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Reading and Unreading a Historiography of Hiatus

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I The Argument

The fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in the years which followed brought into play a new international imaginary launched with a flurry of inaugural gestures. These included the proclamation, by US President George Bush, of a 'New World Order' in 1991,[1] the publication, by UN Secretary-General Boutros Boutros-Ghali, of an *Agenda for Peace* in 1992,[2] and, in the most triumphalist gesture of the three, the American political scientist Francis Fukuyama's invocation of the end of history.[3] Many international legal scholars, too, applauded the beginning of a new post–Cold War world, no longer dominated by two rival superpowers. It was a moment widely thought to be full of new 'global', if not cosmopolitan, possibilities. This sensibility was to find expression in a raft of institutional initiatives: the creation of the World Trade Organization (WTO) in 1995, the establishment of the International Criminal Court in 1998, UN-sanctioned interventions in the former Yugoslavia and in Somalia and new regimes of international administration in Kosovo and East Timor.

Although seldom articulated as such, this sensibility was embedded in a particular legal and institutional historiography of this 'new' world. In

[1] George Bush, 'Address before a Joint Session of the Congress on the State of the Union' (Speech delivered 29 January 1991).
[2] *Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UNGAOR, 47th Sess, UN Doc. A/47/277 (17 June 1992).
[3] Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

this account, events after 1990 were read as the fulfilment of a destiny prefigured for international law and institutions in 1945. This covert historiography, then, made a double inaugural gesture (1990 and 1945) by retrospectively casting 'the Cold War' as a period of legal stasis, or a 'hiatus' between two highpoints of legal utopianism. Its markers were on one hand, the triptych of institutional events after the end of the Second World War: the Conference establishing the UN at San Francisco; the meetings at Bretton Woods in 1944; the Nuremberg Trials in 1945–6; and on the other, the 'New World Order' announced in 1991. In this narrative, the Cold War was an epoch in which everything was shaped or shadowed, if not frozen, by the spectacular ideologies of socialism and capitalism, the political economies of command and market, and the intense rivalry between their state avatars. In the deep shade of this contest, no international institutional initiative could flourish, whether that be the promotion of human rights, trade, criminal justice or disarmament. In this story, a high-minded desire and universalist objective to build a stable global legal order was projected back to 1945, and then described as having been sacrificed by, and during, the Cold War.

But even as it was understood to be overdetermining in political terms, in analytical terms this 'Cold War' typically stayed in the realm of the inaugural gesture. If it was elaborated upon at all, it usually took the form of shorthand readings of competitive international legal engagement, opportunistic tactical manoeuvring, the ennui of tit-for-tat diplomacy, or the mutuality of assured destruction (each given as a reason why nothing lasting could be achieved). This particular historiography is embedded in accounts of international law generated between 1990 and the present day, frequently conveyed in a single word, or offhand phrase, in which the Cold War era is dismissed as a time for international law and institutions in which nothing much could happen. Normative and institutional projects of the post-war era were routinely described as 'casualties' of the Cold War,[4] or as having been 'postponed',[5] or in 'abeyance',[6] or 'paralysed',[7] or as a 'total

[4] For example, the United Nations Military Staff Committee: Paul Kennedy, *The Parliament of Man: The Past, Present and Future of the United Nations* (Random House, 2006).
[5] For example, post-war international law itself: I. A. Shearer, *Starke's International Law*, 11th ed. (Butterworths, 1994).
[6] For example, international criminal law: Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford University Press, 2008).
[7] For example, the UN: Stephen C. Neff, 'A Short History of International Law' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2003).

failure'.[8] All of this is said to have been the result of the 'political struggle between the [two] blocs'.[9] With the Nuremberg trials and the hanging of some high-ranking Nazis, international law had got off to a 'glorious start' but soon institutions were reduced to 'ineffectiveness', 'hopes' were 'dimmed' and we entered a period of 'impotence' and 'inactivity' in which international law 'played little role in the daily political life of the world'.[10] The end of the Cold War, then, in this historiography of hiatus 'allowed countries to rediscover their old selves . . . free from either pole'.[11] Or, in more prosaic terms, it simply permitted the reinvigoration of the 1945 compact.

