for one thing he never quite escapes his own critique – he still seems largely to present his subject (international law?) in a way that equates it with the ideas and thoughts of a group of predominantly European international lawyers, and he still uses as his context, an account of history that would not be too far removed from that supplied by Grewe. His techniques of evasion – concentrating upon the ‘sensibilities’ of the profession rather than a description of the practice of ‘international law’, and adjusting the temporal horizons of the contemporary era so it starts in 1870 rather than 1919 or 1945 – do not, in themselves, really avoid the impression that here again one is faced with an essentially ‘Whiggish’ story of great men and their deeds. But at the same time, Koskenniemi does

⁶⁴ His target, in that respect appears to be accounts such as those of Grewe, *supra*, n. 7. For a critique of ‘monological’ historicism see Greenblatt S., ‘Introduction’, 15 *Genre* [1982] 5 (in which he suggests that such accounts usually reduce historical periods to a single homogenous tradition which are then related as facts rather than the product of the historian’s imagination. He suggests, alternatively, that historical practice should be considered as presenting two kinds of dialogue: one *within* the past, the other *with* it. Not only thus, should the heterogeneity of the past be recognised, but also the constructive role of the historian in representing that past).

⁶⁵ *Supra* n. 6, pp. 5-6.

⁶⁶ *Ibid*, p. 8.

⁶⁷ For similar ‘experimental’ works of historiography see Cohen P., *History in Three Keys: The Boxers as Event, Experience and Myth* (1997); Figs O., *A People’s Tragedy* (1996)

⁶⁸ For an intelligent review that examines Koskenniemi’s historiography see Galindo G., ‘Matti Koskenniemi and the Historiographical Turn in International Law’, 16 *European Journal of International Law* (2005) 539.

introduce in his work a far more nuanced appreciation of the social context in which prominent international legal scholars develop their ideas or ‘sensibilities’ concerning international law, and clearly adopts a position which denies any real sense of progress.

Two contributions to this volume develop the kind of biographical/ contextual legal history that Koskenniemi sketches out, but do so in respect of particular authors and schools of thought that are otherwise left out of Koskenniemi’s broad narrative. Lobban directly situates his argument about the changing sensibilities international lawyers in the late 19th Century within the framework of Koskenniemi’s narrative in the *Gentle Civilizer*, but focuses specifically upon English jurists (such as Montague Bernard, John Westlake, and T.E. Holland) rather than the predominantly Continental lawyers to whom Koskenniemi refers (von Martens, Klüber, Asser and Bluntschli).⁶⁹ For Lobban the mentality, or professional outlook, of international lawyers in England in the 19th Century changed quite radically from a time in which they represented, as members of the Doctors Commons, a closed professional elite of civilian lawyers concerned with abstract rules of natural justice (represented by figures such as Stowell and Phillimore), to a more pragmatic, politically-attuned, college of scholars based in the Universities of Oxford, Cambridge and London (including Mountague Bernard, Holland, Whewell, Maine, Westlake and Oppenheim). The institutionalisation of international law as a subject of scholarly activity within the academy thus occurred at the same time as (and perhaps was related to) the rejection of rationalist, *a priori*, natural law approaches to international law, and their replacement by a species of legal reasoning that was overtly empirical in orientation and far more closely attuned to the politics of public opinion and the pragmatics of statecraft. This is represented, as Lobban observes, in the debates surrounding the Royal Commission on Fugitive Slaves⁷⁰ and the case of *R v. Keyn*.⁷¹ The story then told is one of the subsequent engagement on the part of this new breed of scholar-practitioner with the ‘vulgar Austinian’ critique of international law (in which John Austin is read as relegating international law to the status of mere ‘positive international morality’). For the most part, Lobban’s article is one concerned with exposing how and why English international lawyers came to obsess about the work of Austin in the late 19th Century (partly because of what Austin’s imperative approach to law offered in terms of providing an anti-speculative foundation for international law),

⁶⁹ Lobban M., ‘English Approaches to International Law in the Nineteenth Century’, in this volume, p. ?.

⁷⁰ Royal Commission on Fugitive Slaves, *Parliamentary Papers* 1876 [C 1516-I] XXVIII 285.

