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Neoformalism and the Turn to History in International Law

1.1 TURNING TO HISTORY

International lawyers are very familiar with the claim that international law has taken a turn to history. Indeed, for some more dramatically inclined legal scholars, there is a 'struggle for the soul' of international law being played out through debates about the past.[1] This book seeks to grasp the political stakes of that historical turn. It does so by situating debates over the origins of international law and the meaning of past legal material within the broader field of political, social, economic, and institutional transformation that has reshaped the theory and practice of international law since the end of the Cold War.

The tumultuous decade of the 1990s was the initial context in which international lawyers took what has since been characterised as a 'turn to history'.[2] That is not to say that this was the moment at which international lawyers first began talking and writing about history. International law has

[1] A Carty, 'Visions of the Past of International Society: Law, History or Politics?' (2006) 69 *Modern Law Review* 644, at 645 (on the 'struggle for the soul' of international law being played out in debates about the past); P Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043, at 2077 (arguing that 'there is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy').

[2] GRB Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539; M Craven, 'Introduction: International Law and Its Histories' in M Craven, M Fitzmaurice, and M Vogiatzi (eds), *Time, History, and International Law* (Leiden: Martinus Nijhoff, 2007), 1, at 3; T Skouteris, 'The Turn to History in International Law' in A Carty (ed), *Oxford Bibliographies Online* (Oxford: Oxford University Press, 2016); M Craven, 'Theorizing the Turn to History in International Law' in A Orford and F Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 21. For an early account challenging the utility of the 'move to history' in international law theory, see AL Paulus, 'International Law after Postmodernism: Towards Renewal or Decline of International Law?' (2001) 14 *Leiden Journal of International Law* 727.

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been an intensely historical field of practice for as long as there have been international lawyers. Past texts, concepts, and practices are regularly retrieved and taken up as a resource in international legal argumentation, and past events or figures are invoked to situate current developments within a longer narrative and provide a meaningful teleology for the discipline. The tendency to equate the history of international law with the progress of humanity accompanied the organisation of international lawyers into a profession in the late nineteenth century.[3] In the aftermath of formal decolonisation scholars also turned to history to place newly independent states within a longer internationalist tradition,[4] or to insist that international law needed to be renovated if it were to treat new states on equal terms and move beyond the Christian and imperial bases of the European variant of international law.[5]

Nonetheless, the end of the Cold War marked a moment at which history began to play a more central role in international legal argumentation.

[3] M Koskenniemi, 'A History of International Law Histories' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 943, at 943–944.

[4] See, for example, KA Nilakanta Sastri, 'International Law and Relations in Ancient India' (1952) 1 *Indian Yearbook of International Affairs* 97; M Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 *American Journal of International Law* 358; MK Nawaz, 'The Law of Nations in Ancient India' (1957) 6 *Indian Yearbook of International Affairs* 172; CJ Chacko, 'India's Contribution to the Field of International Law Concepts' (1958) 93 *Recueil de Cours* 117; H Chatterjee, *International Law and Inter-State Relations in Ancient India* (Calcutta: KL Mukhopadhyay, 1958); CH Alexandrowicz, 'Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries' (1960) 100 *Recueil des Cours* 203; CH Alexandrowicz, 'Kautilyan Principles and the Law of Nations' (1965–1966) 41 *British Yearbook of International Law* 301; M Khadduri, *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore: John Hopkins Press, 1966); CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon, 1967); I Keishiro, 'The Principles of International Law in the Light of Confucian Doctrine' (1967) 120 *Recueil des Cours* 1; CH Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)' (1968) 123 *Recueil des Cours* 117; MT Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968); N Singh, *India and International Law* (Delhi: S. Chand and Co, 1969); TO Elias, *Africa and the Development of International Law* (Leiden: AW Sijthoff, 1972); RP Anand, *Origin and Development of Law of the Sea: History of International Law Revisited* (Leiden: Martinus Nijhoff, 1983); CG Weeramantry, *Islamic Jurisprudence* (New York: St Martin Press, 1988).

