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Force Field: On History and Theory of International Law

Abstract

»History« and »theory« have increasingly appeared together in the vocabulary of international law. Although international lawyers have traditionally looked to the past in their search for authority, a more critical approach has emerged in the last three decades, proposing not only a close relationship between history and theory, but embracing the aims and methods involved in the tasks of historians and theorists. Three tensions that emerge from this critical approach are discussed in terms of their potentials and challenges: local/global, ideas/practice, and micro/macro. The article concludes that the engagement between history and theory must continue and deepen.

George Rodrigo Bandeira Galindo

Force Field: On History and Theory of International Law*

»[E]very historical state of affairs presented dialectically polarizes and becomes a force field in which the conflict between fore- and after-history plays itself out. It becomes that field as it is penetrated by actuality. And thus historical evidence always polarizes into fore- and after-history in a new way, never in the same way«. [1]

1 Introduction

Over the last three decades, academia has increasingly considered the historical and theoretical dimensions of international law as a common field of research. Terms such as »history and theory« (or »theory and history«) are now being widely used in the title of monographs and articles or in the syllabi of courses in renowned universities throughout the world. [2] This is more than a perspective that aims to separate the »practical« from the »non-practical« side of international law where history and theory remain in a realm apart from other topics such as sources, responsibility, or the use of force. It is an emerging literature trying to make history and theory talk. [3]

However, such »coupling« between history and theory is not without its problems, and in-depth analyses about this relationship have been rare in the past. Such »coupling« must be welcomed (and even encouraged), but it is undeniable that there is a constant tension between history and theory, especially because the methods and the aims of those disciplines are sometimes substantially different. Despite the fact that much has been done to bridge the gap between history and theory in the past decades, historians are not always comfortable with theories, nor are theorists every day disposed to engage in history.

Concepts such as history and theory are extremely difficult to formulate due to the fact that different schools of thought have their own views about them. But if we rely on a broad consensual idea of what they mean, we could come to the conclusion that history is basically »past events and processes«. [4] It is something related, but not the same as historiography – which could be described as »the results of inquiries about history, written accounts of the past«. Finally, theory is »generalizations that may be tested against reality and are thus falsifiable«. [5] It is true that, in order to make their narratives intelligible, historians must generalize, just like theorists (when they speak, for example, about ages, time, future). But generalizations are made in order to find what is particular. As John Gaddis clearly states:

> »We [historians] do […] normally embed our generalization within our narratives. […] Because the past is infinitely divisible, we have to do this if we're to make sense of whatever portion of it we're attempting to explain.

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1 Benjamin (1989) 60. Force field is also the title of an important collection of essays written by Martin Jay, one of the most important American intellectual historians today. Similarly to Jay's main argument in that book, I think international legal history »can itself be seen as the product of a force field of often conflicting impulses, pulling it in one way or another, and posing more questions than it can answer«. Jay (1993) 3.

2 One example, among many, is the publication of Evans (ed.) (2010). The first part of this best-selling course book is entitled »The History and Theory of International Law« in contrast to other parts more »practical« in scope.

3 It is possible that the mainstream in the profession often tends to see history and theory as completely different domains from the practical side of international law. Such an attitude is evidenced by the fact that serious attempts to articulate the relationship between international legal theory (and also history) and practice are almost nonexistent. One of the few notable exceptions is an important study by Koskenniemi, dated more than ten years ago: Koskenniemi (1999). Another exception is the classic Schachter (1977).

4 Tucker (2009) 2.

5 Joas/Knobl (2009) 8.

> Explanation is, however, our chief priority: therefore we subordinate our generalizations to it. […] We generalize for particular purposes; hence we practice particular generalization.
> Social scientists, in contrast, tend to embed narrative within generalizations. Their principal objective is to confirm or refute a hypothesis, and they subordinate narration to that task […]. Theory therefore comes first, with explanation enlisted as needed to confirm it. Social scientist particularize for general purposes; hence they practice general particularization«. [6]

In such diverse ways to face generalizations and particularizations reside the main chasm between historians and theorists. They are often looking for different things. And many historians and theorists in the discipline of international law do not act differently.

Much was written about the decline of interest in theory during the Cold War era. Scholars influenced by the so-called *newstream* in international legal studies have correctly identified the main reasons for that phenomenon. The need for renewal in a discipline unable to avoid a second global war contributed enormously to the creation of a pragmatism that sparked theoretical debates of minor importance in the face of greater challenges. Such challenges included the building of an enduring peace in a political scenario of confrontation between East and West. [7] The post-Cold War interest in theory reflected a need to inquire into the foundations of international law and the choices made by international lawyers, but it also came as a reaction to the pragmatist approach that failed to fulfill its promise to give law a more prominent role in international relations. [8]

The aforementioned sense of pragmatism also influenced the study of the history of international law after the Cold War. [9] But one main difference must be stressed. If systematic and methodologically-oriented studies on the history of international law were infrequent during the Cold War, history never remained completely outside international legal discourse. Although the contention is that theory was implicit, international lawyers never stopped considering history explicitly. Arguments grounded on the past have been omnipresent in international lawyers' discourse, in the making of their doctrines or in their statements before international courts. [10] For example, monographs almost always contain a chapter with the »historical background« of a topic; historical titles are frequently invoked in international cases concerning territorial or maritime boundaries; the »founding fathers« of the discipline are often cited to support an argument in different domains, from diplomatic to international economic law. If this is so, what is different now?

Following Robert Gordon's taxonomy, three attitudes of lawyers toward history can be traced. The first is *static*. This attitude normally assumes that »a legal norm or rule or practice has a fixed meaning that has been established by past usage«. Lawyers following the second attitude – *dynamic* – promoted the idea that »the interpretation of legal texts and rules and principles does and must change over time to adapt to changing conditions«. A common denominator of those two attitudes is that they look to the past for authority. History thus plays an important role in legitimizing an argument posed in the present. It is based on the assumption that there is continuity between past and present, expressed, for example, in the form of a tradition or even in a movement of »progress and decline«. Finally, a *critical* attitude aims to »destroy, or anyway to question, the authority of the past«. It cuts off the necessary relation between past and present that gave authority to the latter, and it focuses on the discontinuities in history. [11]

The static and the dynamic attitudes have been central to international lawyers' understanding of their profession. Such search for authority is not something necessarily wrong or bad. However, it

6 Gaddis (2002) 62–63.

7 David Kennedy was one of the precursors in such diagnosis. See Kennedy (1988).

8 For a good overview of the recent interest in theory, see Johns (2009).

9 For this interpretation, see, for example, Kennedy (1996).

10 As Craven intelligently puts: »International lawyers (perhaps lawyers more generally) all trade in history, all engage with events and situations arising in particular historical junctures and a consistent feature of that engagement is not merely a concern to translate what we know of the past into ›history‹, but to translate an idea of ›history‹ into law«. Craven (2007) 6–7.

11 The quotations in this paragraph and the general taxonomy can be found in Gordon (1996) 124–126. It is curious to note that the vision some notorious professional historians have regarding a lawyer's interest in history is restricted to the first and the second attitudes mentioned above: the search for authority. See, e. g., Pocock (1998) 483.

has consequences. The first is that once historians do not necessarily look to the past to find authority for an argument, their methods are generally forgotten when international lawyers write their doctrines. Second, for doctrine, history frequently becomes a mere tool in order to prove an argument or the existence of a certain state of affairs. International lawyers' lack of familiarity with the aims and methods of history is one of the causes of why lawyers who are experts in international legal history normally feel isolated not only from practitioners but also from theorists. [12]

After the end of the Cold War a critical attitude toward the history of international law that frequented international law literature has become more visible. While refusing to look to the past as a necessary source of authority, critical histories were compelled to engage deeply with historians' aims and methods. At the same time, those critical histories also refused to look to history for history's sake, as some historians do, [13] because one of their main purposes was to articulate the presence of the past in their theories. By breaking the continuity on which the search for authority is based, critical histories have offered many different versions of how the past can be seen, allowing past doctrines, concepts, institutions, or legal rules to be seen dialectically. The past as a place of opposing forces, where the power of attraction of force fields can destroy unified meanings and their translation to the present in the shape of authority, has many potentialities. But it also poses great challenges to the building of theories. Theories based upon shaky terrains, full of contradictions, can fall, but they can also break structures: the continuum of time, for example.