⁷¹ (1876) 2 Ex. D. 173.

but it also represents an account of what may be taken to be the peculiarities of a burgeoning 'English tradition' of international law.⁷²

Perreau-Saussine develops some of the themes laid out by Lobban.⁷³ Her chapter is overtly concerned with seeking to understand the influence of Lassa Oppenheim's *Treatise* upon successive generations of scholars within England. What becomes fully apparent, however, in her initial account of the editorship (moving from Oppenheim, to Roxburgh, to McNair, to Lauterpacht and finally to Jennings and Watts) is the sense of how the *Treatise* itself seemed to assume canonical (or even totemic) significance for international lawyers within England. Each of the editors was to assume a position of considerable prominence within English academia, and frequently combined this with a high-profile career as a practitioner or legal advisor. Each also appears to have acquired the responsibility of editorship as protégée to the incumbent scholar-editor (in a chain of 'filial piety' as Perreau-Saussine puts it⁷⁴). The significance of the *Treatise*, however, as Perreau-Saussine argues is not merely to be found in the way that the passing of the editorship to the new 'disciples' seemed to ensure the maintenance of a particular 'faith' or set of beliefs about international law - successive editors after all subtly modified key elements of Oppenheim's liberal internationalist vision of international law. Rather, it is to be found in what remained consistent in the *Treatise* through the various editions – a consistency, as Perreau-Saussine suggests, which manifests itself both in its surface style and structure (its systemic orientation, methodological completeness and clarity) and in an underlying commitment to the idea of legal positivism as a technique for the promotion of key political and moral values. In this respect, the *Treatise* seems to mark out most clearly the nature of what was to become a peculiarly English tradition of international law – a tradition which, one supposes, also left its marks on the discipline more generally through the various professional interventions of its adherents.

Perreau-Saussine's analysis of Oppenheim's *Treatise* seems to return the historian of international law back to doctrine rather than practice,⁷⁵ back to canonical texts rather

⁷² For two of the few accounts of this tradition see Johnson D., 'The English Tradition in International Law', 11 *International and Comparative Law Quarterly* (1962) 416; Crawford J., 'Public International Law in Twentieth-Century England', in Beatson J. and Zimmerman R. (eds) *Jurists Uprooted: German Speaking Emigré Lawyers in Twentieth-Century Britain* (2004) 681.

⁷³ Perreau-Saussine, *supra*, n. 9

⁷⁴ *Ibid.*, p. ?

⁷⁵ For criticism of the reliance upon doctrine in historical research see Lesaffer, *supra*, n. 19, p. ?.

than official deliberation, back to cultural particularity rather than universalising assumptions as to the nature or character of international law. But one also senses that the history that can be told through such narratives is also a dense one: a sustained engagement with the process of cultural production and re-production of a canonical text may tell us a great deal more about the assumptions and predispositions of successive generations of international lawyers, and about the sense of a tradition being generated and maintained, than might be garnered for example through an examination of the diverse works of the individual authors themselves, or through accounts of particular subject areas of international law that fail to acknowledge the anthropological embeddedness of the authors or actors themselves. What one gains, at the very least, from such work is the sense of how varied histories of international law might be, and how particular and contingent the position of authors within those stories.

HISTORY WITHIN INTERNATIONAL LAW

Even those who either avoid, or see no need for, the writing of grand narrative histories of international law as part of their engagement with the discipline, will inevitably have to marshal and deploy historical material. Whether, for example, as a matter of determining the content of customary international law through an analysis of past and contemporary state practice,⁷⁶ interrogating the precedential value of judicial decisions, construing international agreements by reference to the *travaux préparatoires*, or identifying the applicable law or the ‘critical date’ in the context of dispute resolution, some engagement with history, or more narrowly, the history of the discipline is inevitable.⁷⁷ Even for those suspicious of the precedential value of past decision-making or of originalist modes of construction,⁷⁸ the past will still represent a repertory of possible ‘approaches’ to, or ‘solutions’ for, contemporary problems.

⁷⁶ See e.g., Carty A., ‘Distance and Contemporaneity in Exploring the Practice of States: the British Archives in Relation to the 1957 Oman and Muscat Incident’, in this volume, p.?

⁷⁷ For a thorough examination of the role that ‘time’ plays in decision-making, see Higgins R., ‘Time and the Law: International Perspectives on an Old Problem’, 46 *International and Comparative Law Quarterly* (1997) 501.

⁷⁸ As Kennedy suggests there might appear to be something of a transatlantic divide on this issue – international lawyers in the United States being less convinced of the significance of the pedigree of legal rules than those in Europe or elsewhere. He also suggests, however, that this divide is largely superficial. *Supra*, n. 41, p. 91.