As Neff observes, the 'legal aspects of the Cold War have been generally neglected'.[12] But in our account, a covert and largely unexplored 'historiography of hiatus' has become operational in international law of which this neglect is precisely a symptom. Much as the nineteenth-century historiographies of international law authorised an imperial international law but located the 'origin' of the state system in 1648,[13] a key effect of the historiography of hiatus has been to author and authorise a new international law coinciding with a period of US dominance, and which finds its origins in 1945. This has had the effect of erasing a great deal of what happened in between, or of extracting from this period only usable histories or innovations, namely those that authorise the 1945/1990 story. So, Third World deployments of international law are elided, or become mutated into a form of extra-legal politics where contestation over the meaning of international law itself is diluted or obscured (Soviet international law dies a death); European, Anglo and American international legal projects get retrospectively unified (despite important divergences), and utopian, or even mildly iconoclastic, international initiatives are sidelined as dreamy failures.

[8] For example, collective security: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994).
[9] Cassese, above n. 6, 324.
[10] Stephen C. Neff, *Justice among Nations: A History of International Law* (Harvard University Press, 2014) 396, 404, 410, 438.
[11] David Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *American Journal of International Law* 552, 588.
[12] Neff, *Justice among Nations*, above n. 10, 596.
[13] Peter Fitzpatrick, 'Westphalia: Event, Memory, Myth' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (Routledge, 2011) 55; Matthew Craven, 'Theorising the Turn to History in International Law' in Anne Orford and Florian Hoffman (eds.), with Martin Clark (asst. ed.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 21.

In this book, we seek to interrupt the historiography of hiatus by assembling a series of essays which reflect upon the presence of international law in the places in which the historiography has declared, or assumed, it to be absent. These essays also question the assumptions of periodicity and place relied upon and advanced by this historiography, and interrogate the 'polar' configurations and univocal claims of a singular Cold War. The Volume as a whole, then, becomes a book of 'unreading' – concerned with unravelling, picking apart, and troubling – the ideas that animate and sustain the 'hiatus' thesis. But as the story of hiatus does not only author by omission, the book seeks also to intervene in the ongoing work of authorisation that the historiographical dimension of the thesis performs. And so our several contributors offer critical reflections upon the way in which we might go about rethinking the relationship between international law and the Cold War, in order to produce not simply a disturbance in the extant literature, but an intervention in contemporary legal-political life.

In their broadest sense, the chapters disrupt the historiography of hiatus along two main axes. First, the chapters argue that far from being absent or purely epiphenomenal during this time, international law had performative significance across a number of locales, and in a range of different genres, including those in which one might not expect to find international law, and where it has not usually been sought. Simply by broadening the archive, a very different, and much more plural, range of legal histories emerges, many of which depart significantly from the received account. Second, these chapters destabilise the idea that Cold War International Law was essentially an intra-European or US–Soviet affair, in which others figured only as proxies. So, the idea here is to provincialise this rivalry or make transparent the parochial quality of this image by seeking to understand it as an internecine battle between two Eurocentric universalisms and by re-describing an extra-European Cold War International Law (of experimental non-alignment, of de-proxified political struggle, of economic heterodoxy, of picaresque diplomacy).