This article will show that the critical attitude toward the past has more seriously confronted the relationship between theory and history, attempting not to isolate history by analyzing history for its own sake. At the same time, this confrontation will avoid using the past out of context in order to support a certain theory. From such tension between history and theory, a number of challenges surface and must be surmounted if the critical project is to be coherent and influential. I will focus on three of them: the crafting of global or local histories, the emphasis on ideas or on the practice in the writing of history and, finally, the option for macro or micro historical approaches.

The article is divided into two main parts. The first will present a brief review of the state of the relationship between history and the theory of international law with an emphasis on how some critical legal scholars have faced this relationship. The second part will present those three tensions and challenges that emerge from the critical engagement with history and theory in the discipline of international law.

2 Critical history, Critical theory

The traditional picture of the relationship between historians and theorists is not one of harmony, but of conflict. Sometimes a lack of politeness and toleration leads to friction and often times a »dialogue of the deaf«. Theorists and historians hurl mutual accusations. Among many different mutual accusations, theorists consider historians as inevitably providing a too reductionist image of the past, not taking into consideration what happened in different domains from those of the historian. Alternatively, historians argue that theorists' reliance on generalizations (or general particularizations, to use the term coined by Gaddis) oversimplifies and sends details and nuances that affect human behavior and entire societies into oblivion. Such different perspectives on generalizations were based on what Isaiah Berlin (who did not believe history could be equated to natural science) called the »deepest chasm« between historical and scientific studies. For him, »[i]t lies in the difference between the category of mere togetherness or succession (the correlations to which all sciences can in the end be reduced), and that of

12 One example of such a feeling of isolation sometimes emerges clearly in the writings of eminent international legal historians like Wolfgang Preiser. Reviewing the state of the discipline of history of international law, he complained that nineteenth century international legal histories were much more an exposition of different theories applied to international legal relations than historical narratives. By the end of that century, however, history of international law developed academically to the point that it could »be recognized as a branch of legal history«, Preiser (1995) 716. It is intriguing to note that he does not mention that the history of international law could become a branch of international law itself. For a general overview about the discomfort of legal historians amidst lawyers and historians, see Lesaffer (2008)

13 On this issue, see, e. g., Pocock (1998) 483–484.

coherence and interpretation; between factual knowledge and understanding«. [14] Berlin was then contesting the scientific character of history because of its difficult reliance on theoretical assumptions.

Even though international law was established as a profession and a discipline in the nineteenth century, [15] it is far from clear that the subfields of history and theory engaged in a substantial dialogue and in a mutual intellectual enterprise. International legal historians describing themselves as theorists, and theorists claiming they write about the history of international law is a recent phenomenon. The cosmopolitan project endorsed by international lawyers of the end of the nineteenth century and most of the twentieth was deeply embedded in the past [16] – e. g., in the Grotian or in the Spanish Scholastic traditions. But this does not mean they borrowed methods and aims of history to construct their theories, nor did their histories use presuppositions found in theoretical works.

A theory cannot be sustained without history, and a historical narrative, to be understood, needs a theory. [17] But this does not answer the intensity of their relationship. In other words, taking the past seriously does not necessarily imply respect for historians. [18] Theorists of international law regularly looked to the past, but often they did so only to confirm their hypothesis – to prove the existence of the law that in their minds ruled or should rule present societies (or the international society). For instance, Hersch Lauterpacht, undeniably one of the most influential theorists of the inter-war period, in the first part of one of his most important monographs, *Private Law Sources and Analogies of International Law*, focused mainly on the history of the discipline. He tries to prove that the founding fathers of international law made much use of (Roman) private law analogies, something he was enthusiastic about. But Lauterpacht's intention in proving his point historically was clear: He wished to position natural law again at the forefront of the theoretical picture of international law. [19] He does not hide such intention. For him, the issue of the application of private law in international law is »attributed to the circumstance that the problem has become intimately connected with the controversy between the positivist and the natural law tendencies and with the ultimate victory of the positivist school«. [20] Similarly, we may conjecture whether the »Grotian Tradition of International Law« was not, from its origins, a tradition established by Lauterpacht himself or an older tradition, mainly associated with Francisco de Vitoria's writings. [21] Although intelligent and erudite, Lauterpacht's article on the Grotian tradition treats Grotius as a true oracle who can »obtain an insight into the persistent problems of international law in the past, in the present and, probably for some long time to come, in the future«. [22] Such examples suggest that Sir Hersch Lauterpacht was much more inclined to do what Pocock described as »historiosophy«, in the sense that history is treated as a source of wisdom [23] (or authority).

Hans Kelsen, with his great influence on German and Latin-American international lawyers of the twentieth century, is no different. Although sometimes excluding the place of history in his theory, [24] he also made use of the past in building his pure theory of international law. For example, the idea of *civitas maxima*, borrowed from Chris-

14 Berlin (1960) 28.

15 I endorse Koskenniemi's interpretation of the beginning of modern international law with the launching of the *Revue de Droit International et de Législation Comparée* and the creation of the *Institut de Droit International*. See Koskenniemi (2001).

16 Koskenniemi (2004b).

17 This is suggested by Belz in his review of the use of history in constitutional theories in the United States. See Belz (1994).

18 See Burke (2005) 8.

19 Lesaffer also stresses such intention in Lauterpachts's book. See Lesaffer (2005). A complementary reading is that Lauterpacht was trying to prove that international law was »complete« since general principles of law, borrowed from (Roman) private law, could fill the gaps occasionally found in the system. See Koskenniemi (2004a) 616–620. Such an interpretation also corroborates the idea that history in *Private Law Sources* was instrumental in Lauterpacht's theoretical project.

20 Lauterpacht (1927) 7.

21 For this suggestion, see Lesaffer (2002) 103 (although this author does not go as far as to suggest the replacement of Grotius' name for Vitoria's in the title of the tradition).

22 Lauterpacht (1975) 364–365.

23 Pocock (2004) 547–548. For a more detailed study on Pocock's ideas about (political) theory and history, see Pocock (2008).

24 For example, he refuted Heinrich Triepel's argument that the prevalence of international law over municipal law had no historical basis. The national state emerged before the law to regulate the relations between national states: international law. For Kelsen, such objection was »based on the lack of differentiation between the historical relation of facts and the logical relation of norms«. Kelsen (1967) 339.

tian Wolff, albeit not explicit in Kelsen's late writings, fulfilled an essential role in the crafting of his proposition of a unified legal system encompassing international and municipal law (monism), with the prevalence of the former.[25] However, Kelsen never made a comprehensive investigation into the context in which Wolff wrote his ideas about *civitas maxima* or how they were received by successive generations of international lawyers. Similarly, Kelsen's theory of just war was based on a reinterpretation of contradictory and discontinued doctrines defended by a number of international lawyers in several different historical contexts. Herein lies the reason why so many strongly criticized it as »a simplified, stylized version«[26] of the theory of just war as professed by many in the past. Those examples show that it is not an exaggeration to say, as Randall Lesaffer did some years ago, that the »history of the law of nations« was »over-simplified and distorted by international lawyers«.[27] Such over-simplification and distortion were certainly often perceived as a way to advance their »cosmopolitan project«.

Historians of international law, from their part, constantly refused to engage in theory and normally saw their task as one involving more the particulars of the past than the great generalizations theorists wish to embrace. Two of the most influential books on the history of international law published in the twentieth century demonstrate this. Arthur Nussbaum's *A Concise History of the Law of Nations* intentionally has no theoretical ambitions. In the preface to the first edition of the book, the author warned that »in the appraisal of the present era he [the historian] has to be on guard against the deflecting influence of ideologies and hope«.[28] More than sounding a Rankean perspective on the role of the historian in finding objectivity in history, the passage clearly traces a demarcation between present and past in the sense that the priorities or the passions of the present cannot affect the enterprise of discovering what really happened in history. This is one of the few instances where Nussbaum makes explicit his method – the effort of abstraction and generalization not even historicism could avoid – as to the history of international law. Although making an important contribution to the study of private international law in Germany and in the United States,[29] Nussbaum did not use his historical »findings« in the building of a theoretical approach toward international law.