As the various contributions to this book suggest, however, there is considerable unease amongst those who take legal history seriously about the perceived failure on the part of international lawyers to deal with historical material in a rigorous manner. Bederman identifies five different types of defect that he associates with ‘law office history’ or more specifically ‘foreign office international legal history’.⁷⁹ These include:

‘(1) a lack of analytic rigor in historical investigations, (2) selective use of historical materials, (3) sloppy or strategic methodologies in the review of historic sources, (4) overt or implicit instrumentalism in the selection of historic data and/or the conclusions drawn from such material, and (5) an unwillingness or inability to reconcile conflicting sources, or an inability to accept ambiguity or incompleteness in the historic record.’⁸⁰

The central complaint, thus, is one of the abuse of the historical record for purposes of sustaining an argumentative position – a point which he demonstrates in his examination of *Sosa v. Alvarez-Machain* in the United States and the *Kasikili/Sedudu Island case* before the International Court of Justice (ICJ). He urges, in his conclusion, that international lawyers should be prepared to accept that the historic record may, on many occasions, be simply incomplete, ambiguous or contradictory,⁸¹ and that due consideration should be given to proper methods of historiography. Lesaffer similarly complains about the instrumental nature of much historical enquiry (characterised, as suggested above, by what he terms ‘genealogical enquiry’) and observes that the problem is not merely the thinness of the historical accounts that are engendered therein, or the ‘abuse’ of the past, but the tendency to read back from present to past – to think of the past only in terms of what it may tell us about the present, or to present historical material in terms of some smooth evolution from past to present.⁸² For him, the past should really be understood in its ‘own terms’ and by reference to its own standards – recalling implicitly Ranke’s demand that historians should tell it ‘how it actually happened’ (*wie es eigentlich gewesen ist*).

As both Lesaffer and Bederman implicitly accept, international lawyers – whether as scholars searching for rules of customary law in state practice, or as practitioners fighting their corner in a dispute – will approach historical material with a view to garner from it some insight or rule of contemporaneous relevance. The primary concern, in such cases, is not to understand the past in its own terms with all its complexities, ambivalence, or

⁷⁹ Bederman D., ‘Foreign Office International Legal History’, in this volume, p. ?.

⁸⁰ *Ibid* p. ?

⁸¹ One may recall Oakshott’s description of writing history as an act of restoration in which we discover from fragments of evidence ‘what may be inferred from them about a past which has not survived’.

Oakshott M. *On History and Other Essays* (1983) p. 52.

⁸² Lesaffer, *supra*, n. 19, p. ?

ambiguity, but rather to identify within it, a thin tradition of thought and practice that is in some way normative. An evident consequence of this approach is that the telling of history is skewed from the outset. As Kennedy puts it, successive moments or events from the past are deliberately sieved or compressed to generate ‘a list of factors and a holding’⁸³ rather than to relate the experience or lives of those involved. It is not uncommon to find in discourses concerning humanitarian intervention, for example, a brief historical account of ‘state practice’ (Bangladesh, Uganda, Kampuchea, Iraq, Sierra Leone and Kosovo perhaps) which will identify the ‘key events’ and the positions adopted by ‘relevant actors’ (States and international organisations for the most part) followed by a conclusion that purports to lay down when, if at all, intervention on such a basis might be regarded as legitimate.⁸⁴ This tends to involve distinguishing between those factors that form part of the normative proposition (such as, perhaps, the severity of the humanitarian crisis and the inability of the UN Security Council to take action) and those which, whilst historically significant, do not (such as might relate, for example, to the origination of the crisis, the relationship between intervener and intervened, the experience of those facing intervention, or the perceptions of other non-State actors). The excision of these latter contextual factors from the elaboration of the rule is clearly necessary in order for the rule itself to have normative bite (the more factors or conditions included within any particular rule, the fewer the cases in which the rule is likely to have effect), and the extent to which they may figure in any narrative account of the ‘practice’ itself, will tend to depend upon the intuition as to whether such factors may have some subsequent significance for purposes of distinguishing between the rule and its exception.

Apart from the limited nature of such accounts in terms of the history they purport to narrate, the practice of relating history in this way makes all sorts of assumptions about the past and its relevance to contemporary decision-making. As Kennedy observes:

‘The rhetorical gestures and motives of scholars and statesmen are extremely hard to compare across time as applications of similar ideas or contributions to a single institutional project. Moreover, it is unlikely that historical actors were primarily concerned, or even noticed, the relationship between their actions and a transcendent historical development of something which would later come to be summarized as ‘international law’. The complexity of the historical record – different ideas about what ‘law’ was, different attitudes about

⁸³ Kennedy, *Disciplines*, *supra*, n. 41, p. 82.

