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GIVING MEANING TO THE PAST: HISTORICAL AND LEGAL MODES OF THINKING

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The association between international law and its history is no novelty: past legal sources, texts, concepts and practices considered normatively relevant are routinely scrutinized and recovered to draw authority in legal argumentation, contest legal meaning, question normativity, provide a teleology of the discipline or a source of rationalization, and the like.[1] In Orford's words, "international law has been an intensively historical field of practice for as long as there have been international lawyers".[2] New, though, is the increased attention among international lawyers for how historical narratives are crafted, who uses them, and for what purposes.[3]

This increased devotion to history among international lawyers – best known as the "turn to history" in international law – coincided with historians' renewed attention for international law in global affairs. Instead of generating constructive cross-disciplinary conversations, the debate has come to a halt on questions of method.[4] On one hand, historians relying on the contextualist method have criticized international lawyers for using the present to understand the past.[5] On the other hand, international lawyers have questioned historians' capability to create a space for critique[6] and criticized their method as articulating artificial constructions[7] – see the neat separation between past and present,

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[1] Y. Gamarra, "Public Uses of the History of International Law", *Jus Gentium: Journal of International Legal History*, VI (2021), p. 7; A. Orford, *International Law and the Politics of History* (2021), p. 2; A. Orford, "On International Legal Method", *London Review of International Law*, I (2013), p. 173.

[2] Orford, note 1 above (2021).

[3] D. Kennedy, "When the Renewal Repeats: Thinking Against the Box", *NYU Journal of International Law and Politics*, XXXII (2000) pp. 335-500; M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law (1870-1960)* (2002); A. Anghie, *Imperialism, Sovereignty and International Law* (2005); A. Carty, "Visions of the Past of International Society: Law, History or Politics?", *Modern Law Review,* LXIX (2009), pp. 644-660; M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law*, (2007); A. Peters, B. Fassbender, and D. Högger (eds.), *The Oxford Handbook of the History of International Law* (2012); A. Becker Lorca, *Mestizo International Law – A Global Intellectual History 1842-1933* (2014); E. T. Jouannet and A. Peters, "The Journal of the History of International Law: A Forum for New Research", *The Journal of the History of International Law*, XVI (2014), pp. 1-8; A. Orford, *International Authority and the Responsibility to Protect* (2011); K. J. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (2013); A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2d ed.; 2020); Orford, note 1 above (2021); I. Venzke and K. J. Heller (eds.), *Contingency in International Law* (2021). See also M. Del Mar and M. Lobban (eds.), *Law in Theory and History – New Essays in a Neglected Dialogue* (2016).

[4] For a more comprehensive account of this debate, see N. Wheatley, "Law and the Time of Angels: International Law's Method Wars and the Effective Life of Disciplines", *History and Theory*, LX (2021), pp. 311-330.

[5] A. Fitzmaurice, "Context in the History of International Law", *Journal of the History of International Law,* XX (2018), p. 9: "Skinner's concern…was not with the relevance of past cases for present law – this is something that surely could not be denied – but the use of present doctrine as a window through which to understand the past, and through with the past therefore becomes distorted". D. J. Bederman, "Foreign Office International Legal History", in Craven, Fitzmaurice and Vogiatzi (eds.), note 3 above, pp. 43-63.

[6] To Martti Koskenniemi, the historians' method led to an "outright uncritical attitude" resulting in "suppressing undermining efforts to find patterns in history that might account for today's experiences of domination and injustice". See M. Koskenniemi, "Vitoria and Us: Thoughts on Critical Histories of International Law", *Rechtsgeschichte,* XXII (2014), p. 124; M. Koskenniemi, "Histories of International Law: Significance and Problems for a Critical View", *Temple International and Comparative Law Journal*, XXVII (2013), p. 229.

[7] Orford, note 1 above (2013), p. 175; Orford, note 1 above (2021), pp. 12-17, 78-81.

a linear conception of time, or the existence of an objective context that would not be mediated by subjective interpretations. There is no universal history to find – the argument goes – but a plurality of histories to construct.

On closer scrutiny, the debate revolved around particular international lawyers sharing a critical approach to international law and some historians submitting to a particular view of historical awareness – the so-called historicists. As recalled by Tosh, historicism is grounded on three basic premises: the "otherness" of the past whereby a "difference" or distance between the past and the present is drawn; the "otherness" in context according to which the past shall be set in context if the historian wants to explain it; and the historic continuum which acknowledges that historical events are bound together into a historical process and thus aims to grand narratives.[8] The actual contention unfolds therefore with regard to the historicist approach to historical enquiry, not with history as a scholarly discipline *tout court*.

However, whereas challenges to historicism purportedly seek to disrupt and expose hegemonic historical narratives about international law, they also offer an entry point for manipulative historical narratives and instrumentalist uses of the past.[9] How should then one discern quality historical work – in terms of reliability, scholarly rigor, "veracity and verifiability"[10] – from the mere reproduction of ideological beliefs? To question historiography as an exact science is not, and should not be, equal to questioning it as a scholarly discipline. For historians, the answer to this question lies in (historiographical) methods. For international lawyers – in particular for critical legal scholars – method is not a solution; it is actually part of the problem.[11] This struggle essentially epitomizes divergent modes of thinking which not only characterize these two communities of professionals, but are firmly rooted in shared epistemological beliefs and theoretical understandings of their respective disciplines and of their functions therein. Not all historians conceive of historical enquiry and history-writing in the same way[12] – just as international lawyers deploy different ways to think and argue about international law. Thus, as a necessary simplification, the reference to the figures of the historian and the international lawyer throughout the contribution intends to designate historicists and critical legal scholars, more particularly.

In revisiting this debate, this article approaches the turn to history in international law as an activity of giving meaning to the past. The term "giving" here is not to suggest any particular affiliation to schools of thought or theoretical approaches to (legal) interpretation in international law. It rather aims to underscore that the activity of interpreting is common to both disciplines insofar as historians

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[8] J. Tosh, *The Pursuit of History – Aims, Methods and New Directions in the Study of History* (6th ed., 2015), pp. 8-11.

[9] On the point, see J. Tosh, *Why History Matters* (2d ed., 2019); K. Kończal and D. Moses (eds.), *Patriotic History and the (Re)Nationalization of Memory* (2023); K. Kończal and D. Moses, "Patriotic Histories in Global Perspective", *Journal of Genocide Research,* XXIV (2022), p. 156: "… the extent to which 'patriotic' uses of historical research are selective and distorted cannot be understood without considering the overall post-truth environment that devaluates expert opinions, promotes personal beliefs and appeals to collective emotions". See also Gamarra, note 1 above, in particular p. 11 in which Gamarra, by referring to Jürgen Habermas, draws a pertinent distinction between "historical interpretation and ideological political purposes".

[10] L. Benton, "Beyond Anachronism: Histories of International Law and Global Legal Politics", *Journal of the History of International Law,* XXI (2019), p. 9.