The highly-acclaimed and much controversial *The Epochs of International Law (Epochen der Völkerrechtsgeschichte)*, by Wilhelm Grewe, is a similar example. Despite the fact that Grewe had a good background in legal theory and his book was influenced by a specific kind of theory maintained by scholars such as Carl Schmitt, Grewe neither extracts general laws from the history of international law to understand the current situation of norms, institutions, or doctrines nor tries to apply to the present his interpretation of the past.[30] This is clear in his conception about the legal order. For him, a legal order is not a »logical system of precisely interacting rules without gaps and contradictions« but rather »the normative image of a natural state of order«. The main context in which legal rules and institutions are found »is not logical, but rather morphological«. »It is the subsequent task of jurisprudence to build systems and co-ordinate concepts«.[31] Because Grewe's aims in *The Epochs of International Law* were neither to build such systems nor coordinate concepts but instead to provide historical data for experts in jurisprudence, he assumes the existence of a clear boundary between the legal historian and the legal theorist.[32]

25 See, for example, the first course given by Kelsen at the Hague Academy of International Law in which he makes the point about the role of the idea of *civitas maxima* in his monistic theory: Kelsen (1926) 325.

26 Zolo (1998) 312.

27 Lesaffer (2002) 103.

28 Nussbaum (1954) x.

29 For a summary of his contributions to a wide range of disciplines, including public and private international law, see Cheatham et al. (1957).

30 Grewe's position regarding theory was, in itself, provocative, because »he saw theory as something which, more often than not, is advanced in the service of power politics«. Fassbender (2002) 488 (this article contains a very comprehensive analysis of Grewe's book).

31 Grewe (2000) 32.

32 It is noteworthy that even when speaking from the practitioner's point of view, Grewe was cautious in identifying patterns of behavior and regularities from the history of international law. Such a posture is evident when he tries to answer the question about the role of international law in the diplomatic practice. Although providing his perspectives on the issue, he warns openly that history »is not unequivocal in producing answers«. See Grewe (1999) 22.

One may find exceptions to such division between historians and theorists of international law, but they are uncommon. In the last years of the twentieth century, however, a growing number of international lawyers showed a parallel interest both in formulating theories and investigating the history of the discipline. The so-called *newstream*, from the very beginning of its associates' writings, had a clear idea about the need to articulate theory and history.[33] Not only did the terms start to appear side by side, but the generalizations of theory became essentially dependent upon the tracing of particularities in history.

One of the first systematic presentations of the *newstream*ideas is crystal-clear in such an effort to join history and theory. In *A New Stream of International Law Scholarship*, an article from 1988, David Kennedy states that his »method is to begin by focusing on argumentative patterns – patterns of contradiction and resolution, of difference and homology – which are reasserted in the materials of international law history, doctrine, and institutional structure«. In other words, in order to show that international law is immersed in an »obsessive repetition of a rather simple narrative structure«,[34] investigation about the past became absolutely necessary. The presence of patterns or structures and other generalizations in the past were definitely not something for which the vast majority of international legal historians of the twentieth century were looking.

Martti Koskenniemi labeled his *From Apology to Utopia* as »an exercise in social theory and in political philosophy«[35] and admitted later that his depiction of the international legal argument as a constant opposition between apology and utopia was static and consequently unable to situate lawyers in their proper social and political context.[36] But the book presents a deep concern for past authors and doctrines. In fact, the recurrence of apologetic and utopian arguments is structured in a pattern of repetition through history.

Different from other theoretical efforts in the discipline, which never abdicated from looking at the past, the *newstream* emphasized the need to engage not only with history, but also with historians. Nathaniel Berman's writings of the early nineties are a good example of such engagement. Exploring a vast array of studies on aesthetic, history of nationalism, and of literature in articulation with international law, Berman's detailed analysis tried to prove that studies on how the question of nationalism was approached in the inter-war period were necessary because »we can only avoid being deafened by the universal clamor for reconstruction by a vigilant historical critique of its rhetoric«.[37] More, for him, »the history of exuberance and catastrophe that marked the inter-war years continues to exert a powerful hold on us, whether or not we are aware of it«.[38]

Outi Korhonen's study on international lawyers' »situationality« attributes a great importance to history. She contends not only that the role of international lawyers is informed by the history that he or she narrates, but also that are many possibilities for looking at the past, although a realist approach has insisted on a fixed meaning for the discipline's history. Her approach is also theoretically-oriented, since »situationality« »can be analysed to uncover more potential for solutions and to reduce blind-spots«.[39]

At the very beginning of the twenty-first century, Marti Koskenniemi decided once more to rely on history in a lengthy study, fully incorporated in his reflections on the theory of international law. But now, just like Berman and different from his *From Apology to Utopia*, he leaned much more on the side of historians than that of the theorists. With an impressive amount of historical data and bibliography, his investigation into what constitutes international law – what international lawyers do or think – has gained a »sense of historical motion and political, even personal, struggle«. However, theory was still there. Ulti-

33 Cass makes this point clear in her excellent review of the *newstream* project. See Cass (1996).
34 Kennedy (1988) 2, 11.
35 Koskenniemi (2005) 1.
36 Koskenniemi (2001) 1–3.
37 Berman (1992) 380.
38 Berman (1993) 1903. This connection between theory and history is evidenced by Ignacio de la Rasilla, for whom Berman conceives »history as [a] method in order the better to work out the consciousness of the discipline and be thus able to warn about the dangers of authoritarianism looming ahead in the new post-Cold War era«. De Rasilla del Moral (2009) 641.
39 Korhonen (2000) 129–206, 295.

mately, the main articulation between theory and history is in his defense of »a culture of formalism« as a lesson or sensibility international lawyers of present times can learn or receive from the narrative of rise and fall of international law: »a universality that may be able to resist the pull toward imperialism«.[40] Such articulation is being followed in an ongoing historical investigation of what he identifies in current international law as a trend toward the so-called managerialism.[41]

The efforts of the *newstream* to articulate theory and history have expanded to different realms, some of which are detailed below. Antony Anghie's impressive command both of history and of post-colonial studies has articulated several new ways of inquiring into the unresolved relationship between present international law and persistent forms of colonization and imperialism. It has also contributed enormously to the emergence of many creative studies under a Third World Approaches to International Law (TWAIL) perspective.[42] Liliana Obregón's investigation of the history of Latin-American international law, especially during the nineteenth century, has shown that a *creole* legal consciousness still plays an important role in the region, evidenced by the contemporary discourse stressing the peculiarities of an Inter-American system of human rights.[43] Janne Nijman's remarkable study on the concept of international legal personality, although departing from premises other than those established by the *newstream* to the research of the history of international law, comes also to innovative conclusions. Making use of an historical methodology grounded on Quentin Skinner's contextualism, she has aptly identified different layers of contexts that coming from the past in several different shapes affect the way many authors conceive of international legal personality today. Such layers of context open the way, in her mind, to the defense of a new version of natural law in the international legal discipline.[44] Onuma Yasuaki's perspectives on a transcivilizational international law are also deeply rooted in historical concerns. For him, in order to advance such perspectives, it is absolutely necessary to »re-view the history of international law with a keener and more sensitive concern for the global (including trans-cultural, trans-religious and transcivilizational) legitimacy of international law«.[45] Some of Jörg Fisch's writings, although written before the main pieces of international critical legal thinking, can also be seen as a parallel effort to see the history of international law through critical lenses. Fisch often looks to present situation of international relations in order to realize how classical debates reappear in present international law with different clothes, under the rubric of new concepts. Making use of a conceptual history apparatus, he argues that, despite the fact that some concepts useful to European expansion changed through time – such as Christianity, civilization or, currently, democracy – continuities among them can also be envisaged, since they are based on a »teleological view of history as a universalizing project«.[46]

These are some examples of historical narratives that treat the past critically. Although this attitude toward the history of international law is found mostly in authors influenced by the critical legal studies movement, this is not a rule. The works of Nijman and to a certain extent those of Anghie, Onuma and Fisch demonstrate such exceptions. Although commendable, such efforts to link theory and history demand further reflection on the part of international lawyers because they pose different challenges and possibilities, some of which will be only briefly sketched here.[47]

40 Koskenniemi (2001) 2, 500.
41 For his historical explorations on the issue of managerialism, see, for example, Koskenniemi (2009b) 395 and Koskenniemi (2009a) 27.
42 See, especially, Anghie (2005).
43 See Obregón (2006) 815.
44 See Nijman (2004) 347–445.
45 Onuma (2009) 268 (this course contains a comprehensive summary of Onuma's early writings on the topic).
46 Fisch (2000) 6. Fisch's full argument about European expansion may be found in Fisch (1984).
47 It is important to note that beyond the efforts to articulate history and theory, a vast number of creative studies focused on the history of international law and with no pretensions as to the formulation of theories has come to the fore in the last three decades. Two excellent books published in the 1980s and the 1990s, respectively, go in this direction: Haggenmacher (1983), and Jouannet (1998). For a general overview of the contribution of several similar studies in the past years, see Koskenniemi (2004b) and Hueck (2001) 194 (this article was a precursor to deep discussion of historical methodologies applied in international law in recent years, especially in the context of Germany).