Before turning to the unreadings collected in this Volume, it may be helpful to lay out the general features of the hiatus thesis itself. The details of the story vary somewhat from one account to another, but in general the same trajectory is tracked. In the field of international criminal law, for example, there was a moment in the immediate aftermath of the Second World War when the creation of a permanent machinery of international criminal justice appeared to be tantalisingly close. In

Nuremberg, Tokyo and zonal Germany, the Great Powers acted in tandem 'to stay the hand of vengeance' in Robert Jackson's sententious phrase, with Soviet judges working alongside French officials, and prosecutors from the four great powers combining to rid the world of Nazism.[14] But then, the Cold War 'intervened' and international criminal law became dormant until, that is, Trinidad and Tobago called for a statute for a permanent international criminal law to be debated by the General Assembly just as the Berlin Wall was falling. Ten years later, in the new post–Cold War era, the Rome Statute was adopted. A similar story is often told about international economic law when, after a long period of semiformal ordering through the GATT, the Bretton Woods vision of a juridified economic trade regime is dusted off in the 1990s with the establishment of the WTO and its system of Panels and Appellate Body. And in the field of security, the Cold War story is all about paralysis – in which Security Council initiatives were routinely subject to the veto of one power or another, and in which activity was confined to the extracurricular (peacekeeping) or the accidental (the Soviet absence from the chamber when the Korean vote was being taken). According to this narrative, 1989 represents a moment of release, with a re-energised collective security structure, a tribunalised trade and investment sphere, an architecture of legalised retribution and a more general shift away from a principle of non-intervention towards discretionary humanitarian intervention and a 'responsibility to protect'.

Away from the high politics of international law, this thesis plays slightly differently, for whilst the Cold War appeared to have forestalled the development of international criminal law or a system of global security, many scholars have shown this was not necessarily the experience across the board. Indeed, much work has been done which shows that the years between 1945 and 1989 were a period of extraordinarily active codification – key instruments in the fields of humanitarian law, human rights law, environmental law, law of the sea, diplomatic law and outer space law were all drafted and entered into force during this period of time. But such accounts generally confirm, rather than deny, the essentials of the hiatus thesis. For example, whilst the two Covenants on Human Rights entered into force in 1976, the prevailing view is that they only really became fully

[14] Robert Jackson, 'Justice Jackson Delivers Opening Statement at Nuremberg, November 21, 1945', Robert H. Jackson Centre, www.roberthjackson.org/article/justice-jackson-delivers-opening-statement-at-nuremberg-november-21–1945/.

operational towards the end of the 1980s. Similarly, the rise of humanitarian law is posited as a consequence of the emergence of its enforcement arm in the form of international criminal law. So even in accounts of these 'active' sites, one finds elements of the same hiatus thesis – that international law only comes into full, or effective, operation in the aftermath of the collapse of the Soviet Union.

II Themes

One of the greatest challenges to the task of 're-reading' the history of international law during the period between 1945 and 1989 is the way in which the Cold War has come to represent not simply a chronological description of that period of global history, but a way of thinking about the world, and of the role of international law within it. To seek to understand the Cold War in its own terms, it might seem, demands thinking about global history in a way that predisposes us to marginalise the relevance of international law. The more one thinks about the centrality of the geopolitical confrontation between East and West to the organisation of international affairs, the less significant might be its ordering by way of international law. This was the script proffered by the likes of Morgenthau and Kennan at the time, and is largely sustained in the conventional historiographies today. But this in itself is suggestive of the latent persistence of Cold War thought even after the apparent termination of Cold War 'hostilities'. And of course, this observation in turn then raises questions both as to the substance and periodicity of the Cold War itself.

To attempt then to think about the relationship between the Cold War and international law without, at the same time, adopting the style of thought of its protagonists – to put, in a sense, the thought, as well as the practice, of the Cold War under similar scrutiny – demands, at least, that a certain distance be maintained between the archive itself and the methodological or theoretical frames of reference through which we might choose to interpret it. In that vein, an analytical separation may usefully be held in place between three different kinds of Cold War, each of which operates at a different level or generality, or in a different genre or register:

(a) the Cold War as a period of history that conventionally begins sometime in the early twentieth century (1945 or perhaps 1917) and ends in 1989/90;

(b) the Cold War as a description of the geopolitical/ideological confrontation between East and West, more or less confined to relations between the Soviet bloc and the Western alliance; and
(c) the Cold War as a description of a particular mode of strategic thought and action-a mode of governmentality perhaps-that described and shaped the outlook, and operative priorities, of its main protagonists (principally scholars and statesmen in the US, but extendable also to those on the other side of the 'Iron Curtain').