[11] This position is not shared by all international lawyers. Some have actually displayed a critical attitude toward the position of critical legal scholars in doing history. See, for example, S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018), pp. 210-216; R. Lesaffer, "International Law and Its History: The Story of an Unrequited Love", in Craven, Fitzmaurice, and Vogiatzi (eds.), note 3 above, pp. 27-42.

[12] In this regard, see the illuminating volume by Hayden White in which the author referred to historians (Michelet, Ranke, Tocqueville, and Burckhardt) and philosophers of history (Hegel, Marx, Nietzsche, and Croce) as "models of possible ways of conceiving history" depending on alternative – sometimes mutually exclusive – "visions of the historical field": H. White, *Metahistory – The Historical Imagination in the 19th century Europe* (2014), p. 4.

interpret the past and international lawyers interpret the law and it draws an analogy between history-writing and legal interpretation as both encompassing the activity of meaning-giving. On one hand, history-writing gives meaning to the past; on the other, legal interpretation gives meaning to legal material. Moving from this, the argument that this contribution advances is twofold. First, the discourse on the turn to history in international law as understood by critical legal scholars re-proposes strikingly similar challenges that have already arisen prominently in the context of legal interpretation in international law, but in a different terrain of history-writing. Whereas the former led to the demystification of legal interpretation as an objective endeavor consisting in finding a ready-made meaning of a legal text, the latter seeks to challenge the existence of the past as distinguished from the present, the possibility of a universal as well as objective history. Second, to make the critique about methods a constructive one, further reflection could be attempted as to what criterion/-a one should elect to *validate* historical narratives, not as a matter of formalism but as a matter of discursive interaction. The legal mode of thinking may offer important insights as to how newly crafted historical narratives may be validated.

Indeed, amid these challenges which certainly deserve attention, a central question remains: how can one discern manipulative historical narratives and instrumentalist revisions of the past from history in a historiographical sense? Whereas for international lawyers legal interpretation is – to some extent[13] – governed by a set of international rules so widely agreed as to be considered customary (for example, the rules codified in the 1969 Vienna Convention on the Law of Treaties – "VCLT" hereinafter)[14] the activity of history-writing within international law circles is not bridled into similar normative constraints. This is not to say that the VCLT constitutes a roadmap to objective, uncontestable, universal interpretations – this would be an unpersuasive statement to make to date. However, actors engaging in legal interpretation would be expected to use the canons of the VCLT – that is, the interpretation of a term according to its ordinary meaning, in its context, and in light of the object and purpose of the treaty – to justify their legal interpretation, thus offering a set of valid arguments shared within the community. Unjustified departure therefrom would be a reason for criticism or protest and for discarding one's suggested legal interpretation over others. In this light, from the standpoint of an international lawyer, the turn to history appears as a turn towards a less regulated field as a way in which new possibilities are opened up, where international lawyers can gain more space to make claims about international law, freer from the disciplinary constraints that would typically bear on them when operating in the context of legal interpretation. This is also why the turn to history as advocated by several international lawyers may be described as anti-foundational.

The article is structured to first sketch the main traits of the discourse on the turn to history in international law. An analogy is drawn between interpreting the past and interpreting the law as both meaning-giving activities. This section considers the particular way in which the methodological battle between historians and international lawyers is seen to unfold. Finally, the risk of instrumentalist histories of international law is problematized once the claim of a plurality of histories and an anti-

[13] In principle these rules only apply to the interpretation of international treaties concluded between States (Article 1, VCLT). However, their application has been extended to the interpretation of other legal material, such as United Nations Security Council Resolutions and the statutes of international courts and tribunals. See *Prosecutor v. Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), paras. 32 et seq.; *Prosecutor v. Nyiramasuhuko et al.* (Judgment) ICTR-98-42-A (14 December 2015), para 2137; *Prosecutor v Slobodan Milošević* (Decision of Preliminary Motions) ICTY-02-54 (8 November 2001), para. 47: "the Statute of the International Tribunal is interpreted as a treaty"; *Prosecutor v Bemba* (Trial Judgment) ICC-01/05-01/08 (21 March 2016), paras. 75-86: "The Appeals Chamber clarified that the international of the Statute [of the International Criminal Court] is governed, first and foremost, by the VCLT, specifically Articles 31 and 32".

[14] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, and entered into force on 27 January 1980, 1155 UNTS 331 (VCLT).

foundational attitude against historiographical methods are simultaneously accepted, and a way is suggested in which the turn to history *by* international lawyers can be better appreciated – namely as a tradition-building project rather than as a historiographical one.

The "Turn to History" in International Law

A uniform understanding of what the "history" of international law is appears out of reach. Several conceptualizations of the history of international law have been attempted: as a set of State practices or relations among governments,[15] as a history of international legal thought[16] or genealogies of doctrine,[17] as a form of disciplinary consciousness,[18] as a history of humanity[19] and of its political organization, as a set of narratives making our identity, as history of a particular (European) language, tradition or hegemonic technique,[20] as a morality tale.[21] Particular emphasis should be given to Philip Allott's account of history as public memory.[22] For Allott, history-writing does not simply mean to write a story or suggest an alternative narrative. It is about remembering things we did not experience, as part of the consciousness of our society.[23] As such, history is a *form of knowledge* that can impact our public memory by providing different meaning to facts of the past. In producing new narratives, one aims at impacting the *memory* of international law, in a way competing with the activity of legal historians – not meant as an exclusive disciplinary field or department, but as a common playfield. For instance, Koskenniemi contends that "… the choices and evaluations which enable the historian to engage with the past ought to reflect an effort to attain *a better understanding of the nature of the present, including the causes of today's domination and injustices*, in order to contribute to their eradication".[24] This move shall necessarily pass through the contestation of European standards against which new histories are forged,[25] as well as the assumptions and method legal historians would embrace.[26]

This is, however, not the only way in which international lawyers turn to the past. Indeed, there are several turns to history, or several ways to turn to history in international law. As mentioned, some international lawyers turn to the past to understand the complicit role of international law in contributing to the growing global vulnerability, insecurity, and inequality.[27] Others may use the past to enhance the narrative of international law as an emancipatory project and defend existing international institutional arrangements[28] in the name of the inherently progressive mission of international law. Yet others may

[15] Koskenniemi, "A History of International Law Histories", in Peters, Fassbender and Högger, (eds.), note 3 above, p. 953, referring to Johann Ludwig Klüber (1762-1837) and August Wilhelm Heffter (1796-1880).
[16] J. Nijman, "Seeking change by doing history" *Inaugural Lecture 591*, 24 November 2017, University of Amsterdam, pp. 1-25 (available online), p. 7.
[17] Fitzmaurice, note 5 above, p. 6.
[18] J. d'Aspremont, *The Critical Attitude and the History of International Law* (2019).
[19] Nys and Laurent, in the account of Koskenniemi.
[20] M. Koskenniemi, "International Law in Europe: Between Tradition and Renewal", *European Journal of International Law*, XVI (2005), pp. 113-124.
[21] M. J. van Ittersum, "Hugo Grotius: The Making of a Founding Father of International Law", in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), p. 96.
[22] P. Allott, "International Law and the Idea of History", *Journal of the History of International Law,* I (1999), p. 3.
[23] Ibid.
[24] Koskenniemi, note 6 above (2013), p. 230 (emphasis added).
[25] Ibid., p. 223.
[26] Ibid., p. 229: "[contextualism] tends to rely on a 'positivist' separation between the past and the present that encourages historical relativism, indeed an outright uncritical attitude that may end suppressing efforts to find patterns in history that might account for today's experiences of domination and injustices".
[27] Orford, note 1 above (2021), p. 3.
[28] Ibid.

seek to "reveal" untold histories, unearth contingencies, and redirect the spotlight onto actors who went unnoticed. Thus, there are different agendas, political beliefs, and ideologies to which those turning to the past may subscribe. It is worth repeating that what is in focus in the present contribution is the particular way of conceiving of the turn to history advanced by critical legal scholars, that is, the entire group of international lawyers who have been at the forefront of the project and also for the way in which it has unfolded.