⁸⁴ See e.g., Franck T., *Recourse to Force: State Action against Threats and Armed Attacks* (2002) pp. 135-173.

‘sovereignty’ and ‘war’ and ‘right’ – tend to disappear when one looks at historical events for evidence of what ‘the law’ about some transhistorical phenomenon like ‘conquest’ or ‘sovereign immunity’ has been.⁸⁵

The caution, then, that the search for law appears to suppose the pre-existence of the law being sought, is one which not only exposes the methodological frailty of the endeavour but also its overtly polemical character.

Kennedy’s critique of international lawyers’ reading of the past – and particularly their assumption that ideas such as sovereignty, jurisdiction or custom can be taken to be historically stable notions and hence provide a basis for transhistorical analysis – is one that corresponds with elements of the ‘Cambridge school’s’ approach to the history of ideas. As Skinner and others have consistently maintained,⁸⁶ the social and cultural context in which political, philosophical or legal ideas come to be inscribed in textual form is critically important for an understanding of what those ideas actually meant to those using them. It is thus only through a critical examination of the linguistic practices and tradition in which a writer was working that one would be able to ascribe particular meaning to the vague phrase or abstract concept articulated in her work. If this was the case, furthermore, one could no longer automatically hold onto the idea that the subject of one’s discussion – the idea of sovereignty or the concept of intervention for example – remained an independent and invariable constant nor really to the idea that international law exists as a single phenomenon existing within history.⁸⁷

One initial response to this may be to point out that international lawyers do not necessarily insist upon the stability of concepts within their discipline. The idea of territory, for example, is one which is generally understood to have changed quite radically over the course of the 18th-20th Centuries. Brownlie, for example, describes the ‘historical development of the law’ in the following terms:

‘In the Middle Ages the ideas of state and kingship prevalent in Europe tended to place the ruler in the position of a private owner, since feudal law, as the applicable “public law”, conferred ultimate title on the ruler, and the legal doctrine of the day employed analogies of Roman private law in the sphere of property to describe the sovereign’s power. The growth of

⁸⁵ Kennedy, *supra*, n. 41, p. .

⁸⁶ See generally, Skinner Q., ‘Meaning and Understanding in the History of Ideas’ in *History and Theory* (1969) 3; Tuck R., ‘History of Political Thought’ in Burke P., *New Perspectives on Writing History* (2001) 218.

⁸⁷ *Ibid* (Skinner) p. 30 (‘to suggest... that a knowledge of the social context is a necessary condition for an understanding of the classic texts is equivalent to denying that they do contain any elements of timeless and perennial interest, and is thus equivalent to removing the whole point of studying what they said.’)

absolutism in the sixteenth and seventeenth centuries confirmed the trend. A treaty ceding territory had the appearance of a sale of land by a private owner, and sales of territory did in fact occur. In the eighteenth and nineteenth centuries the significance of private law notions declined. In the field of theory sovereignty was recognized as an abstraction and thus the ruler was a bearer and agent of a legal capacity which belonged to the state.⁸⁸

There is a movement, here, recorded in Brownlie's account, that sees an essentially patrimonial conception of territory being replaced by one that understood territory primarily in terms of 'jurisdiction' (as realm of competence delineating the space within which governmental agencies may legitimately act), and this itself, was related to changing conceptions of sovereignty on the one hand, and the relative significance of private law analogies in international legal reasoning on the other.⁸⁹ Even if generic labels such as 'territory' 'sovereignty' or 'jurisdiction' remain the same, there is acute awareness that the content and meaning of such terms has not, and will not, remain entirely static.

One may wonder, however, why this kind of admission is not more perplexing for international lawyers. If it is the case that 'territory' or 'sovereignty' now mean something quite different from the meaning attributed to them a century or more ago, then what is the relationship between the past and present of those ideas, and why, more importantly, might that history be worthy of being narrated in the manner described? In one sense, it may be taken merely as a warning against the incautious evocation of historical source material: one has to be clear, for example, about the problems of drawing upon historical precedents for purposes of describing the legal consequences associated with the cession of territory when those consequences seem to depend upon how 'territory' itself is understood.⁹⁰ In another sense, however, it also seems to be a matter of conveying a sense of progress: it is a way of describing how international law has divested itself of the authoritarian or imperialist impulses associated with the 'power of the sovereign', and how it now remains open to a more democratic agenda, or perhaps an agenda concerned with 'empowering the self'.⁹¹ But of course, this is to return once again to the problem of 'old historicism' and the dubious postulate that one can

⁸⁸ Brownlie, *supra*, n. 40, p. 126

⁸⁹ See further Carty A., *The Decay of International Law* (1986) pp. 43-60.