It is easy to slip between each of these registers, and they are cumulatively concordant if read from (c) to (a). But holding them apart has the merit of enabling one to think about the cold war *ab exteriore*, so to speak, without internalising its own operative pathologies: to think about the Cold War other than in, and on, its own terms. Three things plausibly emerge from this that may be regarded as central to a project of re-reading the Cold War and its relationship to international law.

The first of these is to undercut the kind of linear historiography that is associated with the characterisation of the Cold War as a specifiable period of global history with defined moments of origination and conclusion. For, as soon as one holds apart the idea of the Cold War as an epoch in history from the idea of the cold war as a particular set of practices and/or modes of thought, it becomes clear that the former is almost entirely dependent upon the latter. To then understand the periodicity of the Cold War as being dependent upon a description of its various operative sites (political, economic, legal, social, cultural, etc.) is to make clear that any straightforward description of it – of its beginning or end – will depend largely upon the intellectual or geographic vantage point from which we choose to examine or imagine it. A geopolitical Cold War (beginning in 1945) might thus be contrasted with an ideological Cold War (beginning in 1917), and a Northern Cold War from a Southern Cold War.

In the second place, holding apart the idea of the Cold War, as a geopolitical confrontation between superpowers, from the particular styles of thought that were immanent to that antagonism, is to allow one to observe how the confrontation may not have had the paralysing effect upon international law that many might suppose. Indeed, it opens up the possibility that geopolitical confrontation played out in myriad ways in different fields of endeavour – both enabling and disabling international initiatives, both discouraging and incentivising creativity. Our intuition is that the Cold War (understood narrowly as a geopolitical confrontation)

may also have been innately productive: juridifying itself in voting blocs and in regional security arrangements, opening space for creative alternative understandings of the international and facilitating the emergence of anti-hegemonic modes of thought and practice (non-alignment, positive neutrality, 'third-way' thinking).

Finally, holding apart the thought and practice of the Cold War from the broader thematics of global history allows one to recognise that its 'globalisation' is something that has to be argued rather than assumed. The Cold War, in this guise, emerges as a parochial (US-centric/Northern-centric) way of thinking about the world at that time, the 'globalisation' of which has come about (in hindsight if nothing else) only through the suppression of both its own point of origin and of rival accounts of global ordering. The final act of re-reading, then, is to bring into prominence the dissensus, the attempts to provincialise the Cold War, or advance alternative ways of thinking about or imagining the international.

These three themes, which roughly orientate themselves around the three distinct registers of the Cold War outlined above, are picked up in the essays in this collection. In discussing these themes, we do no more than offer a range of reflections upon the theme in question: the first of which concerns an engagement with the temporality of the Cold War in international legal historiography, the second with the productive or generative dimensions of Cold War international law, and the third with its spatial ambit.

A The Anti-linear Cold War

As we have seen, a central feature of the hiatus thesis holds that the Cold War represented a force of restraint, a force which held back international law until its release in the aftermath of the fall of the Berlin Wall. What often goes unremarked upon, however, is the kind of history that is being invoked, or narrated, in such a context. First is the question of emplotment, as Hayden White would put it: is it a history of progress (a romance of kinds), or rather a story of tragedy or loss?[15] Does the history that is being told assume a linear, triumphal guise (in the form of its 'end'), or is it 'just one bloody thing after another' to use Alan Bennett's evocative phrase?[16] Secondly, how are we to understand the

[15] Hayden White, *Metahistory: The Historical Imagination in Nineteenth-century Europe* (John Hopkins University Press, first published 1973, 2014 ed.).
[16] Alan Bennett, *The History Boys* (Faber and Faber, 2004).

relationship between past and present that such accounts are to perform? As de Certeau points out, the practice of historical representation not only inverts the order of time by prescribing 'for beginnings what is in reality a point of arrival', and makes final that which is otherwise unutterably open-ended, but also produces the 'present' through lack. It 'represents', he notes, 'through an ensemble of figures, stories and proper names, what practice seizes as its limit, as exception or difference, as past'.[17] Insofar as historiography takes shape, then, as textual representation in which both past and present are actively produced in the same text, it also subverts its own medium, bringing into view the very presentness of the past that is to be invoked (in its absence), reversing the order of chronology, and turning beginnings into ends.