The "turn to history" in international law as heralded by critical legal scholars belongs to a project that seeks to foster *change* in and of international law. More particularly, the project aims to reappraise the authority and legitimacy of international law against its colonial origins and the past of European expansionism.[29] The stakes are high, for the project can lead to a radically different self-understanding of international lawyers and their role within the discipline, let alone to a radically different image of international law and its role in the world affairs. Plainly, the issue does not rest with reassessing the understanding of international law as a (solely or exclusively) progressive, emancipatory project. Although this idea was central to the past of international law, it appears rather weakened at present. What is in the making, instead, is the new understanding of international law as a discipline. It should therefore be a matter of interest for international lawyers, broadly, to take a closer look at how the past is re-examined, new historical narratives are generated, under which assumptions as well as with which normative interests in mind.

The turn to history by international lawyers in the 1990s overlapped with an increasing interest of historians for international law in global affairs. However, coming from different epistemological cultures and methodological attitudes, this common interest has generated more controversies than synergies, with historians criticizing the "anachronism" of some international lawyers, and some international lawyers warning against the artifice of "contextualism", which would prevent scholars from engaging with the past critically – particularly by using the lens of the present to assess the past. In fact, in the eyes of historians, history-writing is to step into the shoes of the actors whose actions are in focus and to judge their conduct by the standards of their time, not of the present.[30] Precisely this mode of history-writing would create – in the view of some international lawyers – the terrain to justify past injustices as "felt necessities" rather than exposing them.

Despite the critiques mobilized against professional historians, the turn to history as articulated by several critical legal scholars comes with the promise of "truly" understanding today's international law by looking at its past. For instance, Koskenniemi considers that "what seems needed is a better understanding of how we have come to where we are now – *a fuller and a more realistic account of the history of international law and institutions*".[31] Similarly, Orford calls for the production of "*better* histor*ies* of international law".[32] What is though the criterion that would make these histories better or fuller? Is it just a matter of eliciting more attention and producing more historical work from a quantitative standpoint?

A twofold reflection is warranted at this point. First, a "fuller history" may be achieved by providing competing interpretations about the past, thus by attaching different meaning to facts, or by identifying different cause-effect relations to events in the past. However, it is fair to recall that

[29] A. Orford, "The Past as Law or History? The Relevance of Imperialism for Modern International Law", *International Law and Justice Working Papers*, no. 2 (2012), p. 1: "The stakes of the debate about the legacies of the imperial past in the multinational present are high. In part this is because the authority and legitimacy of modern international law rests on its claim to have transcended its European heritage and to operate today as a universal law capable of representing humanity". See also Orford, note 1 above (2021), pp. 3-4.
[30] Tosh, note 8 above, pp. 9-10.
[31] Koskenniemi, note 6 above (2014), p. 216.
[32] Orford, note 1 above (2021), p. 8 (emphasis added).

professional historians have already encountered many of the challenges raised by international lawyers, in particular the conception of cause-effect relationship, and the role of ideology in the selection of relevant facts bearing on the present. Second, although these international lawyers set out the possibility of a multiplicity of histories in quite dogmatic terms, at the same time they indicate their historical interpretation as the most convincing, let alone the only redemptive one, thus replicating, on one hand, the same historicist mode of arguing that they seek to unmake and, on the other, the legal mode of thinking onto historical enquiries.

Indeed, debates on universalism, truth-claims and pluralism echo known struggles about the nature of legal interpretation as an activity of meaning-giving in international law: can legal interpretation be objective? Can a legal text be treated as a mere object of inquiry or is there rather an hermeneutic relation between the interpreter and the legal source to be interpreted? There is hardly an incontrovertible interpretation in international law. Its argumentative character makes it pliable to some subjective element depending on the interpreter that engages in legal interpretation. *Change*, according to this view, would thus ensue from legal interpretation. This is the game to play ("the only game in town") if one wants to produce change. This *prise de conscience* among international lawyers is, though, a relatively recent gain for, until a few decades ago, legal positivism would be the default doctrine in legal interpretation and the belief in the *objective* interpretation of the law would be a common dogma to reaffirm.

Arguably for this reason, the rules of the game governing the activity of interpreting a legal text (Articles 31-33, VCLT) have attracted considerable attention over time and possibly even new significance, not so much as a set of steps to *find* the correct interpretation of legal rules, but as shared arguments to *justify* interpretive outcomes.[33] In the face of codified rules of interpretation, legal theory has opened up room for change by formulating ontological conceptualizations about legal interpretation. The turn to history replicates some of the arguments that have proliferated in the debate on legal interpretation. However, it unfolds in the novel terrain of history-writing – that concerned with facts in the past being the cause of a certain effect in the present – which remains subject to important methodological discussions, not only between international lawyers and historians – assuming that a (professional) boundary between the two disciplines can be neatly drawn – but, perhaps most importantly, between international lawyers themselves.

With regard to the latter, the debate about history-writing has engaged an additional dimension of scholarly reflection. While critical legal scholars – espousing a distinctive theoretical approach to international law – propose to turn to the past to understand the injustices of the present and the role that international law has had in forging and nurturing them,[34] "counter-critical" voices have objected the choice of upholding the same dominant markers, periodization, and causal sequencing of the (liberal) historical narratives that critical legal scholars have sought to disrupt and critiquing.[35] According to such counter-critical views, no critical history is possible if one embraces the same points of reference that have informed, canvassed, and oriented international law as a discipline in a certain way or towards a certain direction. Said differently, while dominant liberal narratives have, for instance, seen in Hugo Grotius the founding father of modern (secular) international law, no serious critical history could ever

[33] L. Lo Giacco, "Eureka! On Courts' Discretion in 'Ascertaining' Rules of Customary International Law", in P. Merkouris, J. Kammerhofer, and N. Arajärvi (eds.), *The Theory, Practice, and Interpretation of Customary International Law* (2022), pp. 256–276.

[34] A strong criticism along these lines was levelled by Lesaffer: "[This kind of historiography] tries to understand the past for what it brought about and not for what it meant to the people living in it". See Lesaffer, note 11 above, p. 33.