3 Critical tensions, critical challenges

3.1 Local/Global

The first challenge concerns the postmodern rejection of meta-narratives. [48] Any history presupposes a certain space, one or many places where human interactions of different kinds occurred. Postmodern historical accounts challenge not history's dependency on space, but how spaces were made by traditional histories. Suspicion about how the universal or the global are categories built to advance singular interests – e. g., national or Western – has led postmodern historians to reduce the scale of their investigation, often privileging the local over the universal. From such a perspective, the local can assume different forms: It can be the Nation-state in opposition to the World, or a small village or a group in opposition to a Nation-state or a certain community. In the discipline of international law, such preference for the local can be traced to a visible trend to reject a singular and unified narrative of the development of international law and instead focus on how such development happened in different ways, at different speeds, and from different perspectives. Not only are studies on the way international law was thought of and practiced in the »periphery« of the world becoming important, but the »other« or the »subaltern« are coming to the fore. Even the history of »European international law« is increasingly treated as such, and not in terms of a history of universal international law.

Such a trend toward localized histories has potentialities and dangers. The greatest potentiality is to reveal more thoroughly what is behind the crafting of institutions, rules, and ideas in the international legal realm. It also makes it possible to show how universalism is embedded in oppression, imposition, subjugation, and pain by the repetition and renewal of legal arguments. But the rejection of meta-narratives can also pose problems for the relationship between history and theory of international law. One of them is how to articulate the history of the local and of the global.

It is fair to say that today, even professional historians are starting to overcome the »antipathy« toward meta-narratives. They have assimilated much of the critique about how histories are »constructed« and reflect hegemonic interest – Western, but also non-Western. At the same time, many feel the need for narratives more general in scope alongside those that emphasize what is specific and local. [49] The point is that there are certainly »local« histories of international law: Latin-American, African, and European versions are the most written about in contemporary international law. Further, there are possibly »local« histories on a more reduced scale – not only what is called national traditions of international legal thought, but histories of how international law was seen as a cultural or social phenomenon or how it was (literally) read within the boundaries of nation-states. Nevertheless, there is also a global or world history of international law that happened in a space not limited by national frontiers or specific nationalities, a space many went as far to treat as a cosmopolis and fought against its reduction to the local dimension. Such global or world history waits to be written through the lens of the engagement between history and theory. For good or for bad, to open possibilities for human freedom or to reproduce oppression, many have thought and acted in what they considered a broader scenario.

Writing a global history of international law alongside its local variants is not the only challenge for the relationship between theory and history. Histories should be written to reveal to what extent and intensity local histories existed along a global one or how locals »without history« interacted with those »with history«. [50] But how to inquire into such mutual existence is another challenge. Comparing and establishing connections have been two of the most preferred styles employed by global history scholars in recent days. [51] However, both are problematic.

For those who focus on comparisons, the greatest risk is to embark on a field full of tensions between theorists and historians, because how much

48 For a comprehensive summary of different post-modern approaches to history, see Jenkins (ed.) (1997).

49 See O'Brien (2006) 32–33.

50 The question whether history itself is a Western concept that was imposed on non-Western peoples has been a complex topic of great relevance for many historians. See, e. g., Nandy (1995) 44.

51 O'Brien (2006) 4–7.

one is involved in comparison, less he or she forgets the peculiarities of a given »local«. If it is the theorist's job to compare, it is the historian's job to find the specific. Historians who try to compare are in constant »danger of ethnocentrism« or in danger of making implausible choices when deciding »what exactly to compare with what«. [52]

Although international lawyers from different countries and schools of thought are increasingly aware of the deep and exuberant ties current international law has with Europe, [53] it has proven difficult not to consider »the West as a norm from which other cultures diverge«. [54] At least in the field of international law, what does not come from Europe (ideas, doctrines, institutions) almost invariably looks strange or exotic. This is one of the reasons why authors associated with the TWAIL have not exerted a stronger impact on the discipline's mainstream. It is dubious if the usage of terms such as »periphery« or »otherness«, without a clear explanation of what they represent, help in tackling the »normativity of the West« in international legal issues. [55]

Choosing what to compare is another difficulty. Historical comparisons between, for instance, the attitudes of Latin-American and African jurists toward international law are extremely rare not only because such issues are not on the agenda of the discipline's mainstream, but because such an enterprise is astonishingly difficult. The fact that Latin-America and Africa suffered many deprivations from Europe obviously does not answer why their attitudes differ in many aspects (Latin-Americans, for example, were more moderate than Africans in the critique against the colonial origins of international law). It instead tends to converge on other issues (such as their approach toward the revision of the law of the sea rules in the 1970s). If a broad perspective is adopted, it will hardly show a realist account about the relationship between the two groups, leaving aside a number of issues in which convergences and divergences exist. Whether a microscopic approach is chosen, a more realist narrative about a single issue can be depicted, but it will not reveal the great number of convergences and divergences that existed over different issues.

For those who are more concerned with establishing connections between different »units« the challenges are not minor. One of the few attempts in recent years to demonstrate how the »locals« have interacted with the »global« in international law is Arnulf Becker Lorca's research on how the concept of universality was built in the international legal arena. Although making use of some comparisons, Lorca's main focus is on how an international law as applied mainly to European States »encountered« and »interacted« with the non-identical: different civilizations, societies, or groups of people in parts of the world other than Europe. The author challenges the narrative that insists on the idea that the concept of universality is a by-product of the expansion of the *Droit Public de l'Europe* to the whole world [56] and argues that the non-West, in its several »local« variations, did not passively receive the rules of an »European international law« but instead re-interpreted those rules to their benefit and ultimately contributed actively to the building of such universality. Therefore, imposition was complemented by appropriation in order to shape the basic tenants of what we today conceive of as the international legal order. [57]

Lorca provides many examples of how non-European international lawyers were creative to re-interpret the then-existing international legal rules to the benefit of their states, and his narrative is highly convincing. However, in this effort to establish connections (an effort typical of the theorist since coming to the conclusion that a connection exists demands a certain level of abstraction different from what was observed in the particulars of units), a theory that explains the dynamics of such a connection is necessary. In the international legal field, a theory of power could contribute enormously to explain that dynamic.

52 Burke (2005) 25.

53 Koskenniemi has recently described such influence in the following way: »European stories, myths and metaphors continue to set the conditions for understanding international law's past as it does for outlining its futures«. Koskenniemi (2011) 155.

54 Burke (2005) 25.

55 Orford is one of the few scholars in international law who thinks more thoroughly about the potentials and risks of deploying a vocabulary based on duals such as »same« and »other« in the discipline. See Orford (2006) 1–33.

56 For this interpretation see, e. g., Steiger (2001) 180.

57 See Becker Lorca (2010) 475.

What does imposition mean? And what is appropriation? Do they act socially or psychologically? Are there boundaries between them? Is it possible for the category of appropriation to become imposition? These are questions the past alone cannot answer.

For example, Lorca praises the fact that nineteenth century non-European international lawyers were capable of writing their books and articles in foreign (European) languages. This allowed them to put into practice a strategy of resistance against imposition.[58] However, such a perspective does not pay due attention to the role of language in the crafting of relations of power. It would be important to investigate how such strategy of writing in foreign languages affected the appropriation of the old *Droit Public de l'Europe* by non-European international lawyers. It is hard to ignore that »[p]resuppositions about language that are parts of language ideologies systematically work to naturalize social arrangements that seem to have nothing to do with language«.[59] A theory of power could also reveal that universalism is far from a synthesis of a dialectic opposing imposition and appropriation – as Lorca seems to suggest. Rather, since the strength of imposition was much stronger than that of appropriation, current international law evidences a vast number of »gaps« and »silences« that promote and perpetuate inequality among states and peoples around the world.[60] This is an example of how difficult it is to establish connections in history and how more theory is needed to articulate plausible histories. Nevertheless, Arnulf Becker Lorca's research[61] is a good starting point in this direction within the discipline.