The first of these themes is picked up by Richard Joyce in his contribution to this Volume, in which he engages directly with the conceptions of history that influence or inform thinking about the Cold War and its relationship to international law. Using, as a heuristic, the idea of the *katechon,* a theological figure of the 'restrainer' (which loomed large in the work of Carl Schmitt), Joyce argues that two different accounts of 'restraint' operate. In one, the US and the Soviet Union assume the role of the *katechon* during the Cold War, holding at bay an earthly apocalypse, securing stability through their mutual enmity. The *katechon*, in this form, assumes an eschatological guise, unmoored in time and essentially static. In the other, liberal account, it is the Cold War itself that acts as the restrainer, holding back the promises of Kant's enlightenment project of world government, and of the securing of global peace through law. Each of these accounts, Joyce suggests, has attendant effects, either by operating as an apology for the power of the guarantors of concrete orders, or by denying/deferring responsibility for the present state of affairs. He argues, in that respect, that we should be cautious about the temptation to write back into history a story of the emancipatory 'unfolding' of international law in empty homogenous time, and challenges us to think, instead, about international law and its history through the lens of Walter Benjamin's conception of 'weak messianic power'. Our task, as he puts it, 'is not to wait, but to make use of the constant splintering of now-time with the potential of messianic interruption', to

[17] Michel de Certeau, *The Writing of History*, Tom Conley trans. (Columbia University Press, 1988) 86–7.

'reimagin[e] our relationship to history and authority, and to make political change in the present which goes beyond replacing one dominant power with another'.[18]

If Joyce concludes with an appeal to a historiography of political action premised upon the splintering and coalescing of temporal formations (past, present and future), Dino Kritsiotis joins him both in his critique of the temporality of conventional historiography of the Cold War and in his attentiveness to the complex temporalities of apparently past events. In his chapter on the more-or-less contemporaneous Korean war, and the agreement ending the war at Panmunjom in 1953, he alerts us to the evocative imagery used in invoking the Cold War not in terms of a singular event with a singular beginning and a singular ending but, rather, as a series of events with multiple points of beginning and even multiple endings – an 'end' that does not occur all at once but is delivered in a series of instalments through time. He asks, in light of that, whether the announcement that the Cold War is *over* is not merely a way of keeping it alive, preserving its historical valence in the present through its repression – as that which has to be made illegible in order to make possible that which comes in its wake. What this brings into view, he suggests, is the idea that the Cold War was not simply a titanic contest between self-styled hegemons, but rather a headlong struggle for the supreme model of political organisation in which command over history itself is one of the necessary objectives.

B The Generative/Productive Cold War

If Joyce engages with the quasi-theological structure of the historiography of hiatus, and Kritsiotis with its periodicity, several of the contributors to this Volume grapple more directly with the second of our three themes. This second theme seeks to bring into view the productive dimensions of the ideological rivalry that, in the hiatus thesis, are assumed to have had an immobilising effect upon international law and institutions. These contributions hold in place the familiar periodisation of the Cold War (variant (a)), as well as working within a frame of a bipolar world (variant (b)). And yet, although they share some ground with the conventional historiography of hiatus, they foreground two rival dimensions of that history. The first is to displace the central insight

[18] Richard Joyce, 'International Law and the Cold War: Reflections on the Concept of History', Chapter 2 of this Volume, 27 [pinpoint 1], [pinpoint 2].