[5] See, for example, FC Okoye, *International Law and the New African States* (London: Sweet and Maxwell, 1972); RP Anand, *New States and International Law* (Delhi: Vikas, 1972); UO Umozurike, *International Law and Colonialism in Africa* (Enugu: Nwamife, 1979); M Bedjaoui, *Towards a New International Economic Order* (Paris and New York: UNESCO/ Holmes and Meier, 1979); RP Anand, 'Sovereign Equality of States in International Law' (1986) 197 *Recueil des Cours* 9; FE Snyder and S Sathirathai (eds), *Third World Attitudes toward International Law* (Dordrecht: Nijhoff, 1987).

The sense that more recent historically minded work in international law represented a radical turning point lay not in the mere fact of scholarship engaging with the past, nor even of engaging with the past as 'history'. Rather, the sense that twenty-first-century scholarly trends signalled renewal and innovation was related to two developments – first, the turn to history as a way of understanding or critiquing the role of international law in a shifting global situation and second, the turn to history as a means of professionally engaging with the past. Both the turn to history as a means of intervening in current legal debates and the turn to history as a professional method for studying the past presented themselves as correctives to problems with earlier scholarship and both captured a sense of energy, innovation, and movement.

The first phenomenon that could be characterised as marking a 'turn to history' – the turn to history as a means of critically engaging with a rapidly changing legal and political situation – gained ground during the 1990s. Given the context of a unipolar world in which international law was being remade in the image of the sole remaining hegemonic power, it is perhaps unsurprising that the history of international law became a field of increasing interest and attention. With the break-up of the Soviet Union, international law became the vehicle for an ambitious US-led project of remaking relations between and within states. While for most of the twentieth century, international adjudication had played a relatively minor role in the broader international law field, that began to change. The twin processes of judicialisation and constitutionalisation began to intensify, particularly in areas that were central to the global economy. Appeals to the history of international law played a significant role in debates over the legitimacy of that expansionist project and the far-reaching regimes of investment, trade, and human rights adjudication that were consolidated as a result.

That focus on international law's history only intensified as the project of realising a new international law for a world of liberal states began to falter in the first decades of the twenty-first century.[6] In the wake of the war on terror, the subsequent financial, energy, climate, food, and humanitarian crises, and the disruptions to the US-led international order posed by the rise of China and the populist backlash against liberal multilateralism, history again became a site of struggles over the nature, meaning, and proper role of international law. The sense that history may not have ended and that a world of liberal states was not necessarily our destination re-entered the

[6] For the description of the US-led vision for international law in those terms, see A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

mainstream of international legal debate. The consequences of those wars, crises, disruptions, and uprisings re-enlivened debates about how the world had come to take this form and what alternatives to the current global order were possible. Some scholars looked to the past to understand the role international law had played in contributing to the global financial crisis, climate change, mass displacement of people, and the growing vulnerability, insecurity, and inequality that were increasingly apparent within and between states. Others sought to muster a defence of existing international institutional arrangements and treaty regimes by linking their development to progress narratives.

Much of that initial scholarly work engaging with the history of international law was motivated by what historians call 'presentist' concerns. Lawyers assembled past texts, concepts, practices, and institutions to make arguments directed at rationalising, shaping, or resisting the transformation of international law over the turbulent decades following the end of the Cold War. Legal scholars engaged with the past in the process of participating in the everyday routines of international legal work. They attempted to understand what role international law had played in shaping the rapidly changing global situation, relied on inherited legal concepts, rethought received interpretations of treaties or state practice in relation to new contexts, suggested analogies for current situations requiring legal responses, and participated in exercises of regulatory redesign in the aftermath of financial, security, climate, energy, refugee, and food crises. While some of those international lawyers saw themselves as undertaking historical projects, most did not. In general, the work being undertaken by international lawyers did not conform to professional historical protocols in either style or method.

The idea that international law turned to history in the late twentieth century has also been used to describe a second scholarly trend that emerged during that period. That version of the 'turn to history' followed in the wake of more politically charged interventions. The scholars involved in the turn to history in this second sense urged international lawyers to take a more professional, less instrumentalist, and less partisan approach to history. As the history of international law and international institutions became more visible as public sites of contestation and struggle over the legitimacy of liberal internationalism, historians of international law began to challenge the accounts of the past offered by international lawyers on methodological grounds. Surprisingly quickly, international lawyers and historians became caught up in debates over the appropriate methods, styles, and protocols for engaging with texts, concepts, ideas, institutions, practices, or events considered to belong in and to the 'past' of international law, most notably in the fraught

discussion over the past and present relation of international law and empire. A growing body of literature began to argue that those engaged in a substantive turn to history in legal scholarship should become more professional and less amateurish. That literature called on legal scholars to adopt proper historical methods, represented as a unified set of basic rules and standards.