3.2 Ideas / Practice

Most of the recent work trying to articulate history and theory is focused on ideas. More specifically, the genre of intellectual history or the history of ideas has been preferred by many international lawyers to show how ideas move from time to time and how contemporary doctrinal discussions are, in one or another way, linked to several different doctrinal debates involving international lawyers in the past. Such emphasis on the history of ideas has been criticized by some professional legal historians as one that gives only a partial picture of the history of international law. Together with a history of doctrines of the past, it is said, a history of state practice in international law must also be written (such as a history of treaties or a history of the formation of customary rules).[62] A history of state practice is necessary in international law. However, such criticism fails to see that for many scholars writing international legal history today, state practice mainly comprises ideas. What international lawyers think will invariably be reflected in what they do, and in the way they (or the states and international organizations they represent) practice. This is clear in the way the literature influenced by the critical legal studies movement approaches history. Departing from the artificiality of a strict separation between theory and practice, such literature often sees legal doctrine as a »form of conceptual practice«.[63] Furthermore, the insistence on the history of ideas has to do with a perception that law and society cannot be separated and thus cannot easily be split into a doctrine/theory versus practice dichotomy.[64] The reliance of such literature on the history of ideas is thus far from being incoherent.

In approaching the legal history of ideas, one of the most recurrent concepts employed by critical legal studies-influenced literature is that of the legal consciousness. This involves doctrine as a »conceptual practice« that shapes its presuppositions and attitudes toward law. As David Trubek argues:

> »For those who engage in the critique of legal thought, ideas in some strong sense can be said to ›constitute‹ society. That is, social order depends in a nontrivial way on a society's shared

58 Becker Lorca (2010) 497.
59 Gal (2006) 386.
60 For a different perspective on how universality was achieved in international law, see Chimni (2007) 500–503.
61 It is important to note that Lorca's historical reflections are also concerned with the present. In his view, the strategic appropriation by nineteenth century non-European international lawyers has some »lessons worth reclaiming« by the present generation. Becker Lorca (2010) 548.
62 For a strong criticism of this kind, see Lesaffer (2007) 36–37.
63 Unger (1983) 565.
64 See Gordon (1984) 75–81, 117–124.

> ›world views.‹ Those world views are basic notions about human and social relations that give meaning to the lives of the society's members. Ideas about the law – what it is, what it does, and why it exists – are part of the world view of any complex society«. [65]

In the history of international law written in recent years, such a concept has been of great importance.

The investigation of legal consciousness has had a deep (and positive) impact on the writing of the history of international law in recent years. It has helped to reveal, for example, why ideas such as positivism and naturalism are so persistent in the disciplinary vocabulary although sometimes wearing different clothes. Furthermore, it has served as a useful tool in the investigation of the ideologies behind contemporary perspectives on international law, crafted to give an answer to »post-modern anxieties«. [66]

Richard Collins' retracing of the origins of constitutionalism contends that constitutionalism is »ingrained in the legal consciousness of mainstream international lawyers«; the author provides several examples showing that the recourse to domestic constitutional analogies and the search for ways to tame sovereignty are not postmodern gifts to contemporary international lawyers. They can clearly be identified in nineteenth century legal doctrines. The »sense of fatality« or inevitability, present in some versions of international constitutionalism (like that professed by authors such as Bruno Simma and Christian Tomuschat, who claimed that international law is evolving toward a constitutional structure), is not a trivial detail, but something »itself embedded in the consciousness of mainstream academic lawyers«. [67]

One of the most clear and influential definition of legal consciousness in the critical legal studies movement is that so often employed by Duncan Kennedy in his vast and creative work on (mainly American) legal history. To him,

> »[t]he notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind«. [68]

The concept of legal consciousness is certainly useful, but it also presents some challenges when applied to the field of international legal history. The first is related to the centrality of the idea that lawyers can share premises not consciously.

Much has been done in recent years to establish links between history and those sciences concerned with the study of consciousness, like psychoanalysis. A few years ago, a professional historian even stated that psychoanalysis and cultural history have the same purposes – »the expansion of one's own self narrative and that of our analysands, as in the narratives of our collective historical past from Thucydides and Burckhardt, from slavery and the Bauhaus, to the present«. [69]

Even if cultural historians rely on psychoanalysis, the study of what was not done consciously can make the historians' task difficult and sometimes impossible within the history of ideas or intellectual history. Even if sometimes they do not come to an agreement about the methods they use (emphasis on texts or contexts, for example), »[h]istorians of ideas set out initially to recover the conscious beliefs of authors«. [70] Reliance on utterances is what makes their narratives plausible and understandable. However, the search for the unconscious or subconscious sometimes is necessary if what was consciously uttered does not make sense for the historian of ideas. It is surprising that such a great mind as Jean Bodin's accepted the existence of witches and wrote about them. [71] Since reconciling such a belief with his more philosophical and political writings might be difficult, an investigation into what is not conscious is a plausible approach. Inquiring about the unconscious or subconscious may also be useful if the historian is interested in discovering whether an author or a group of authors held beliefs of which they were unaware. [72] In other situations, the search for what was conscious in an author's

65 Trubek (1984) 589.
66 The term was made famous by the article of Koskenniemi/Leino (2002) 553.
67 Collins (2009) 254–255.
68 Kennedy (1980) 6.
69 Loewenberg (2007) 34.
70 Bevir (1999) 156.
71 For a brief discussion or such apparent paradox in Bodin's *œuvre* and its relation to the task of the historian, see Skinner (2002) 28, 30.
72 Bevir (1999) 157.

utterance is the main task of the historian. Therefore, it is problematic that the lawyer's conscious attitudes rely on the unconscious or the subconscious. A more in-depth theorization of the historian's task of ideas in international law regarding the investigation of the consciousness is necessary.[73]

International lawyers must also be aware of at least two other consequences in grounding their historical narratives in the concept of consciousness. First, because the concepts of the conscious, unconscious and subconscious were unavailable to remoter generations, caution is recommended while employing them. Trying to argue the existence of a certain consciousness in international lawyers of the past is different from saying international lawyers of the past were aware that they shared a certain consciousness. There is a thin line separating both arguments, but with important consequences. While the former is a legitimate interpretation of the past, the latter is the first step in building myths with no empirical support. Over time, myth can be transformed into historical fact, as examples in the history of international law – such as the Peace of Westphalia as the foundational moment of the modern international legal system – widely show.[74] As Quentin Skinner argues:

> »If we believe, for example, that Freud's concept of the unconscious represents one of the more important of these enrichments, we shall not only want to do our best to psychoanalyse the dead, but we shall find ourselves appraising and explaining their behaviour by means of concepts that they would have found, initially at least, completely incomprehensible«.[75]

Here, we need less theory in the sense that a legal consciousness must emerge from the investigation of the historical context of its foundations and not by a preconceived conceptualization of legal consciousness.

Second, in order to persuasively show a legal consciousness indeed exists, it is not enough to prove such consciousness was present in the writings of the most famous names of a specific legal field. Since international law involves actors of »minor« importance and is applied daily by bureaucrats, public servants, and judges, what they think should also be considered in tracing the existence of a legal consciousness. This is not a new criticism of histories written by critical legal scholars and the almost exclusive reliance on canonical authors and the mandarins of the discipline. A good answer is that the »mandarin materials are among the richest artifacts of a society's legal consciousness«.[76] This is correct, but the reliance on the mandarin writings may sometimes lead an international legal historian to fail to notice that changes in international law may sometimes happen as a bottom-up process.

It is easy to think about international law as a product of diplomatic intercourse or the teaching of eminent professors. The state-centric self-image of the discipline may sometimes underestimate the role national judges or low-ranking diplomats have in fixing the meaning of an international legal rule or overcoming a deadlock in an important international negotiation. More than that, a legal consciousness may also be influenced by the cultural substrata that involve chiefs of state and eminent professors. What role do caricatures and cartoons, for instance, play in international law? And what about photography? Some pictures are so shocking that they can contribute enormously to on the end of long-standing wars. Nick Ut's famous picture of an »accidental« napalm attack during the Vietnam war, for example, generated so much outrage in American society that it influenced American authorities' positions about the war.[77] There is no doubt that writing histories of this sort is extremely difficult. However, historians of international relations, at least since the last two decades, have started to pay more attention to the need to

73 Such theorisation is starting to being made outside international law. Some contemporary critical legal studies' enthusiasts have noted that the concept of legal conscious as employed by authors like Duncan Kennedy or David Trubek – related to ideas about law held by people within a society – should evolve to also encompass elements outside the doctrinal field, such as »the evaluation of legality made by ordinary citizens in everyday life«. See Lobel (2007) 939.