[35] d'Aspremont, note 18 above. Although this is a reasonable criticism, it is fair to recall that – at least in theory – critical legal scholars called for looking beyond the usual markers. See Koskenniemi, "Expanding Histories of International Law", *American Journal of Legal History*, LVI (2016), pp. 104-112.

be generated if attention keeps being devoted to Grotius as a marker in the history of international law. The agenda that counter-critical positions propose is to produce new historical discourses in a way that is different from what historians would typically do. While critical legal scholars seek to produce historical knowledge, the advocates of radical critical histories argue that a separate historization is possible, capable of producing "a wide-range of new discourses".[36]

Within this dialectic, a third avenue is possible. Change – the ultimate aim of critical legal scholarship – can still be possible while maintaining similar markers, periodization, and causal sequencing suggested to those shared by liberal histories of international law. This may be possible if, for instance, new meaning is given to those markers. A good example is offered by Haskell,[37] who revisits Grotius' writings and provides new meaning and rationalities to his work – what White would call "motifs".[38] In assigning new meaning and rationalities to the past, however, critical legal scholarship seeks to produce dominant counter-views that can identify with the "true" history of international law, one of hegemony, injustices, and subjugation. This mode of arguing stands irrespective of claims that multiple histories of international law can co-exist. In fact, according to Koskenniemi himself, admitting that international law is a European language does not make it *ipso facto* incapable of expressing something universal:[39] "For the universal has no voice, no authentic representative of its own. It can only appear through something particular, only a particular can make the universal known".[40] Accordingly, utterances on behalf of the international community or a universal history of international law are in principle possible, provided that they are somehow genuinely universal, not just disguising particular interests under the herald of universality.[41]

The Activity of Meaning-Giving: Interpreting the Past as Interpreting the Law?

Discursive interaction is central to the practice of international law. For instance, by arguing, the parties to a case offer reasons to interpret relevant rules one way rather than another, and authoritative interpreters – typically courts – provide reasons for upholding one interpretation from a range of simultaneously plausible interpretations that are in conformity with the law. Interpretation is thus understood as "a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions".[42]

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[36] d'Aspremont, note 18 above, p. 46.

[37] J. D. Haskell, "Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial", *Emory International Law Review*, XXV (2011), pp. 269-298. Grotius has indeed been at the center of several revisitations also among historians. For one, Martine Julia van Ittersum claims that the portrait of Grotius as a founding father of international law is "a historical construct" that came into being by a combination of Dutch nationalism and the self-understanding of international lawyers at the end of nineteenth century. According to van Ittersum, "It would be far more appropriate to call him the godfather of Dutch imperialism". See van Ittersum, note 21 above, p. 99.

[38] White, note 12 above, p. 6. More particularly, White referred to the creation of a story as a set of events "motifically encoded". See also p. 12: "… history differs from the sciences precisely because historians disagree, not only over what are the laws of social causation that they might invoke to explain a given sequence of events, but also over the question of the form that a 'scientific' explanation ought to take".

[39] Koskenniemi, note 35 above, p. 115. Similar positions had already been expressed in Koskenniemi, note 20 above, p. 113.

[40] Koskenniemi, note 35 above.

[41] See the classical reference to Proudhon's so called 'false universalism', ibid, 116. For *contra* views, see P-M. Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", *European Journal of International Law*, XVI (2005), pp. 131-137.

[42] N. MacCormick, "Argumentation and Interpretation in Law", *Argumentation*, IX (1995), p. 467.

Argumentation is commonly seen as a practice aimed at gaining an audience acceptance. It is for the audience to determine whether arguments are valid. In other words, the persuasive strength of arguments determines their acceptance by an audience, and hence their validity. The idea that communities of practice ("epistemic communities" and "interpretive communities") validate arguments by accepting them as correct seems a frequent corollary to approaching international law as an argumentative practice. While accounts premised on rule-skeptical positions have suggested that international law depends more on how it is argued then on what rules provide, alternative accounts have treated argumentation in international law as an essentially normative enterprise, conditioning assent upon the quality of the arguments advanced rather than on shared common beliefs or interpretive postures.

Perhaps because of their sensitivity to grey areas, most international lawyers would find everything interpret*able*: a legal term would be no different from the past as an object of inquiry. Here an interesting parallel can be drawn between the role of context in treaty interpretation and in historiography. According to Article 31 VCLT, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The context comprises the text of the treaty, any agreement relating to the treaty made by all the parties, and any instrument made by one of more parties in connection with the conclusion of the treaty and accepted by the other parties.[43] An interpreter shall also take into account, among other things, "any *relevant* rules of international law applicable in relation to the parties".[44] What is relevant lies in the eyes of the beholder and is where different discretionary choices may actually lead to different interpretive outcomes.

Thus, the past, like the context, is not given; they are constructed by the interpreter. International lawyers would thus display a skeptical attitude towards the activity of "finding" a historical truth in the study of historical sources.[45] Some would be suspicious of history being an empirical science leaning towards claims to truth and reality.[46] Plainly, this is an over-simplification,[47] for the dogmas of historiography – leading to the "crisis of historicism" – have already been at the center of heated reflexive debates among professional historians since the nineteenth century.[48] For instance, by the early 1920s, in asking the question "How, or on what conditions, can the historian know the past?", Collingwood observed that "the past is never a given fact which [the historian] can apprehend empirically by perception".[49] The "only possible knowledge of the past is mediate or inferential or indirect, never empirical".[50] To know the past, the historian cannot simply limit him/herself to read documents or believe in a witness testimony. The historian must envisage the situation and re-enact the past in his/her own mind, so as to know how someone else has thought.[51] Yet history is treated as having an objective component, in the sense that "its concern is not with [one's] own personal past, but we the past in general … the past simply as fact".[52] Similarly, for post-modernist historian Keith Jenkins

[43] Article 31(2), VCLT.
[44] Article 31(3)(c), VCLT.
[45] Orford contended that history, conceived as a domain of empiricist science, offered "a new foundation for formalism in international law". Orford, note 1 above (2021), p. 8.
[46] Ibid, pp. 8-10.
[47] Historian Lauren Benton also underscored the mischaracterization of historical methods among some international lawyers and the misconception of the Cambridge School as being representative of all historical approaches. Benton, note 10 above.
[48] White, note 12 above, p. xii.
[49] R. G. Collingwood, *The Idea of History – Lectures 1926-1928* (1993), p. 282.
[50] Ibid.
[51] Ibid., pp. 282-283, 288. On the objective and subjective character of the act of thinking, see ibid., pp. 292-297.
[52] Ibid., p. 367.

> The past contains nothing of intrinsic value, nothing we *have* to be loyal to, no facts we *have* to find, no truths we *have* to respect, no problems we *have* to solve, no projects we *have* to complete; it is we who decide these things *knowing* – and if we know anything we know this – that there are no grounds on which we can ever get such decisions right.[53]

Tomlins, too, contended that

> [p]rofessional history 'historicises' its subjects by placing them in context … in relation to one another at appropriate points in the medium of historical time. It will be immediately apparent that the universe of spatio-temporal subject rationalities is infinite, governed only by the historian's judgment of what is appropriate. (…) The lesson professional history has drawn from its examinations of what it does (historiography) is that what it examines – the past – is irreducibly contingent.[54]

This changed perspective ought to be inserted in the broader changed theoretical landscape which, in law as in history, saw the ascent of new theories such as hermeneutics, phenomenology, structuralism, post-structuralism deconstructionism, new historicism, new pragmatism, post-modernism.[55] As noted by one commentator, the contextualist method, that is, the historical method associated with the Cambridge School, "allows us to recognize that a scholarly reconstruction of a text's context and the identification of the author's intention involve assumptions, understandings, beliefs, and theories that a scholar brings to the reading of the historical text".[56] In other words, there is a hermeneutical, subjective, element involved in the reading of texts for the sake of history.

