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Neoformalism and the Turn to History in International Law

1.1 TURNING TO HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2 THE HERMENEUTIC OF SUSPICION AND THE HISTORY OF INTERNATIONAL LAW

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

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

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

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

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

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

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

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

[8] JW Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465, at 516.
[9] Singer, 'Legal Realism Now', 516. See also G Peller, 'The Metaphysics of American Law' (1985) 73 *California Law Review* 1151 (comparing realism as critique and realism as science).
[10] D Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575.

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

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

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

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

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

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

1.3 THE POLITICS OF MAKING INTERNATIONAL LAW

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

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

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

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

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