74 See Beaulac (2000) 148.

75 Skinner (2002) 56.

76 See Gordon (1984) 120.

77 More than influencing public opinion, photography can also show the potentialities and difficulties in dealing with the past and, consequently, in writing historical narratives. On this, see Roth (2010). It is fair to say that academics are starting to pay attention to the general topic of the relationship between international law and media. See Joyce (2010).

write cultural and social histories applied to the international realm. They should be carefully considered by international lawyers. [78]

Furthermore, in relying only on important authors, critical legal histories in international law may produce the opposite of what they intend. Instead of emphasizing the liberating potential of legal imagination, they can confirm the idea that legal changes can only happen in the upper floors of a culture, by the »dominant classes« of the legal profession, not by external factors and with the influence of »less« important actors. In this case, more theory is needed to detail what elements compose a legal consciousness.

3.3 Micro/Macro

Articulating history and theory can lead the historian to rely on number of models and types in his or her work. On the one hand, this is helpful to give intelligibility to historical narratives. It is clear that the usage of terms such as Enlightenment, Renaissance, Imperialism, or Colonialism helps readers to situate narratives in time and in the frame of a set of ideas that compose a specific model or type. Nevertheless, models and types may also contribute to generalizations that are far from explaining the peculiarities of the past. [79]

Martti Koskenniemi issued such a warning about the danger of types in the history of international law some years ago when he promoted a historical sociology of international law. According to Koskenniemi, »depictions of ›Westphalian system‹, ›anarchy‹, ›Empire‹ and ›international community‹ have remained abstract ideal-types of international society resulting from arm-chair generalization rather that sociological study«. [80] The question that remains for future scholarship is how concrete should international legal histories be that depict those types. In other words, how high should be the microscope's magnification?

International lawyers have rarely if ever embarked upon full-length, small-scale histories. Some commendable efforts »excavated« the doctrine of forgotten authors, [81] but they are generally unconcerned with a movement that starting in the 1970s shook the field of historical studies under the label of micro-history. [82]

Micro-historians generally believe that a single object or event studied is capable of showing grand structures within the society. Although underlining the connection between micro and macro dimensions, micro-histories differ from postmodernist historians' preference solely for small-scale studies (which generally reject the implications of the micro in the macro dimension). Furthermore, such connection can be seen as a commitment to the specificities of the micro – allowing historians to go deep into the details – but also a commitment to generalizations within a society or other large units. Thus, it is fair to say that micro-history is also an attempt to connect history and theory. [83]

However, reducing the scale in historical research may also pose problems. One of the most evident is choosing what should be studied. Micro-histories can easily focus on the trivial with no revelation as to the big picture. Further, by emphasizing the uniqueness of a certain person or event, the micro-historian can fall into the trap of coming to artificial conclusions about the relationship between the micro and the macro because their sole purpose is to create a coherent narrative.

This is one of the reasons why micro-historians assume not only a spatial perspective in their methodologies (finding what is macro in the micro), but also a temporal one. They choose to start »an investigation from something that does not quite fit, something odd that needs to be

78 Among many works, Enloe's narrative on the role of women in international affairs (from politicians' wives to prostitutes) is not only a rich contribution to the history of international relations, but also to gender studies in general. See Enloe (2000).

79 It seems to be the case that Vinogradoff, who interprets the history of international law in one of his most important writings through types, makes it difficult for the reader to see what gaps and fissures exist within the structure of each type. See Vinogradoff (2009) 61.

80 Koskenniemi (2004b) 65.

81 See, for example, the important study of Skouteris on Stelios Seferiades – an author to whom present international lawyers rarely refer. Skouteris (2010).

82 The expression micro-history has sometimes appeared in international legal scholars' writings, but in a complete different sense from that often used by professional historians, as in the case of LaForgia (2009).

83 Some sociologists seem to come to a similar conclusion by arguing that Carlo Ginzburg's micro-history points to a »method as a way of approaching historical and social inquiry«. Franzosi (2006) 447.

explained«.[84] Such discomfort with something that does not fit or seems odd produces the feeling that time may have holes or cracks – more precisely, a specific time represented as a historical narrative has something incomplete when a single object or event is contrasted to a broader social structure. Carlo Ginzburg, one of the most important and creative representatives of micro-history, makes this point clear when he mentions what a historian should do when he finds »anomalies« in the documentation of his research. He contends,

> »Furet proposed ignoring them [the anomalies], observing that the *hapax legomenon* (that which is documentarily unique) is not usable in the perspective of serial history. But the *hapax legomenon*, strictly speaking, does not exist. Any document, even the most anomalous, can be inserted into a series. In addition, it can, if properly analyzed, shed light on still-broader documentary series«.[85]

This passage shows the potentials of micro-histories. In their connection of micro and macro dimensions, small-scale analyses are able to complement whole theories. They can show the uncountable specificities of types such as Imperialism or the Enlightenment. By studying micro dimensions, they can take theories more easily to the domain of contingency, forcing them to adapt their presuppositions. Micro-histories can teach theories to have an inner structure that moves constantly toward change rather than stability – something with which abstraction is obsessed.

As Matti Peltonen insightfully notes,[86] micro-history's methodology has a close connection to an idea advanced by Walter Benjamin in the 1920s: that of monadology. Acknowledging Leibniz's influence, Benjamin's theory of knowledge started from the point of view that »every single monad contains, in an indistinct way, all the others«. »[T]he real world could well constitute a task, in the sense that it would be a question of penetrating so deeply into everything real as to reveal thereby an objective interpretation of the world«. Ideas have in themselves an »image of the world«;[87] at the same time, finding such an image of the whole is capable to reveal the parts. But the monad is not a synthesis of the relationship between the whole and its parts; it is an unresolved dialectic in which the whole and its parts remain both different and the same in the image of a monad.

After explicitly incorporating the idea of messianic time into his *Thesis on the Philosophy of History*, Benjamin made a correction in his monadology to hold that not every single idea is a monad, but only a specific idea, one that comes with a number of tensions. In his words, »[w]here thinking suddenly stops in a configuration pregnant with tensions, it gives that configuration a shock, by which it crystallizes into a monad«. The monad offers to the historian both an opportunity and a risk: »a Messianic cessation of happening, or, put differently, a revolutionary chance in the fight for the oppressed past«.[88] The opportunity does justice to the past; the risk suffers the consequences of stopping the powerful flow of time, the forces that compel humanity to advance without looking to the past – the forces of progress.

Ginzburg's answer to François Furet's argument that the »documentarily unique« is something »not usable« helps to illustrate Benjamin's thinking and micro-history as well. To the latter, it is only possible to talk about a true universality if it is mediated by the particular. Benjamin's introduction the concept of monad – Thesis XVII – starts with an incisive critique of the historicist school and its culmination in universal history. And, from his point of view, »[u]niversal history has no theoretical armature. Its method is additive; it musters a mass of data to fill the homogeneous, empty time«. Such a discard of historical data frustrates any universality since the memory of the oppressed, those who were considered losers in history, can be engraved on it.[89] It is not only a theory of knowledge but also ethics that Benjamin

84 Peltonen (2001). I borrow the notion of spatial and temporal dimensions as well as the general characterization of micro-historians from Peltonen's brilliant article.

85 Ginzburg (1993) 21.

86 Peltonen (2001) 353–356.

87 Benjamin (1998) 47–48.

88 Benjamin (1968) 262–263.

89 See Mate (2006) 265–266. It is interesting to note that Benjamin makes use several times of allegory: for example, the famous Thesis IX on the *Angelus Novus*. This has implications for his conception of monad and can be explained by the emphasis on allegory over symbol. Although symbol denies time and history »by insisting on organic holism«, masking »the imperfections of the real«, allegory »ought to undo the false totality that the symbol sustains by demonstrating the inevitability of the temporal, of an interminable seeking amid fragments«. Lehman (2008) 235–236.

discusses. The *hapax legomenon* »does not exist«, as Ginzburg stated, because without it we are incapable of knowing what is universal. Furthermore, there is a moral duty for the historian to go deep into the *hapax legomenon* and find the suffering residing within. The crystallization of ideas into a monad demands from the historian a very practical attitude; it demands action »because only through acting do we become revolutionary subjects, subjects capable of effecting a conversion from the ›political‹ into the ›messianic‹«.[90]

International law's history is certainly full of those »historical anomalies«. Critical histories investigating in-depth how colonialism, neocolonialism, or Eurocentrism structured and shaped the image of international law as we know it today are only now being written. Micro-history can offer insight regarding how to approach the difficult relationship between the whole and its parts. Moreover, Walter Benjamin's monadology can help in those efforts, especially if it makes international lawyers realize that their jobs demand a profound ethical commitment to the suffering that remains buried in history.