The argument for taking a more professional approach to studying the history of international law was initiated by legal historians advocating the adoption of specific empiricist or contextualist historical techniques. They were joined by a group of professional historians who had begun to take an interest in international law as part of a broader turn to the international and the global amongst historians. Both the global turn in history and the international turn in intellectual history fuelled a new interest in histories of international law and fed into ongoing discussions about the way in which the past was drawn upon to inform current legal debates. Over time, the encounter between historians of international law and international lawyers has been increasingly characterised by the insistence that empiricist historical methods can produce professional, impartial, and verifiable interpretations of past texts, events, concepts, and practices, and that such methods are needed to correct or complete the misuses of history in international legal argument.

The end result has been that historical claims have begun to take on a new status within international legal debates. Despite over a century of anti-formalist scholarship in both law and history insisting that law is made not found, the turn to history has seen numerous historians and like-minded international lawyers treat historical research as if it offered an objective ground for determining what a past legal text really means, what an international institution was really designed to achieve, or what the field of international law is really for. In addition, numerous lawyers and historians have tended to treat at least some international lawyers (often those on the other side of a debate) as naïve scholastics who have yet to learn the lessons taught by centuries of historicising humanism.

1.2 THE HERMENEUTIC OF SUSPICION AND THE HISTORY OF INTERNATIONAL LAW

This book is concerned with the structure of argument that has resulted from that meeting of empiricist historical methods and international law. In short, I argue that the encounter is structured around a cross-disciplinary hermeneutic of suspicion. The claim that contemporary legal thought is structured around a hermeneutic of suspicion has been made by Duncan Kennedy in an

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article focused on the situation in US legal circles.[7] Kennedy argues that the widespread adoption of a hermeneutic of suspicion amongst US lawyers both in practice and in the academy is a way of dealing with the challenges posed to formalism and to metaphysics, first by the American legal realists of the early twentieth century and subsequently by the self-styled Critical Legal Scholars (or CLS) movement of the 1980s and beyond. The adoption of a hermeneutic of suspicion provides a way to deal with the challenge posed by anti-metaphysical and anti-formalist thinkers to any vestigial traces of the idea that law can be formalist, positivist, and possess a meaning that can be determined free of partisanship or ideology. The technique works by claiming that the lawyers on the other side in any dispute are exhibiting partisanship and engaging in ideological ways with legal rules, texts, or processes. Our side is in contrast simply offering a verifiable account of any legal rule or text and acting in good faith in accordance with processes or canons of interpretation to determine what the law is.

In the debate with which I am engaged in this book, a hermeneutic of suspicion is deployed across and between the disciplines of law and history. It is structured around claims about the ideological character of interpretations of the past by international lawyers and the scientific virtues of empiricist historiography. That cross-disciplinary hermeneutic presents legal scholars as partisan actors who interpret legal rules, texts, or processes politically, while empiricist historical research can offer verifiable and evidence-based interpretations of past legal material.

An argument structured in those terms plays a significant role in the post-realist field of contemporary international law. I characterise the field as post-realist because what counts as a persuasive legal argument in international law has been deeply affected by the realist challenge to the idea that law is a system of rules, the meaning of which is determinate and the consequences of which in any individual case can be mechanically derived from those rules. Yet that challenge to the tenets of formalism and positivism led the early American realists in two different directions, both of which have also shaped international law. On the one hand, the realist challenge fuelled a more sceptical version of legal thinking, which rejected the idea that there was a rational solution to every legal problem that could be uncovered by the use of the

[7] D Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' (2014) 25 *Law and Critique* 91. The idea that there exists a recognisable hermeneutic of suspicion was developed by Paul Ricoeur to describe the mode of interpretation inspired by Freud, Marx, and Nietzsche, the three 'masters of suspicion'. See P Ricœur, *Freud and Philosophy: An Essay on Interpretation* (New Haven: Yale University Press, 1970), 32–36.

correct method, model, or process. On the other hand, the realist challenge also inspired a search for more scientific foundations for the law. For those whose response to the realist challenge led in this direction, law might be politics all the way down, but perhaps other fields of human knowledge could still offer neutral, verifiable, or objective grounds for legal reasoning.