However, this is a limit that the first professional historiographer had recognized in the fifth century BC. According to Thucydides, two factors hinder an objective reconstruction of history: memory (*mnene*) and opinion (*doxa*). Thus, the identification of facts that caused certain effects, far from being incontrovertible, is susceptible of an element of subjectivity. While the archival research is frequently advocated by critical legal scholars to trace untold or forgotten facts –so addressing the *mnene*; how an interpreter's *doxa* bears on the selection of facts is largely escaping the same critical lens. As such, the turn to history heralds the discovery of those "true" facts and, at the same time, disguises the role played by one's ideology in the reconstruction of such past to critically appraise the contemporary international legal order.[57]

The role of normative stances in the discursive construction of facts[58] in general, and of cause-effect relations in particular – that is, the identification of facts in the past from which certain effects ensued – shall therefore not be neglected. For instance, authoritative voices among critical legal scholars emphasize imposition over appropriation: instead of reassessing the authority and legitimacy of

[53] K. Jenkins, *Refiguring History – New Thoughts on an Old Discipline* (2003), p. 29 (emphasis in original). On the point, see also K. Pihlainen, "Escaping the Confines of History: Keith Jenkins", *Rethinking History,* XVII (2013), pp. 235-252 (available online)

[54] C. Tomlins, "Historicism and Materiality in Legal Theory", in Del Mar and Lobban, note 3 above, p. 60.

[55] On the point, see K. Jenkins, *On "What is History?" From Carr and Elton to Rorty and White* (1995), p. 3; White, note 12 above.

[56] Nijman, note 16 above, p. 12.

[57] White refers to motifs instead of rationalities and contends that "When a given set of facts has been *motifically encoded*, the reader has been provided with a story". See White, note 12 above, p. 6. Similarly, he argues that "The historian arranges the events in the chronicle into a hierarchy of significance by assigning events different functions …". Ibid., p. 7. See also pp. 12-13 for a discussion on causation and interpretation in historical thinking.

[58] A. L. Bernardino, "The Discursive Construction of Facts in International Adjudication", *Journal of International Dispute Settlement*, XI (2020), pp. 175-193.

international law based on dynamics of imposition as well as appropriation,[59] the majority seemingly focus on the role of international law in justifying European expansionism and colonial rule over entities not yet regarded as States on equal footing. Yet the dimension of reception and re-elaboration of international legal arguments by non-Western polities is often overlooked in such histories. In other words, most critical legal scholars – although with due exceptions – do not seem to attribute much historical or even normative value to the fact that non-European jurists embraced international law with the objective of transforming the unequal condition of their polities of reference by using the very doctrinal constructs and legal vocabulary as their European counterparts, but reinterpreted and transformed at their advantage.[60] The very construction of these causal relations between facts gives rise to distinctive historical narratives and has implications for the meaning we give to the past. The modes of meaning-giving, through which rationalities are articulated, appear crucial in the construction of narratives.

In the famous Hegelian tri-partition, historical writing can be distinguished according to three types, namely: original history; reflective history; and philosophical history. Original history is written by that "class of historians who have themselves witnessed, experienced and lived through the deeds, events and situations they describe, who have themselves participated in these events and in the spirit which informed them".[61] Accordingly, what these historians produce as history is a "representation of [their] internal and external faculties of mind".[62] Instead, reflective history has as its object "the past as a whole", in a more comprehensive way than the mere experienced events which are in focus in the original history.[63] In the reflective history, the historian approaches the historical material through "maxims, ideas, and principles which the author applies both to the content of his work (i.e. to the motives behind the actions and events he describes) and the form of his narrative".[64] These maxims, ideas, and principles are often shared by a community of history-writers: "they share the attitudes of a common culture" about "how history should be written".[65] The ensuing history is perceived as a detailed, "faithful and accurate portrait' of a 'past age and its life".[66] Unlike the original history, in which the past was experienced by those writers who recounted it and those seen as an almost contemporary dimension,[67] for the reflective history the past is detached from the present[68] and the writing of this history has precisely to do with representing a past age "in the spirit, interests, and culture of the society in question".[69] Importantly, Hegel acknowledges the role that the "own spirit" of the writer – scrutinizing the material and arranging it – plays in depicting the spirit of the age under study.[70] This idea shares some ground with the view that the historian shall "*re-enact* the past in his own mind" in order to know the past.[71] Finally, the third kind of history is what Hegel calls the philosophical history of the world,

[59] See in particular the work on appropriation and universalism by Arnulf Becker Lorca. Becker Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation", *Harvard International Law Journal*, LI (2010), pp. 475-552.
[60] Ibid. See also Becker Lorca, note 3 above.
[61] Hegel, "First Draft (1822 and 1928) – The Varieties of Historical Writing", in G. W. F. Hegel, *Lectures on the Philosophy of World History*, intro. Duncan Forbes; transl. Hugh Barr Nisbet (1975), p. 12.
[62] Ibid.
[63] Ibid., p. 16.
[64] Ibid.
[65] Ibid.
[66] Ibid., p. 19.
[67] In his *Introduction*, Duncan Forbes described this as "the immediate unity between the historian's consciousness or *Geist* and the *Geist* of what he is describing". See ibid., p. xviii.
[68] In Forbes' words, "past and present are separate spheres and the past has to be consciously retrieved and made present". Ibid.
[69] Hegel, note 61 above, p. 19.
[70] Ibid., p. 22.
[71] Collingwood, note 49 above, p. 282.

aiming at providing a general perspective of "the spirit which is eternally present to itself and for which there is no past".[72]

This third variation of Hegel's philosophical conception of history attracted critiques by several professional historians. Important to recall is that, at any rate, did those critiques seem to take issue with the idea of there being a subjective element involved in the interpretation of the historical material, expressed either in the form of the mediation of one's own spirit, international and external faculties of the mind, or of their own interpretation. On the contrary, Collingwood, among others, considers *interpretation* to be one of the distinctive traits in which historians think about history, namely as a science/an answering of questions; concerned with human actions in the past; pursued by interpretation of evidence; and for the sake of human self-knowledge.[73]

Eternal Tensions and Struggles for Authority

To assert that there are many cognizable pasts is to subscribe to a plurality of histories. However, how can one discern what can be accepted as historical knowledge from what it is not? Put differently, what is the criterion whereby one can distinguish historical knowledge from mere speculation or opinion/belief? This challenge is a long-standing one. For instance, in the 1940s Walter Bendix Schönflies Benjamin (1892-1940) referred to the threat of the past becoming "the tool of the ruling classes"[74] in his work on the philosophy of history. Similarly, in more recent times, other commentators have reiterated "the danger of ideological abuses and oppression in the name of truth is quite real"[75] and to how political actors instrumentally "draw on the past to pursue goals in the present".[76]