4 Conclusion

In a relatively recent survey of attempts to engage history and theory (especially social theory), Charles Tilly identified three different visions. The first, which he calls *practical sense*, is more interested in picking up theoretical approaches that can facilitate the practice of history, the daily routine of the historians. For those, history can only be well exercised with the support of theories, but not necessarily one specific type of theory; neither the present nor the past can be properly understood without the help of the generalizations of theory. Theorists also cannot make sense of their theories without history. The second vision, *cultural phenomenology*, emphasises the role of human consciousness in the apprehension of different historical social processes of the past. Historical actors and their actions are, from this perspective, confined to the (numerous) cultural traits in which they are immersed. Finally, a third vision, advocated by Tilly himself, is called *systematic constructivism*. As opposed to the second vision, knowledge does not depend on the capacity for penetrating a consciousness situated in the past, but it emerges from the systematic observation of historical transactions. For Tilly, the analogy of conversation is adequate to describe such a vision as a process whereby participants are constantly transformed and social action originates.[91]

Such a picture broadly fit current approaches used by international lawyers to make history and theory talk. The first vision is widely practiced in the profession, especially from the point of view of theorists. International lawyers refer to history to give authority to their work. They feel theories can only be legitimized if deeply grounded in an author, a doctrine, a principle, or an institution of the past. Unfortunately, such a practical need for history many times is made without proper respect for the historian, differently from the sophisticated works of historians such as Peter Burke, an author Tilly labels as an enthusiast of the first vision. Narratives reflecting on the past concerns of the present were widely used by authors like Lauterpacht and Kelsen and can be seen in a number of articles and monographs today. Normally, the »historical origins« or the »historical background« of a specific issue are presented to give space to the author's main argument.

The second vision is evident in critical legal studies-influenced literature by its emphasis on the concept of legal consciousness. Studies following this perspective tend to treat historical data carefully while elaborating on their theories. There are certainly some difficulties in using the concept of legal consciousness. However, such literature brings something new, especially for the history of international law, because it treats seriously and considers indispensable a close relationship between history and theory.

The third vision is still in its infancy in international law, and further studies adopting its postulates are necessary. Books like *Great Powers and Outlaw States*, by Gerry Simpson, come closer to a more sociological history of international law. Simpson's powerful narrative combines intellectual history with an analysis of how states socially interacted to legalize hierarchies in international relations.[92] However, more is needed. Studies

90 Marramao (2008) 402.
91 Tilly (2007).
92 Simpson (2004).

adopting a more small-scale perspective, as do micro-historians, can reveal how the international society has a much more complex web of interactions not only on the level of states, but also on the level of individuals, institutions, and social movements.

It is possible that the first vision will continue to be largely used by international lawyers in the years to come. History has been a powerful practical source for legal arguments for centuries, and this is not necessarily wrong or bad. What is necessary, however, is that any international lawyer – practitioner or theorist alike – approach history more carefully, avoiding seeing in the past what is not there at all: the present. It is fair to say that there is no objective or impartial study of history. But if history is something irreducible to a web of literary narratives, methodological concerns must inform the way jurists look at the past.[93] Moreover, teleology is not something that can be totally discarded while someone is looking to the past. But this does not mean there is *carte blanche* as to the past. As Koselleck put it so succinctly and brilliantly, »everything can be justified, but not everything can be justified by anything«.[94] Searching for authority requires method.

The second and third visions, although not employed by the main circles of international legal thought, are becoming increasingly influential – the second more than the third. Even though outside the mainstream, these visions can be more fruitful for future research in international legal history and theory not only because they have proven possible a coherent articulation between theory and history, but also because they open the possibility of breaking with continuities. If the current situation of international legal rules is unjust to millions of people, possibilities for interrupting such a continuum of injustice are welcome. Certainly, these second and third visions can enhance the dialogue between theory and history. In this article, I offered three paths in this direction, but there are certainly many more. These visions are an important contribution to the task of the international lawyer in a world eager to understand the past, articulate it in a systematic way, and offer solutions to the problems of the present. Perhaps making history a force field full of tensions and contradictions will lead to danger and confusion, but it can also lead to justice or even to redemption.[95]

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Bibliograpy

- Anghie, A. (2005), Imperialism, Sovereignty and the Making of International Law, Cambridge
- Baxi, U. (2006), New Approaches to the History of International Law, in: Leiden Journal of International Law 19 (2006) 555–566
- Beaulac, S. (2000), The Westphalian Legal Orthodoxy – Myth or Reality?, in: JHIL 2 (2000) 148–177
- Becker Lorca, A. (2010), Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation, in: Harvard International Law Journal 51 (2010) 475–552
- Belz, H. (1994), History, Theory, and the Constitution, in: Constitutional Commentary 11 (1994) 45–64
- Benjamin, W. (1968), Theses on the Philosophy of History, in: Illuminations, ed. by H. Arendt, New York, 253–264
- Benjamin, W. (1989), N (Re the Theory of Knowledge, Theory of Progress), in: Smith, G. (ed.), Benjamin: Philosophy, Aesthetics, History, Chicago, 43–83
- Benjamin, W. (1998), The Origin of German Tragic Drama, London
- Berlin, I. (1960), Theory and History: The Concept of Scientific History, in: History and Theory 1 (1960) 1–31
- Berman, N. (1992), Modernism, Nationalism, and the Rhetoric of Reconstruction, in: Yale Journal of Law and Humanities 4 (1992) 351–380
- Berman, N. (1993), »But the Alternative is Despair«: European Nationalist and the Modernist Renewal of International Law, in: Harvard Law Review 106 (1993) 1792–1903
- Bevir, M. (1999), The Logic of the History of Ideas, Cambridge

93 Lesaffer warnings about the need for historical methodology, even when international lawyers are using the past to understand the present, must be taken into account. See Lesaffer (2007) 33–35, 37–41.

94 Koselleck (2002) 12.

95 For the idea of »redemptive history« as a »reading of the past of international law, which was ›never written‹«, see Baxi (2006) 555.