Over the intervening decades, there have been numerous attempts 'to recreate, to some extent, the idea of an objective standpoint' that lawyers can use to make decisions about 'complex legal issues without taking sides in desperate social struggles'.[8] Some have sought to find those new foundations in allegedly neutral processes or non-controversial decision-making procedures (such as the democratic process, the veil of ignorance, or game theory). Others have posited abstract values or criteria for judgment that are said to trump or transcend political divisions (appealing to categories such as rights, dignity, welfare, equality, or efficiency). Others have sought to turn normative disputes into debates about social scientific data or facts. In each case, the ambition has been 'to create a new foundation' for adjudication or legal reasoning 'to replace the discredited foundations of formalism'.[9]

The core argument of this book is that appeals to history do the same work in international law today. Empiricist historians make the neo-formalist claim that reconstructing historical contexts can offer us a verifiable means of interpreting past legal texts, practices, or institutions. Where social science methods are appealed to for objective accounts of the social world in which law operates,[10] historical methods are appealed to for objective accounts of past contexts. International lawyers are repeatedly told that contextualist historical methods can offer us a new foundation for grounding our arguments about the real history of a regime, the origins of international law, or the meaning of a past text. Accepting such claims allows lawyers to avoid the sceptical conclusions to which the realist critique ultimately leads. Rather than fully accepting uncertainty and our responsibility for the politics of our legal arguments, we can use the work of historians to establish truths about international law. In much contemporary international law scholarship, historical claims provide an exit from the uncertainty, self-doubt, or existential dread produced by arguments about the indeterminacy of legal rules or the lack of transcendent values upon which to base a shared law.

[8] JW Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465, at 516.

[9] Singer, 'Legal Realism Now', 516. See also G Peller, 'The Metaphysics of American Law' (1985) 73 *California Law Review* 1151 (comparing realism as critique and realism as science).

[10] D Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575.

As debates over the interpretation of past texts, events, and practices have heated up in the context of a rapidly changing field of international law, history offers a silver bullet. While international lawyers may all be realists now, we tend to be realists about the opponent's argument while appealing to objective foundations to ground our own. In the case of the interdisciplinary version of the hermeneutic of suspicion that I study in this book, we find in history a new foundation for arguments about the meaning of law to ground our interpretations or indict our opponents. International lawyers may be biased, partisan, and political, but historical accounts and methods can still offer us knowledge that is objective, impartial, and factual. Numerous historians and like-minded international lawyers have argued that the adoption of professional historical methods can lift debates about legal meaning out of the realm of partisan politics and into the calmer domain of empiricist science. The overall effect is that history is presented as offering a new foundation for formalism in international law.

It is possible to see the resulting debates over the turn to history as simply a form of departmental rivalry – a petty clash between two groups of scholars, concerned with an arcane set of issues focused on style and method. The claim that one discipline is trying to exercise a form of 'scientific imperialism' over another certainly has something of that inside baseball quality to it.[11] Indeed, those of you who are reading this because you are interested in producing better histories of international law might look at my description of this debate and wonder what the fuss is about. Don't lawyers have something to gain from accepting the counsel of professional historians, if their methods can offer us an evidence-based account of the true origins of international law or allow us to understand the real meaning of the historical texts with which we routinely go to work? After all, what could be wrong with a commitment to rigorous engagement with evidence, careful work in documentary archives, articulating with precision the intentions informing particular utterances, and correcting partisan or instrumentalist misuse of the past? Don't we secretly hope for an interpretative method that would allow us to understand what a legal text really means once and for all, and escape from the relentless nihilism of anti-formalist legal theory and its insistence that the meaning of legal texts is indeterminate?

And those of you who are reading this because you are interested in thinking critically about international law might also wonder why I would baulk at an argument structured along those lines. Isn't it valuable to discover

[11] See generally U Mäki, A Walsh, and MF Pinto (eds), *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity* (London and New York: Routledge, 2018).

the true origin of the legal regimes with which we are working and thus be able to prove beyond doubt that everything else we have been told about them is simply an effect of mythologising or the invention of tradition? Shouldn't we adopt a relentlessly suspicious attitude towards the arguments made by lawyers and embrace any methods we can find in other disciplines to help us demonstrate the instrumentalising and misuse of the historical record by our opponents? Shouldn't we welcome a method that can empirically establish the misleading nature of international law's claims to embody universal values or represent all of humanity? And don't we believe – or perhaps fear – in our secret hearts that lawyers' amateurish approaches to interpreting texts, society, agency, and human behaviour need to be corrected by professional historians or social scientists, who can provide us with the empirical data that will expose the dangerous rhetoric with which lawyers pull the wool over everyone's eyes, including, on our worst days, our own?