⁹⁰ It is evident, for example, that the changing understanding of 'territory' and hence the implications of its 'cession' had particular relevance for purposes of questions of nationality. See generally, Weis, *Nationality and Statelessness in International Law* (2nd ed. 1979).

⁹¹ See, Franck T., *The Empowered Self: Law and Society in the Age of Individualism* (2001)

confidently map out the history of international law (or anything else for that matter) in terms of a teleology of ‘progress’.⁹²

The one particular context in which present (putatively democratic) and past (putatively colonial or imperial) visions of international law appear to collide is in case of disputes over historic titles. In such cases, reliance upon Huber’s doctrine of ‘Inter-Temporal Law’ would appear to require deference to an understanding of history ‘as it was’:

‘a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such dispute in regard to it arises or falls to be settled’.⁹³

Whilst Huber subsequently qualified this initial proposition with the proviso that this only pertained for purposes of the ‘creation’ of rights rather than their ‘continued manifestation’, it has generally been taken as meaning that historic titles based on annexation, for example, cannot be called into question simply because annexation is no longer a legitimate means of acquiring title to territory. Precisely this kind of argument was rejected by the ICJ in the *Cameroons/Nigeria case* in which it held that the cession of the Bakassi peninsular to Germany in 1913 was effective notwithstanding the fact that it appeared to breach the terms of the earlier protectorate agreement between Great Britain and the ‘Kings and Chiefs of Old Calabar’. The Court concluded, in face of Nigeria’s assertions to the contrary, that the ‘Treaty of Protection’ was, in light of general European practice in Sub-Saharan Africa, not an agreement that recognised or preserved the sovereignty of the Kings and Chiefs of Old Calabar:

‘many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States. Indeed, apart from the parallel declarations of various lesser Chiefs agreeing to be bound by the 1884 Treaty, there is not even convincing evidence of a central federal power. There appears in Old Calabar rather to have been individual townships, headed by Chiefs, who regarded themselves as owing a general allegiance to more important Kings and Chiefs. Further, from the outset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them.’⁹⁴

As a consequence, Britain was taken to have acquired sovereignty over Old Calabar and was competent to subsequently dispose of that territory by agreement with Germany.

⁹² Such historiography was decisively undermined by Karl Popper in *The Poverty of Historicism* (1957)

⁹³ *Island of Palmas Case* (1949) II UNRIIAA 829, p. 845.

⁹⁴ ICJ Rep. 2002, p. 103, para. 207.

Whilst overtly representing a clear example of the application of the doctrine of inter-temporal law, the case of Old Calabar also exposes the limits of this kind of historical enquiry. In essence the Court saw itself as being asked to deliberate upon the significance of a treaty concluded between Britain and the Kings and Chiefs of Old Calabar, not by reference to the standards of treaty interpretation today, but by those pertaining in the 1880s.⁹⁵ It thus had to place itself in the mindset of some actor or agent at that time, and the critical choice, of course, was whether it would be that of a legal advisor located within Britain or elsewhere in Europe, or that of the Kings and Chiefs themselves. Working from the apparent assumption that international law was largely Eurocentric in outlook, and actively facilitated the process of colonisation rather than resisted it, the Court seemed to conclude that relevant actors at the time would not have recognised the sovereignty and treaty-making capacity of the Kings and Chiefs, and hence that the treaty was not ‘governed by international law’ and did not affect the capacity of Britain to subsequently dispose of the territory.⁹⁶ Proceeding, thus, on the basis that the treaty either did not really exist, or at least did not mean what it said,⁹⁷ the Court involved itself in a precarious exercise of revisionism. As Koskenniemi points out, 19th Century legal opinion was far from undivided on the question of the status of colonial treaties. Whilst there were those (such as Westlake and Rolin) who regarded such treaties as irrelevant to international law, there were also those (such as Bonfils and Fauchille) who assigned considerable significance to them.⁹⁸ Even if the Final Act of the Berlin Conference had apparently laid down the procedure for colonisation by way of effective occupation, this did not prevent King Leopold from seeking to establish a foothold in the Congo by means of reliance upon a series of treaties signed by envoys with local Kings and Chiefs in the region, nor did it prevent the European powers themselves subsequently relying upon such treaties as a basis for justifying their own claims to sovereignty.