- Burke, P. (2005), History and Social Theory, Cambridge
- Cass, D. Z. (1996), Navigating the Newstream: Recent Critical Scholarship in International Law, in: Nordic Journal of International Law 65 (1996) 341–383
- Cheatham, E. E. et al. (1957), Arthur Nussbaum: A Tribute, in: Columbia Law Review 57 (1957) 1–7
- Chimni, B. S. (2007), The Past, Present and Future of International Law: A Critical Third World Approach, in: Melbourne Journal of International Law 8 (2007) 499–515
- Collins, R. (2009), Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past, in: Leiden Journal of International Law 22 (2009) 251–287
- Craven, M. (2007), Introduction: International Law and its Histories, in: Craven, M., M. Fitzmaurice, M. Vogiatzi (eds.), Time, History and International Law, Leiden, 1–25
- De Rasilla del Moral, I. (2009), International Law in the Historical Present Tense, in: Leiden Journal of International Law 22 (2009) 629–649
- Enloe, C. (2000), Bananas, Beaches and Bases: Making Feminist Sense of International Politics, Berkeley
- Evans, M. (ed.) (2010), International Law, Oxford
- Fassbender, B. (2002), Stories of War and Peace on Writing the History of International Law in the »Third Reich« and After, in: EJIL 13 (2002) 479–512
- Fisch, J. (1984), Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart. Beiträge zur Kolonial- und Überseegeschichte, Stuttgart
- Fisch, J. (2000), The Role of International Law in the Territorial Expansion of Europe, 16th–20th Centuries, in: ICCLP Review 3 (2000) 4–13
- Franzosi, R. (2006), Historical Knowledge and Evidence, in: Goodin, R. E. and C. Tilly, The Oxford Handbook of Contextual Political Analysis, Oxford, 438–453
- Gaddis, J. L. (2002), The Landscape of History: How Historians Map the Past, Oxford
- Gal, S. (2006), Language, its Stakes, and its Effects, in: Goodin, R. E. and C. Tilly, The Oxford Handbook of Contextual Political Analysis, Oxford, 376–391
- Ginzburg, C. (1993), Microhistory: Two or Three Things That I Know About It, in: Critical Inquiry 20 (1993) 10–35
- Gordon, R. W. (1984), Critical Legal Histories, in: Stanford Law Review 36 (1984) 57–125
- Gordon, R. W. (1996), The Struggle over the Past, in: Cleveland State Law Review 44 (1996) 123–143
- Grewe, W. G. (1999); The Role of International Law in Diplomatic Practice, in: JHIL 1 (1999) 22–37
- Grewe, W. G. (2000), The Epochs of International Law, Berlin, New York
- Haggenmacher, P. (1983), Grotius et la Doctrine de la Guerre Juste, Paris
- Hueck, I. (2001), The Discipline of the History of International Law – New Trends and Methods on the History of International Law, in: JHIL 3 (2001) 194–217
- Jay, M. (1993), Force Fields: Between Intellectual History and Cultural Critique, New York, London
- Jenkins, K. (ed.) (1997), The Post Modern History Reader, London
- Joas, H., W. Knobl (2009), Social Theory: Twenty Introductory Lectures, Cambridge
- Johns, F. (2009), International Legal Theory: Snapshots From a Decade of International Legal Life, in: Melbourne Journal of International Law 10 (2009) 1–10
- Jouannet, E. (1998), Emer de Vattel et l'Émergence Doctrinale du Droit International Classique, Paris
- Joyce, D. (2010), Human Rights and the Mediatization of International Law, in: Leiden Journal of International Law 23 (2010) 507–527
- Kelsen, H. (1926), Les Rapports de Système Entre le Droit Interne et le Droit International Public, in: Recueil des Cours 14 (1926) 231–329
- Kelsen, H. (1967), Pure Theory of Law, Berkeley
- Kennedy, D. (1980), Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, in: Research in Law and Society 3 (1980) 3–24
- Kennedy, D. (1988), A New Stream of International Law Scholarship, in: Wisconsin International Law Journal 7 (1988) 1–49
- Kennedy, D. (1996), International Law and the Nineteenth Century: History of an Illusion, in: Nordic Journal of International Law 65 (1996) 385–420
- Korhonen, O. (2000), International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community, The Hague
- Koselleck, R. (2002), On the Need for Theory in the Discipline of History, in: Koselleck, R. (ed.), The Practice of Conceptual History: Timing History, Spacing Concepts, Palo Alto, 1–19
- Koskenniemi, M. (1999), Between Commitment and Cynicism: Outline for a Theory of International Law as Practice, in: United Nations (ed.), Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law, New York, 495–523
- Koskenniemi, M. (2001), The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960, Cambridge
- Koskenniemi, M. (2004), Hersch Lauterpacht (1897–1960), in: Beatson, J. and R. Zimmermann (eds.), Jurists Uprooted: German Speaking Émigré Lawyers in Twentieth-century Britain, Oxford, 601–661
- Koskenniemi, M. (2004), Why History of International Law Today?, in: Rechtsgeschichte 4 (2004) 61–66
- Koskenniemi, M. (2005), From Apology to Utopia: The Structure of International Legal Argument, Cambridge
- Koskenniemi, M. (2009), Miserable Comforters: International Relations as New Natural Law, in: European Journal of International Relations 15 (2009) 395–422
- Koskenniemi, M. (2009), The Advantage of Treaties: International Law in the Enlightenment, in: Edinburgh Law Review 13 (2009) 27–67

- Koskenniemi, M. (2011), Histories of International Law: Dealing with Eurocentrism, in: Rechtsgeschichte 19 (2011) 152–176
- Koskenniemi, M., P. Leino (2002), Fragmentation of International Law? Post-modern Anxieties, in: Leiden Journal of International Law 15 (2002) 553–579
- LaForgia, R. (2009), The Politics of International Law – Twenty Years Later: A Reply to Martti Koskenniemi, in: EJIL 20 (2009) 979–984
- Lauterpacht, H. (1927), Private Law Sources and Analogies of International Law, London
- Lauterpacht, H. (1975), The Grotian Tradition in International Law, in: Lauterpacht, E. (ed.) International Law: Being the Collected Papers of Hersch Lauterpacht 2, Cambridge, 307–365
- Lehman, R. S. (2008), Allegories of Rending: Killing Time with Walter Benjamin, in: New Literary History 39 (2008) 233–250
- Lesaffer, R. (2002), The Grotian Tradition Revisited: Change and Continuity in the History of International Law, in: British Yearbook of International Law 73 (2002) 103–139
- Lesaffer, R. (2005), Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription, in: EJIL 16 (2005) 25–58
- Lesaffer, R. (2007), International Law and its History: The Story of an Unrequited Love, in: Craven, M., M. Fitzmaurice, M. Vogiatzi (eds.), Time, History and International Law, Leiden, 27–42
- Lesaffer, R. (2008), Law between Past and Present (December 15, 2008). Available at SSRN: http://ssrn.com/abstract=1316256
- Lobel, O. (2007), The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, in: Harvard Law Review 120 (2007) 937–988
- Loewenberg, P. (2007), Cultural History and Psychoanalysis, in: Psychoanalysis and History 9 (2007) 17–37
- Marramao, G. (2008), Messianism Without Delay: On the »Post-religious« Political Theology of Walter Benjamin, in: Constellations 15 (2008) 397–405
- Mate, R. (2006), Medianoche en la Historia: Comentarios a las Tesis de Walter Benjamin »Sobre el Concepto de Historia«, Madrid
- Nandy, A. (1995), History's Forgotten Doubles, in: History and Theory 34 (1995) 44–66
- Nijman, J. E. (2004), The Concept of International Legal Personality: An Inquiry into the History and Theory of International law, The Hague
- Nussbaum, A. (1954), A Concise History of the Law of Nations, New York
- O'Brien, P. (2006), Historiographical Tradition and Modern Imperatives for the Restoration of Global History, in: Journal of Global History 1 (2006) 3–39
- Obregón, L. (2006), Between Civilisation and Barbarism: Creole Interventions in International Law, in: Third World Quarterly 27 (2006) 815–832
- Onuma, Y. (2009), A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century, in: Recueil des Cours 342 (2009) 77–410
- Orford, A. (2006), A Jurisprudence of the Limit, in: Orford, A. (ed.), International Law and Its Others, Cambridge, 1–33
- Peltonen, M. (2001), Clues, Margins, and Monads: The Micro-Macro Link in Historical Research, in: History and Theory 40 (2001) 347–359
- Pocock, J. G. A. (1998), Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi, in: McGill Law Journal 43 (1998) 481–506
- Pocock, J. G. A. (2004), Quentin Skinner: The History of Politics and the Politics of History, in: Common Knowledge 10 (2004) 532–550
- Pocock, J. G. A. (2008), Theory in History: Problems of Context and Narrative, in: Dryzek, J. S., B. Honig, A. Philips (eds.), The Oxford Handbook of Political Theory, Oxford, 163–174
- Preiser, W. (1995), History of International Law, Basic Questions and Principles, in: Max Planck Encyclopedia of Public International Law 2 (1995) 126–132
- Roth, M. S. (2010), Why Photography Matters to the Theory of History, in: History and Theory 49 (2010) 90–103
- Schachter, O. (1977), The Invisible College of International Lawyers, in: Northwestern University Law Review 72 (1977) 217–226
- Simpson, G. (2004), Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order, Cambridge
- Skinner, Q. (2002), Interpretation, Rationality and Truth, in: Skinner, Q. (ed.), Visions of Politics. Regarding Method, Cambridge
- Skouteris, T. (2010), The Notion of Progress in International Law Discourse, The Hague
- Steiger, H. (2001), From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law, in: JHIL 3 (2001) 180–193
- Tilly, C. (2007), Three Visions of History and Theory, in: History and Theory 46 (2007) 299–307
- Trubek, D. (1984), Where the Action Is: Critical Legal Studies and Empiricism, in: Stanford Law Review 36 (1984) 575–622
- Tucker, A. (2009), Introduction, in: Tucker, A. (ed.), A Companion to the Philosophy of History and Historiography, Oxford, 1–6
- Unger, R. M. (1983), The Critical Legal Studies Movement, in: Harvard Law Review 96 (1983) 561–675
- Vinogradoff, P. (2009), Historical Types of International Law, in: Butler, W. E. (ed.), On the History of International Law and International Organization: Collected Papers of Sir Paul Vinogradoff, Clark, NJ, 61–144
- Zolo, D. (1998), Hans Kelsen: International Peace through International Law?, in: EJIL 9 (1998) 306–324