The tensions between the universalism/particularism and unity/plurality cuts across historiography and international law. For instance, while more than one interpretation of a legal text might be plausible (i.e. multiple legally correct interpretive outcomes are possible, as much as multiple plausible histories are possible), where should one draw the line? Clearly, not everything goes. For the Greek – particularly, historiographers Herodotus and Thucydides in the fifth century BC,[77] who prompted the first idea of history as a scientific discipline[78] – historiography was meant to achieve

[72] Hegel, note 61 above, p. 24.
[73] Collingwood, note 49 above, pp. 10-11 (emphasis added).
[74] W. Benjamin, "Theses on the Philosophy of History", reproduced in W. Benjamin, *Illuminations*, intro. Hannah Arendt, (2015), p. 247.
[75] Pihlainen, note 53 above, p. 238.
[76] S. Volk, "Patriotic History in Postcolonial Germany, Thirty Years After 'Reunification'", *Journal of Genocide Research*, XXIV (2022), p. 277; P. Satia, "Britain's Culture War: Disguising Imperial Politics as Historical Debate about Empire", *Journal of Genocide Research*, XXIV (2022), pp. 308-320.
[77] Collingwood, note 49 above, pp. 17-20.
[78] Collingwood explained the birth of historiography at this point in time and geography by the "unusually vivid sense of the temporal" the Greeks had: "They lived in a time when history was moving with extraordinary rapidity, and in a country where earthquake and erosion change the face of the land with a violence hardly to be seen elsewhere. They saw all nature as a spectacle of incessant change, and human life as changing more violently than anything else. Unlike the Chinese, or the medieval civilization of Europe, whose conception of human society was anchored in the hope of retaining the chief features of its structure unchanged, they made it their first aim to face and reconcile themselves to the fact that such permanence is impossible. This recognition of the necessity of change in human affairs gave to the Greeks a peculiar sensitiveness to history". Ibid., p. 22.

knowledge about the past, as a transformation from mere opinion (from *doxa* – opinion – to *episteme* – knowledge). We dwell on this transition for a moment.

Historical inquiries aim to know the past. By the same token, legal interpretation may be seen as geared towards knowing the law. This knowledge is not the result of a belief nor of something that can be found ready-made in some authorities.[79] It can rather be conceived as a matter of threshold placing historiography and legal interpretation into a fitting analogy. In other words, instead of looking at the interpretation of the past as those of the law as either true/false, or right/wrong, it may be suggested that gradients are more adequate than on-off distinctions to assess interpretive outcomes. In this vein, historians have for instance affirmed that while a plurality of historical narratives may exist, some may be "truer" than others.[80] The process of knowing the past shall in fact be considered as an infinitive one to which several acts of interpretation of the past have contributed, so improving previous attempts to know the past.[81] A tension therefore arises: on the one hand, the ideal of one history which these different interpretations of the past tend to; on the other, the plurality of these narratives which erupt in practice. However, this tension may be mitigated by looking at this process as one stabilizing the interpretation of the past, and therefore of its knowledge. Knowledge so conceived does not respond to the logic of true/false or right/wrong but to the criterion of acceptance as correct within an *audience* as a criterion of validation.

Scholars have theorized the notion of audience in different ways. Fish, for instance, considered that interpretive communities defined on the basis of a shared interpretive posture make up an audience.[82] There may be various audiences within the international law discipline, signaling acceptance for some arguments and refuting it for others. Conversely, other schools of thought such as that led by Perelman and Olbrechts-Tyteca anchor validity to a *qualified* assent by a universal audience.[83] The concept of universal audience is an intellectual construction of the orator and largely consists in imagining what such rational being would "normally" accept as a valid argument.[84] It is a qualified assent rather than an actual assent to ensure the quality of arguments from a factual point of view as well as from a normative one. As the middle ground between these positions, Wohlrapp distinguished between *knowledge* and *argumentation*.[85] While knowledge is made of validated arguments, argumentation is the realm in which arguments are yet to be accepted as valid. More specifically, Wohlrapp distinguishes between "epistemic theory", that is, what is known, and "thetic theory", that is, testing propositions. According to Wohlrapp, argumentation hinges on thetic theory, while epistemic theory ensures a framework within which argumentation can take place. Hence, not all propositions are subject to validation, but only those that fall in the remit of thetic theory. For Wohlrapp, the aim of argumentation is to test new propositions. Assent *per se* is not a reason to act upon. As such, in Wohlrapp's theory of argumentation, validity is not determined by assent. It rather rests on both an objective dimension, namely the absence of objections against an argument, and a subjective dimension, which has to do with the credibility of an argument.

Accordingly, knowledge can be conceived as the set of propositions that are no longer subject to validation. Instead, argumentation involves propositions that are still subject to objections. In fact,

[79] Ibid., p. 391.
[80] Ibid., p. 400.
[81] Ibid., p. 394.
[82] S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980), p. 141.
[83] Perelman and Olbrechts-Tyteca distinguish between persuasive and convincing: while persuasive refers to argumentation that only claims validity for a particular audience, the term convincing concerns argumentation that presumes to gain the acceptance of every rational being, hence of a universal audience. See C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*, Translated by J. Wilkinson and P. Weaver, (1969).
[84] J. Crosswhite, "Universality in Rhetoric: Perelman's Universal Audience", *Philosophy and Rhetoric*, XXII (1989), pp. 157-173.
[85] H. Wohlrapp, *The Concept of Argument – A Philosophical Foundation* (2014).

argumentation aims at establishing the validity of those propositions that are not yet part of knowledge but certainly aspire to be.[86] Once a proposition becomes part of knowledge, it is believed to be *true* rather than simply *probable*. While scholars agree on approaching international law as an argumentative practice, they also seem to treat the outcomes of argumentative struggles as the *true* and *correct* outcome, orienting future interpretations as epistemic theories would do, rather than as the probable and more convincing one until further falsification.

Against this background, the struggle for epistemic superiority about whose historical narratives about international law ought to prevail (those of anti-foundational international lawyers vs. those of professional historians) can be easily recast as a struggle for authority. Explaining what authority is and how it plays out in legal discourse may in fact help understand why some interpretive statements are more capable than others to attract adherence as well as deference-entitling. Venzke, for instance, introduces the concept of "semantic authority" to capture "an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape". This notion elucidates "whose voice is particularly influential in international legal discourse".[87] In a similar vein, Zarbiyev explores the distinctive traits of "who has the right to speak credibly", distilling four marks of authority entailing a "deference-entitling", namely: (i) a process based on impartiality, independence, objectivity; (ii) socially consecrated "superior knowledge" or specialized knowledge, provided by educational credentials or certification by peers; (iii) reputation; (iv) authorship/ownership from which a right to disposition ensues.