I want to try and persuade you that this clash is not simply a passing and superficial squabble. Rather, it raises a set of issues that have a longer provenance and that go to the heart of questions around the role of lawyers in contemporary international politics. While many of us may want to believe that the truth is out there and that this time it is historians who will help us to find it, I want to suggest that the structure of that argument will lead us down the wrong path. It matters that the debate with which I am engaging is structured around a cross-disciplinary hermeneutic of suspicion, in which the interpretations of lawyers are presented as partisan or ideological, while those of empiricist historians are presented as objective and scientific. The first proposition – that is, that lawyers instrumentalise and politicise the past – is a useful insight, but the second – that is, that historians can save us – is a misguided attempt to avoid the responsibility that comes with moving beyond formalism. I am interested in exploring instead how international lawyers might think about our roles if we accepted the first of the twinned propositions at play in this debate – that lawyers instrumentalise and politicise history – without succumbing to the second – that empiricist historical method might save us from having to take responsibility for actively constructing accounts of the law's past when we argue about law in the present.

1.3 THE POLITICS OF MAKING INTERNATIONAL LAW

This book is an argument for a different way of thinking about the work of making legal arguments about the past. Rather than using history as a way of establishing the truth of our own account or accusing our opponents of ideological error, I ask what might be possible if we took responsibility for

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our own creativity and generativity in the project of making the law and making its history. What if we acknowledged the work we do, individually and collectively, in assembling and conferring power on the objects of our scholarly practice?[12]

At present, the combined moves made by historians and lawyers in producing and deploying empiricist histories of international law mean that both can avoid admitting their active and creative role in making international law in the past and in the present. Both sides of the disciplinary divide rely on the truth effects of the other discipline to bolster their own arguments and both deploy a hermeneutic of suspicion to project the agency involved in that process somewhere else. Historians rely on accounts produced by international lawyers for a sense of what international law is today, as if those accounts were objective, and international lawyers rely on accounts by historians for a sense of what international law was in the past, as if those accounts were objective. The result is that lawyers can escape interpretative uncertainty and our own responsibility for legal argument by suggesting that we are uncovering something about the law, discovering the truth of a regime by pointing to its real 'origins', or revealing the history of a field rather than constructing it. That approach continues to constrain and limit our understanding of the active work that is involved in any attempt to construct an account of international law through narrating its past.

This book challenges the suggestion that the empiricist historian offers a technically correct or professional method for interpreting all past texts, while the lawyer offers a politically motivated or instrumental reading. The current attempt to impose a particular empiricist style of historical research in international law is a political intervention in a field that is already organised around interpretative controversies. However, my elaboration of the limitations of the particular turn to empiricist history explored in this book is not meant as a call to the barricades, or for the building of a new wall to separate law and history, present and past. Quite the opposite – this is a call to think in new ways about that relation. This book seeks to show that law is already shot through with history, that history is already shot through with law, that the two are intimately related, and that the advocacy of a particular kind of historical method is inevitably bound up with a particular struggle for the meaning of law.

[12] For such an approach, see E Sedgwick, 'Paranoid Reading and Reparative Reading: Or, You're So Paranoid: You Probably Think This Essay Is about You' in E Sedgwick, MA Barale, J Goldberg, and M Moon (eds), *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2002), 123, at 149–150.

The arguments made in this book about the limits of empiricist historical method should not upset those historians whose professional commitment is to produce an accurate or verifiable account of the past rather than having any specific form of engagement with the present. If your professional commitment and goal is to produce scholarship that complies with historical protocols rather than to intervene in the present work of international law, then the claim that this turn to history does not always have critical purchase in the present should be uninteresting and without relevance to your scholarship. In addition, the work of people who understand themselves as engaged in a professional historical project often *does* have relevance for contemporary work in international law without historians themselves having to sign up to that project. Those historians can leave now with my blessing. This book is not for or about you.