⁹⁵ For a discussion of this issue see Klabbers J., ‘Reluctant *Grundnormen*: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’, in this volume, p. ?.

⁹⁶ There is some question as to how far this may be squared with the ICJ’s position in the *Western Sahara case* (ICJ Rep. (1975), 12, para. 80) in which it was held that State practice of the relevant period (1884) ‘indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title but through agreements concluded with local rulers.’

⁹⁷ See, Judge Koroma (dissenting), ICJ Rep. (2002), 303, p. 479, para. 15.

⁹⁸ See generally Lindley M., *Acquisition and Government of Backward Territory in International Law* (1926) pp.

This, of course, may be to expose the real sense of agreements of this kind. It is perfectly plausible to argue that, so far as the colonial powers were concerned, such treaties were not concluded with the local 'sovereigns' in mind at all, but functioned rather as a means of demonstrating a relationship of authority or control to other European powers. What would have mattered, in other words, was not whether Britain assumed sovereignty over Old Calabar by means of the agreement, or indeed whether the Kings and Chiefs were regarded as sovereign themselves;⁹⁹ but whether other European powers understood that such territory was no longer open to annexation or other forms of informal influence.¹⁰⁰ The question of where sovereignty actually lay could thus largely be avoided so long as the preponderant interests of Britain in the region were given due recognition,¹⁰¹ and the obvious means by which such interest could be communicated was by the conclusion and publication of a public agreement to that effect.

If this is accurate then, and assuming the standpoint is that of the colonising powers, it would seem to be entirely beside the point to seek within the agreement or its surrounding circumstances an indication as to whether Britain or anyone else recognised the sovereignty of the Kings and Chiefs of Old Calabar. That would have been an 'academic point' of little serious consequence, and one that only few international lawyers would have committed themselves to on one side or another. That it has subsequently become important in virtue of Britain's purported cession of the territory to Germany in 1913, is no reason to read back into the history more than is palpably there, and is to obscure the obvious ambivalence that characterised discussions of treaty law and sovereignty at the time. One kind of response to the Court's problem would thus be to say that the issue was simply unanswerable because there was no sense that international lawyers within Europe in the 1880s thought it to be a question that needed to be

⁹⁹ Cf. Carty's observations about the Agreement of Sib, *supra*, n. 76, p.?

¹⁰⁰ The general sense of the 1884 agreement as spelled out in articles 1 and 2 was that Britain undertook to extend to the Kings and Chiefs 'her gracious favour and protection' (art. 1). In return, the Kings and Chiefs agreed 'to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation of Power' (art. 2).

¹⁰¹ Remnants of this kind of pragmatism in relation to claims of sovereignty are evident in the literature today. Thus Crawford observes, in commenting on the case, that the terms of the treaty itself did not really matter – what was important was the 'position which the parties themselves took and which were applied in practice'. He thus concludes that 'even if, after 1884, a party existed that might have espoused such a claim [to sovereignty], no claim contrary to Britain's own claim appears to have been made, and at the international level the Kings and Chiefs of Old Calabar... disappeared from view.' (Crawford J., *The Creation of States in International Law* (2nd ed. 2005) at 314.

answered. Whether or not the Kings and Chiefs might have had another view of the issue is, of course, another question and one suspects the answer to that is lost to history.

For all the difficulties associated with reading the past, it is also evident that the past may actually be more accessible to the international lawyer – or at least provide international lawyers with a deeper understanding of their own discipline – than the present. In his contribution to this book, Carty points out that in the construction of customary rules, international lawyers necessarily seek both practice and *opinio iuris* and in the context of the latter, tend to rely upon the ‘verbal positions’ adopted by organs of the state in internal processes and external relations.¹⁰² His point, however, is that the latter may be deeply misleading. On interrogation of archival evidence – in his case, the Foreign Office archives relating to the UK’s intervention in Oman and Muscat in 1957 – a picture may emerge in which the formal pronouncements of the government appear to be largely at odds with the views or perceptions of the advisors and other key decision-makers as regards the questions of law with which they are dealing (views which, in fact, only emerge once the records concerned are made public). In the case in point, he observes that whilst the UK maintained the formal position that it was intervening in Muscat and Oman at the invitation of the local sovereign (and hence was not for Charter purposes unlawful), the underlying position of its advisors appeared to be that the Sultan could not plausibly be regarded as ‘sovereign’ given the lack of any historic effective control over the territory. Any insistence, thereby, that the Sultan was, indeed, sovereign could only be seen as ‘window dressing’ obscuring a continued policy of imperial ambition that continued beyond the time of formal decolonisation.