Both Venzke and Zarbiyev's accounts of authority emphasize the facet of *whose* statements about international law matter[88] or *who has the right to speak credibly* as a matter of social recognition.[89] This approach is not surprising: authority is typically understood as content-independent, hinging on the position of the author rather than on the substance of his/her message. Yet the practice of international law offers plenty of examples in which an authority's interpretive statements have remained entrenched in the legal discourse, while others coming from the same authority have not.

It could be claimed that what is considered valid is ultimately determined by an audience's qualified acceptance, that is, the readers of that legal interpretation. Similarly, one could assume that while several plausible histories are possible, the distinction between good and bad histories is determined by their audiences. This ensues from the fact that, among other things, history is dialectical, in the sense that – like legal interpretation – it is subjected to the acceptance of an audience. By the same token, history-making is a process constellated by a falsification-verification attitude, which assumes some histories to be more reliable than others.

History, Tradition, Legacy, Memory, and the Function of Critique

The affirmation of new theories about international law, alternative to traditional approaches such as legal positivism and natural law theories in international law, created fertile ground for new ontological understandings of international law, of what counts as legal material and how knowledge about

[86] On the aim of argumentation as testing new propositions, see ibid. On the point, see I. Venzke (2016) "International law as an argumentative practice: on Wohlrapp's *The Concept of Argument*", *Transnational Legal Theory*, VII (2016), pp. 9-19, p. 10.

[87] I. Venzke, "Semantic Authority" in J. d'Aspremont and S. Singh (eds.), *Concepts for International Law* (2019), pp. 815-826; I. Venzke, "Semantic Authority, Legal Change and the Dynamics of International Law", *No Foundations*, XII (2015), pp. 1–21; I. Venzke, "Between Power and Persuasion: On International Institutions' Authority in Making Law", *Transnational Legal Theory*, IV (2013), pp. 354–373.

[88] I. Venzke, "Semantic Authority", in d'Aspremont and Singh, note 87 above, p. 815.

[89] F. Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law', *Journal of International Dispute Settlement,* IX (2018), p. 297.

international law is produced. Accordingly, the boundaries of the discipline became looser, allowing for greater dialogue with other disciplines such as sociology, historiography, literature as well as for new spaces for critique within the discipline. The turn to history can thus be seen as a byproduct of these new theories aiming – to different extents – at pushing forward the classical boundaries of the discipline, let alone at challenging their very existence. The flourishing of alternative approaches has not been peculiar to international law as a scholarly discipline, but has stretched to historiography as well. As underscored by historians, suffice to refer to the greater variety of definitions of history that gained ground today as compared to a generation ago.[90] What is then that an international lawyer does and can do when turning to the history of international law? In an eye-opening intervention, Nijman conceptualizes three ways of doing history of international law: doing history for the sake of history; doing history for the sake of critique; and doing history for self-knowledge.[91] By combining history and theory (that is, in what context of events a certain legal concept has been forged and validated, and which assumptions and normativity are ingrained in that concept), the third strand can add unfamiliar understandings and the necessary complexity to the transformation of international legal thought up to today.

In this vein, a fruitful way to conceive of history/history-writing among international lawyers is to look at it as tradition-building.[92] A tradition, unlike history, results from beliefs, practices, doctrines, and modes of thinking shared by individuals in a certain community. Unlike a legacy, which is received as a bulk of material (for example, the legacy of the *ad hoc* tribunals), a tradition is a multilayered process to which generations of individuals, members of a community, contributed by accepting, transmitting, and reproducing certain modes of thinking, practices, and beliefs. To look at the history of international law is to study how (primarily) jurists conceived of international law in the past. A common example is the tradition of thinking of international law in celebratory terms, around the themes of civilization, secularism, humanitarianism, and internationalism,[93] as a belief that has been embraced and transferred to younger generations of lawyers. This is arguably different from doing history in a historiographical sense, as the latter would require to study international law in society at large and zoom in on the practices/thoughts not solely or primarily of jurists, but also of philosophers, theologians, journalists, diplomats, statesmen, and political thinkers, among others.

A reflection on historiography and tradition-building is appropriate at this point. To use the same example used earlier, looking back at how Grotius was read and received in the turn of the nineteenth and twentieth centuries means, for the sake of tradition-building, not to understand what Grotius "really" was but what he *represented* for the discipline of international law. Arguably, choosing Grotius as a founding father of international law meant upholding principles of religious toleration that could induce the embracement of its norms and principles among diverse polities. International lawyers should therefore be more sensitive to the activity of tradition-building, and possibly tradition-revision, than history-writing.

The function of critique in the turn to history should be directed at re-appraising a tradition in order to generate new self-understandings among international lawyers. Needless to say, such a re-appraisal will hinge on different sensitivities. To illustrate, the critique of international law as an instrument of power may be traced back to at least the 1920s. A good example is offered by the critical intervention of Henri Rolin (1891-1973) with regard to the mandates system introduced with the 1919

[90] J. Tosh, "Public History, Civic Engagement and the Historical Profession in Britain", *History*, XCIX (2014), pp. 191-192.
[91] Nijman, note 16 above.
[92] T. Kleinlein, "International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection", in G. Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence* (2017), pp. 818-828.
[93] Ibid., p. 813.

Treaty of Versailles at the end of World War I.[94] Rolin is trenchant on the use of international law by the European powers.

> La colonisation transocéanique, fait capital dans l'histoire de l'humanité, n'a guère commencé qu'à la fin du XV^e^ siècle et elle est le propre des peuples de l'Europe occidentale; avant ce temps et en dehors de leur civilisation, on ne trouverait rien de comparable à ce phénomène, dont les conséquences ont été incalculables.
>
> Son début coïncide avec la constitution ou la consolidation définitive des États riverains de l'Atlantique. La colonisation européenne a reçu là une marque dont l'empreinte est profonde et subsiste encore. Elle a été dès le principe, sauf quelques exceptions négligeables, et elle est restée, essentiellement *étatique*, œuvre des royaumes et des républiques d'Occident prolongeant outre-mer leurs ambitions, leurs rivalités et leurs jalousies, œuvre *nationaliste* donc et, à l'origine, exclusivement *égoïste* Les droits et les intérêts des indigènes sont comptés pour rien ; chaque pays cherche à écarter le plus possible tout concurrent dans l'exploitation des colonies.
>
> L'histoire de ce qu'on peut appeler la « morale de la colonisation » montre qu'une série de réactions se sont produites contre ces tendances. On en trouve des indices dès le XVI^e^ siècle. C'est à peine si le XVII^e^ est, à ce point de vue. en progrès sur son prédécesseur. Les méthodes employées alors par les Anglais et par les Hollandais pour tirer de leurs possessions le plus possible de profits, et pour les monopoliser, diffèrent des procédés espagnols et portugais, mais leur but est le même. Au XVIII^e^ siècle commencèrent à se répandre, surtout en Grande-Bretagne, de nouvelles manières de voir : elles étaient caractérisées par plus de pitié pour les natifs et par un moindre exclusivisme à l'égard des autres nations. On se contente d'être « protectionniste » au XIX^e^ siècle et l'on se préoccupe davantage du bien-être des indigènes. Il s'est formé peu à peu une « conscience européenne », plus ou moins susceptible de s'émouvoir aux récits d'atrocités, accueillis d'ailleurs dans chaque pays avec plus de facilité lorsqu'il s'agit de crimes reprochés aux « coloniaux » d'un autre pays.
>
> C'est au fond l'intérêt national qui pousse à acquérir et à posséder des colonies. Il subsiste une large part de l'ancien esprit de monopole et d'exploitation. Le monde colonial moderne, image agrandie de l'Europe déchirée par ses ruineuses dissensions, est issu de l'amour du gain et de la puissance. Si les nations civilisées