However, a body of detailed work on the history of 'international law' is now accumulating at an increasing rate, much of it conforming to historical protocols but lacking an overt reflection on how such work might help us to think about the potential of international law. Indeed, the opposite is at times true – historical protocols are called upon to police innovative work in the field and to ensure that 'presentism' does not inform the way the past is engaged. Making use of the past as a means of engaging with contemporary legal practice requires a form of reflexivity that is not only discouraged but often discredited in the meeting of international law and history.

So if your ambition is that somehow your study of the past can, and perhaps even should, inform an engagement with and potential transformation of the work that an object called 'international law' or people called 'international lawyers' are doing in the present, this book is written for you. Its writing was animated by my commitment to studying the history and transformation of international law as a basis for enabling international lawyers to intervene in the current situation in politically productive ways. In so doing, I hope to establish the theoretical and conceptual foundations for a more nuanced conversation between international lawyers and scholars in related fields about the philosophical foundations and political stakes of the apparently technical debate over the proper 'methods' for engaging with the past of and as international law.

This book aims to enhance the awareness by international lawyers and other scholars of the methodological choices we make when we think and write about legal materials from the 'past', and to increase sensitivity to the political stakes of those choices in particular situations. I also want to encourage scholars of international law to evaluate, choose among, or create

methods based not on whether they are 'correct' but on what they help to make visible or possible.[13]

1.4 OVERVIEW OF THE ARGUMENT

This is a book about the politics of the turn to history in international law at a time of disruption, change, and challenge. Chapter 2 explores the political, social, and economic conditions in which this turn to history and the accompanying interdisciplinary hermeneutic of suspicion has taken shape since the early 1990s. I focus in particular on the break-up of the Soviet Union and the 'end of history' narrative that accompanied a period of ambitious liberal expansionism, the crisis of liberal internationalism triggered by the war on terror, the subsequent financial, energy, food, asylum, and climate crises of the early twenty-first century, and the shift in geopolitics caused by the rise and influence of the BRICS and particularly of China as an economic power. I consider the effects of those conditions on the ways in which international lawyers have made use of the past as part of professional and academic arguments.

Chapter 3 relates the turn to history in international law to the corresponding 'international turn' taken in the discipline of history, and points to the effects of translating the stakes of those turns into a technical debate involving the more abstract question of the proper scientific methods for understanding the past of international law. That chapter explores a wide-ranging set of claims about empiricist history and criticisms of international law that have accompanied the turn to history. The claims made on behalf of empiricist history were organised around the vocabulary of science. Historical approaches were presented as a means of upholding 'standards of veracity and verifiability',[14] 'distinguishing the abuses from the uses of history',[15] and resisting 'the political manipulation of the past for present political purposes' and the growing 'indifference to the verifiability of political discourse' in contemporary culture.[16] The criticisms made of international lawyers took many forms, but the basic idea was that international lawyers impose some kind of organising scheme on past material, often with a view to addressing

[13] For a related approach, see WW Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1997) 49 *Stanford Law Review* 1065.

[14] L Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law* 1, at 3.

[15] S Moyn, *Human Rights and the Uses of History* (2nd edition) (London: Verso, 2017), xii.

[16] A Fitzmaurice, 'Context in the History of International Law' (2018) 20 *Journal of the History of International Law* 5, at 13, 15, 30.

presentist legal issues. International lawyers have been rebuked for writing history 'from present to past',[17] making 'fanciful connections' between texts from different periods,[18] '[m]ining the past for analogues',[19] taking 'daring jumps' that destroy the 'complexity and pluralism of the discourses from various (and often very divergent) centuries',[20] engaging in 'a cherry-picking of historical events',[21] imposing a 'hermeneutic template' on the past,[22] or generally drawing incidents, events, or figures from the past into morality plays or progress narratives. As Chapter 3 shows, central to these arguments was a set of claims about what 'the basic rules of historical methodology' required,[23] including the prohibition on anachronism, presentism, or abridged versions of history. International lawyers proved very receptive to the idea that empiricist historical methods offered a set of technical rules to which legal scholars should conform when writing about the past and quickly began to call out their colleagues for violating those 'rules'.