At one level Carty’s argument may be taken to be a rather worrying critique of customary international law. He seems to insist, at the first stage, that if international lawyers are intent on taking customary international law seriously, they must necessarily seek to adduce from a variety of archival sources the outlook and normative preferences (the ‘mentality’) of key actors. This much is a reasonable demand and makes very clear the way in which historical research may be central to the development of any real understanding of international law (as opposed to an understanding built upon public utterances or formal statements). But what Carty then uncovers is a wholly unappealing world of imperial design, and mendaciousness posturing, which can barely be squared

¹⁰² Carty, *supra*, n. 76, p. 2.

with the lofty ideals which international lawyers frequently associate with their discipline ('consent', 'non-intervention', the 'prohibition on the use of force' and so on). The history Carty unearths in this respect is both too bland and too radical to be effectively 'internalised' within the discipline. It is too radical in the sense that it leads to the obvious question as to whether anyone would possibly want to defend a rule permitting intervention by invitation if all the cases one relied upon were of this kind? Would anyone (even Walmsley's 'reasonable person') assume such practice to be a worthy precedent? What this might suggest, of course, is that only 'worthy' precedents should be sought – those not tainted by deception or malice, that demonstrate honesty, integrity and good faith - but it remains entirely open as to whether, once the history is revealed, any such examples exist. It is also too bland in the sense that many will take it as read that States will have a multitude of reasons for behaving in the way they do, and that compliance with international law is likely to be only a minor consideration. Just because British officials may have had imperial designs in the pursuit of the war, it might be reasoned, does not tell us a great deal about the validity or otherwise of the norm itself. Does it really matter whether, for example, in advancing the idea that the war in Iraq was legal, the British or US governments may have been motivated, like Holmes' 'bad man', by sundry other less persuasive, or valid, concerns (oil, commercial opportunity, or regional influence for example)? Is not the key, the question whether one can plausibly justify the action under some legitimate head, or whether one can persuade others of the legitimacy of the position adopted? In this sense, it is the constraints placed upon actors in seeking the legitimation of their various projects through the language of law and justice that are most important – albeit the case that they are constraints that frequently operate only at the outer edges of everyday activity. But here again, one may return to Carty's concern about the formulation of the rules of legality that supposedly 'police' international actors, and the extent to which they themselves are rooted in a practice of obnoxious imperialism: whose violence is one legitimating when one posits a rule permitting intervention by invitation, and what history is one telling in the process?

INTERNATIONAL LAW IN HISTORY

The concerns that Carty appears to raise here, are not merely ones that relate to international lawyers' conversation with themselves, but also concern the place international law is thought to assume in a broader social environment. As Carty puts it, '[f]or the perplexed international lawyer, the question that is most pressing is whether

and how the Charter paradigm and language... can retain not merely formal validity but also a significant impact upon the forces at work in that society.¹⁰³ The sense that international law has a place *within* history is thus just as important for international lawyers as the sense that it has a history of its own.

In some respects, at least, the origination of this concern may be traced back to the work of John Austin. As Lobban notes, in his contribution to this volume, since the end of the 19th Century international lawyers in England, if not elsewhere, have taken Austin's dismissal of international law as 'mere' positive morality to be a central point of critique.¹⁰⁴ However much Austin's argument in this direction may have been misconstrued (as Lobban suggests) it seemed to lay down two challenges: one concerning the ability of international lawyers to justify to their legal colleagues (within or outside universities) the worth of their subject; the other, their ability to represent to the wider world, the significance of international law for the everyday decision-making of governments. In as far as the significance of international law in its wider sense seemed to depend upon the prior question as to whether it was, indeed, law at all, the fixation of early scholars – Maine, Westlake, and Lawrence amongst them – was to interrogate the assumed connection between law, sovereignty, and the deployment of coercion. Their reaction to the Austinian critique, of course, was to assume different forms – the replacement of 'sovereignty' by 'society' in the definition of law; the insistence upon an plural conception of law; the emphasis upon ordering capacity of law rather than its coercive character; the re-definition of sovereignty as a product of, rather than a source of, law; and so on. But none of these forms of refutation involved a serious engagement with the second question - namely whether the demand for obeisance to international law exerted significant influence in international affairs, or whether to the contrary it was largely epiphenomenal. That, of course, was the direct challenge laid down in the inter-war years by the likes of Morgenthau and Carr, and a great deal of international law scholarship since that time has been centred around precisely that problematic.