[94] H. Rolin, "La Système des Mandats Coloniaux", *Le Revue de Droit International et de Législation Comparée,* I (1920), pp. 329-363.

sont les « tutrices » des peuples arriérés, elles ne sont pas des tutrices *désintéressées*. Mais, outre la passion de dominer et de s'enrichir, elles ont des scrupules, de l'amour-propre et de la prévoyance : on s'est rendu compte, à la longue, que c'est un fort mauvais calcul d'écraser les indigènes et que les conséquences économiques de leur asservissement retombent lourdement, en dernière analyse, sur les tyrans eux-mêmes.

Ces idées, vieilles de plus d'un siècle, ont produit des fruits bien avant de se réfléter dans les traités internationaux. Le Traité de Vienne a, il est vrai, proscrit le commerce des esclaves, dès 1815. Mais l'adoucissement des mœurs coloniales a précédé de beaucoup, au siècle dernier, la Conférence de Berlin (1885) et celle de Bruxelles (1890). Ce serait une erreur de considérer les décisions libérales de ces assemblées comme les principaux leviers du progrès en éthique coloniale. Elles ont adopté quelques mesures utiles ; elles ont affirmé solennellement des principes et les ont ainsi mis en relief, non sans une certaine ostentation. Bref, ce sont surtout des manifestations. Or, c'est la pénétration réelle des sentiments généreux dans les cœurs qui importe et qui est la plus sûre « garantie ». La réforme la plus féconde, c'est celle des mœurs.

In the fashion of a critical legal scholar *ante litteram*, Rolin was potently denouncing the national interest and the egoism of states as drives for conquest of the colonies. It is "the greed for profit and power" that motivates the "civilized nations" to assume the tutelage of "people not yet able to stand on their own", as laid down in Article 22 of the Covenant of the League of Nations. As such – Rolin argued – they are not "disinterested *tutrices*" but are driven by their desire for hegemony and profit at the expense of indigenous people and with no consideration for them.

A plausible reason why authors like Rolin have not succeded in problematizing the colonial past of international law already at the outset of the twentieth century, or for which their critical self-appraisal of the discipline did not find much support in other contemporary accounts, reasonably rests with the ideological mindset predominant among international lawyers at the time. Said differently, if the critique of international law as an instrument that enabled European powers to assert dominium over colonial territories rests on legal and political considerations, hardly could such a critique be upheld in a context in which the neat separation between law and politics was the predominant view at the time. Today, the context is signifiantly different. As put by Koskenniemi, "what we study as history of international law depends on what we think 'international law' is in the first place".[95] It is hence the possibility of alternative theoretical approaches to international law that enables a plurality of histories of international law. In this perspective, historical narratives would be contingent to the rationalities constructed to justify and explain facts in the past, and to the ideologies that would necessarily condition the construction of causal relations on which those narratives rest.

Conclusion: The Way Forward

Scholars engaging with the history of international law are many and variegated. Some look at the past to explore the role of international law in reproducing injustices affecting the present; some others turn to the past to set the scene of an emerging legal concept and, in doing that, they craft historical narratives. Their aims also differ. For instance, they seek to know how the past was or understand how the present

[95] Koskenniemi, note 15 above, p. 970.

came about. Some seek to provide more "truthful" recounts of the past and cast new narratives about a certain object of inquiry.[96]

Turning to history entails turning to facts, broadly understood as to encompass past lived experience. However, since facts are discursive constructions, they necessarily embed a subjective component. As such, in the view of some international lawyers engaging with the history of international law, it is not possible to retrieve the past "as it *really* was" (in Ranke's famous statement)[97] for the scholar – be this a professional historian or an international lawyer – would offer his/her interpretation of the material analyzed and craft his/her own historical narrative. While this aspect has come under the purview of historians since the origins of historiography as a scholarly discipline – across generations of historians and historiographical epochs – international lawyers do not seem to sufficiently account for the challenges associated with history-writing. In particular, while tempering the ambition of achieving a universal reading of the past, anti-foundational international lawyers have failed to offer a criterion or set of criteria to validate historical narratives or at least to discern among the plurality of histories that they seek to attain. This poses an important challenge to history-writing that cannot simply be left in the background, particularly in the light of flourishing arbitrary constructions of histories, instrumental uses and manipulative revisions of the past that both historians and international lawyers have denounced.

The function of history and of critique in international law have to do with re-assessing its tradition, foster self-reflection on international law as a set of doctrines and what it entails to reproduce them as international lawyers. However, this appears a quite different project than what anti-foundational international lawyers seek to achieve while doing history. Yet, if we accept that history is an acquired knowledge about the past, constellated by sequence of events linked together by cause-effect relations, then the question we should ask ourselves is how a plurality of histories can be reconciled with claims to truth, on the one hand, and instrumentalist re-appraisals of the past, on the other?[98] How could one discriminate among plausible histories if we accept that there is no "correct" or "more correct" interpretation of the past, aside from criteria of ideological affinity? In other words, the openendedness of histories generates some unease in accepting some histories and discarding others, particularly if no agreed method comes to hand.

The analogy between interpreting the past and interpreting the law as giving-meaning acivities helps elucidate points of jucture between these two disciplines and to build on them to suggest a way to validate historical narratives and discern among those which contribute to the knoweldge of the past and those who would not. This contribution has shown how the mode of legal thinking and the mode of historical thinking have more to share than what initially anticipated. Perphaps precisely for this very reason the turn to history has turned into a struggle for authority, that is, a debate as to whose narratives count as authortitative of the past of international law.

As both historiography and international law are disciplines related to knowledge and to argumentation, historians shall more closely engage with the discourse on legal interpretion in international law, to better understand international lawyers' mode of thinking about the law and, by extention, to history. Likewise, international lawyers shall come closer to the challenges of knowing the past in a historiographical sense to better appreciate the risks presented by instrumentalist and manipulative uses of the past, which may be legitimated by the claim that there is no single history but

[96] Hegel, note 61 above.
[97] L. von Ranke, "Histories of the Latin and German Nations from 1494 to 1514", transl. in G. P. Gooch, *History and Historians in the Nineteenth Century* (2[d] ed.; 1952), p. 74.
[98] Relevant for this point, Kończal and Moses, note 9 above (2022), pp. 153-157. See also Kończal and Moses, note 9 above (2023).

many. This, I believe, is the most pressing question that is engendered in the very idea of histor*ies* of international law, to which the attention of international laywers should be redirected more vigorously.