Chapter 4 traces the traditions for thinking about meaning and history on which those methodological arguments are built. I argue that claims about what history can offer international law are part of a longer tradition, in which humanist disenchantment and secularisation promised to lift Europe out of the divided world of religious wars and into a new era of civil peace. A particular vision of law and a particular figure of the lawyer has been central to the work of empiricist historians of political thought for at least a century. The chapter explores the work of Herbert Butterfield, JGA Pocock, Quentin Skinner, and Ian Hunter – four influential scholars whose work has influenced the method debates in international law. I draw out the particular figure of the lawyer as apologist for power who reappears in their texts and against which their historicising methods are staged. That figure of the lawyer appears in different guises – as Whig constitutionalist for

[17] R Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' in M Craven, M Fitzmaurice, and M Vogiatzi (eds), *Time, History, and International Law* (Leiden: Martinus Nijhoff, 2007), 27, at 34–35.

[18] G Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 *Journal of the History of International Law* 181, at 207.

[19] K Purcell, 'On the Uses and Advantages of Genealogy for International Law' (2020) 33 *Leiden Journal of International Law* 13, at 27.

[20] Cavallar, 'Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', 207–208.

[21] CR Rossi, *Whiggish International Law: Elihu Root, the Monroe Doctrine, and International Law in the Americas* (Leiden: Brill, 2019), 36.

[22] I Hunter, 'About the Dialectical Historiography of International Law' (2016) 1 *Global Intellectual History* 1, at 6.

[23] Lesaffer, 'International Law and Its History', 37.

Butterfield, as English common lawyer for Pocock, as Italian scholastic lawyer for Skinner, and as nineteenth-century Prussian natural lawyer for Hunter. In each case, however, the function of this figure in the narrative about the arrival of a new method is the same. The lawyer as scholastic textualist, university metaphysician, or Whig apologist functions as the foil against which a new figure is opposed, a figure who will challenge the oppressive authority of received tradition with the liberating methods of historicising contextualism. In each account, while the villain of the story is the scholastic, common, natural, or international lawyer who offers indefensible claims about authority based on appeals to transcendence, metaphysics, or timeless origins, the hero of the story is the humanist (deploying methods that bear a striking resemblance to those of the contextualist historian), who arrives on the scene to offer an anti-metaphysical challenge to authority. I argue that the debate over the turn to method in international law is part of that longer narrative, in which historians are able to take up their preordained place as radical disrupters of orthodoxy. It is this narrative that helps make sense of the certainty with which historians understand their role as at once objective, scientific, and revolutionary.

Chapter 5 challenges the representations of international law that dominate the turn to history. The vision of international law as metaphysically grounded and of lawyers as scholastics or moralising judges is resonant because it shores up a familiar fantasy. Yet that vision bears little relation to the ways in which contemporary international lawyers use the past in the practice of making legal arguments. This chapter challenges that fantasised vision of law, by giving a sense of the broader field of the past out of which lawyers assemble legal arguments and the varied standpoints we take up in doing so. Despite the contextualist assumption that the past centuries of humanist scholarship have not yet registered in international legal argumentation, international lawyers are already immersed in a centuries-long debate over the grounds of law's authority, into which historicising techniques and anti-metaphysical approaches have long been incorporated. Many influential forms of international legal thought, including legal realism, positivism, critical legal studies, and game theory, have been informed by an anti-metaphysical orientation. Anti-formalist arguments and the historicisation of legal texts are firmly established aspects of legal argumentation in both theory and practice.[24] In that sense it can be said of

[24] S Seppänen, 'Anti-formalism and the Preordained Birth of Chinese Jurisprudence' (2018) 14 *China Perspectives* 31, at 37.

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international lawyers, as it was said of American lawyers decades ago: 'Realism is dead: we are all realists now.'[25]