Having reiterated this old question, Carty provides the 'perplexed' international lawyer no direct response. He rather confines himself to observing that 'the least one can say as an international lawyer is that *positions* taken up by the UK, or for that matter any other

¹⁰³ *Ibid*, p. ?

¹⁰⁴ Lobban, *supra*, n. 69, p.?.

government, cannot be taken at face value, or even be treated with anything other than complete scepticism'.¹⁰⁵ He continues:

'Without consistent and comprehensive access to the governmental policy-making process in which government international lawyers may also have a significant input, it is impossible to assess the process of decision-making in such a way as to determine exactly how international law is being interpreted, applied, followed or ignored.'¹⁰⁶

Taken as a critique of arguments sustaining the significance of international law merely by reference to external observation of 'practice' or to the verbalised positions of governmental organs adopted in public *fora.*, this is an important point. But Carty's argument also appears to go beyond this. In his example of British intervention in Muscat and Oman, he points out that the British were entirely duplicitous as regards their presentation of the legal position within the United Nations: although intervention was justified on the basis of consent of the sovereign, there was no real conviction that the Sultan could properly be regarded as sovereign. Even if strategic interests appear to have been important in this case, Carty is uncomfortable with the idea that one should thereby fall back upon a standard account of international relations which understands the world in terms of a competition of interests between 'a collection of primary, unknowable, self-defining subjects'. Rather, he argues, it is the model articulated by Robert Cooper (who suggests that international society is divided into three incommensurable regimes of order, and that relations between the 'modern' and 'pre-modern' worlds he identifies will inevitably assume an imperial form¹⁰⁷) that has most descriptive purchase.

To the extent that Carty seems to re-affirm the subordinate, or dispensable, character of legal argument in this case – and the corresponding importance and centrality of imperial ideology – he might be thought to merely re-affirm the suspicion that international law is a largely insignificant phenomenon in international relations. He avoids any such direct conclusion, however, and one suspects that his account is not in fact susceptible to such kind of theorising: his concern being simply to employ a 'positivist' historiography for purposes of exploring the way in which British officials at the time understood the international legal issues and their relationship to a broader imperial culture. Had the account been of a different incident and concerned a different set of officials, the picture

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Cooper R., *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003)

might have been quite different - what is surprising, after all, is how much time was clearly spent debating the legal issues.

Carty's apparent detached neutrality as regards the role played by international law in this incident is not one that is typically shared by mainstream international lawyers. For the most part, international lawyers are keen to insist upon the strength of international law – either in the form of bland semi-empirical assertions as to how nations behave, or by reference to constructivist accounts of regime formation or of the capacity for certain rules to exercise a pull to compliance. All such accounts, however, are written against a background image of the discipline's frailty – of the potential predominance of political discretion over rules, or power over law. Superficially, of course, this has been such as to encourage international lawyers to focus upon the problem of compliance or enforcement – to direct attention to the devising of mechanisms, strategies, or institutional initiatives to overcome what is thought to be an innate predisposition on the part of governments to ignore international commitments whenever they appear to be inconvenient. It has also been such as to foster the equation of law-breaking with a return to anarchy and violence and a sanctification of power politics.

But it is equally apparent that the constant reiteration of the discipline's potential marginality is an important rhetorical device insofar as it creates an innate pre-disposition in favour of whatever projects are given the soubriquet 'law' or 'legality'. The sense that international law represents the last bastion standing out against the collapse of international society into a lawless world of violence, conflict, deprivation or imperial dominance, is one that not only encourages the view that it is essentially benign (promoting peace, assuring security, engendering compliance with human rights obligations or a commitment to environmental protection), but is such as to render it immune to critique. One cannot be 'against' international law, or parts thereof, except in the name of some other competing legality. Far from being a threat, in other words, the image of a lawlessness world that is constantly present at the margins, is central to international lawyers' sense of their own discipline.