Chapter 5 explores two issues that flow from that constant reiteration of a default position for law in debates over its history. The first issue is analytical and concerns whether these methods help in understanding the way that lawyers use the past in making legal meaning or the roles that lawyers play in doing so. I argue that if we want to understand meaning as it is made in law, and to intervene in that process, it is necessary to pay attention to the language games within which lawyers work as scholars, teachers, and practitioners. It is only by exploring the many roles of the international law scholar and the many uses we make of the past that scholars can understand the work that the argument for empiricist methods does when it is translated into the contemporary field of international legal argumentation. Rather than treat law as a subfield of history and try to 'professionalise' the amateuristic approach that lawyers take to the past, that chapter asks what it might mean to 'take legal amateurism as seriously as any other knowledge practice one might want to study'.[26] The second issue is political and relates to the claim that empiricist historicising is both impartial and liberatory when applied to law. The debate explored in this book makes a set of claims about what historicising can do that are premised upon 'assumptions about the historical position and normative commitments' of both the historian and their audience.[27] Ideas about historicising law are designed to challenge particular forms of orthodoxy that depend upon or are committed to metaphysical ideals like truth or mythical origin stories.[28] In order for the work of historicising international law to have the kind of critical purchase that is claimed for it, the authority of international law would need to be based on a claim to be timeless, natural, or self-evident, or organised around preserving tradition for its own sake. For this form of work to have that effect, there need to be people who hold those beliefs. As Chapter 5 argues, however, there are very few lawyers for whom the idea that international law is historically situated or political is novel or even controversial. Such arguments are already an entrenched part of the argumentative field of international law. To put this differently,

[25] W Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicholson, 1973), 382.

[26] A Riles, 'Legal Amateurism' in J Desautels-Stein and C Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge: Cambridge University Press, 2017), 499.

[27] L Carlson, 'Critical for Whom? Genealogy and the Limits of History' (2019) 31 *Method and Theory in the Study of Religion* 185, at 187.

[28] Carlson, 'Critical for Whom?', 199.

the reader for whom contextualist history or even genealogy is written is not stable through time.[29]

Chapter 6 takes up the claim that historians are able to offer value-free, impartial, and verifiable observations about the history of something called 'international law'. While numerous historians have criticised international legal scholars for misusing the past to tell stories, draw analogies, or link material from diverse periods, historical work is presented as a process of finding evidence rather than making arguments, committed to reality rather than myths. This chapter argues that histories of international law are necessarily as partisan and political as those produced by the most pragmatic of lawyers. Any study that is described as offering a history of something called 'international law', or of a subfield of international law like international economic law or human rights law, necessarily makes choices about what international law is, where its precursors are to be found, who or what counts as a subject of international law, what past practice is relevant to the field of international law, which figures, texts, or events are central to understanding how the field developed, how the technical details of legal practice relate to ideological claims about what the law is for, and why any of this might matter. In so doing, they become part of presentist debates about what international law is and where it is to be found. To show how that works in practice, I explore three empiricist historical accounts that are overtly presented as offering correctives to the distorted, presentist, or incomplete histories of international law produced to date – Lauren Benton and Lisa Ford's *Rage for Order*, Samuel Moyn's *The Last Utopia*, and Quinn Slobodian's *Globalists*.[30] I focus in each case on the normative and political choices involved in deciding what the history of international law, international human rights law, or international economic law is properly a history of.

Chapter 7 returns to take up the argument that the interplay between international law and empiricist history offers a new grounding for formalism in an extremely fraught political context. Historical work is increasingly relied upon as a source of substantive claims about what law really means and of scientific methods for studying the past. Lawyers rely on the scientific tone and resulting truth effects of accounts presented by professional historians to intervene in contemporary debates by using the claims made in those

[29] See L Carlson, *Contingency and the Limits of History* (New York: Columbia University Press, 2019).

[30] L Benton and L Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge: Harvard University Press, 2016); S Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Belknap Press, 2010); Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press, 2018).

narratives about international law's 'true' origins or 'real' history. Appeals to contextualist histories allow lawyers to present their arguments as being grounded on evidence and to characterise the other side in a legal debate as ideologically motivated, presentist, or engaged in myth-making rather than proper scholarship. Yet if international lawyers cannot look to historians (or anyone else for that matter) to save the day with impartial and verifiable evidence-based interpretations of what international law really is, means, or stands for, what then is to be done? I conclude by exploring why and how we might nonetheless study the international legal past even knowing that writing histories of international law is inevitably a partisan act. There *is* a struggle for the soul of international law currently being played out, as there is a struggle being played out for many of the inherited institutions and laws of the past centuries. The kind of historical methods being proposed for legal scholars offer one set of weapons that international lawyers might take up to be part of this struggle, but they do not have to be accepted wholesale. Rather, legal scholars need to think hard about the historical baggage, the time-bound assumptions, the working premises, the institutional conditions, the visions of politics, the possibilities, and the inevitable limitations that are part of any method we borrow or take up.