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An Enlarged Sense of Possibility for International Law

Seeking Change by Doing History

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I. Introduction

This Cannot Be How the World Was Meant to Be.[1]

This is a quote from Philip Allott, one of the most important international legal theorists of our time.[2] He chose it as the motto for a symposium organised on the occasion of his retirement from Cambridge University in 2004. Philip had penned it down when he was sixteen years old.

Many students and scholars today must have had a similar thought around that age. I know I have. Overwhelmed by the disorder and injustices of the world around us, one asks oneself several questions: Could humanity live differently? Could international law play a role in that change? If so, how?

This experience of dissatisfaction with the present state of the world and the role that international law plays gives rise to questions such as the central one pursued by this volume: *could* international law have been different? I am grateful to the editors for the invitation to contribute a chapter that engages with contingency in international law first and foremost through an argument that international law *can* be different and that doing history can help us realise the possibilities in this regard. An alternative past may help us in the present to see what international law *can* be in the future.

By way of illustration, I will recover a specific past possibility when discussing the conceptions of sovereignty and international legal personality that are available as an alternative to what became the dominant conceptions of international law. This is, however, not a chapter on what international law might have looked like had these alternative conceptions prevailed.[3] Rather, my overall aim here is to show how doing history creates space for the

* This chapter builds on the author's inaugural lecture at the University of Amsterdam.

[1] 'Review Essay Symposium: Philip Allott's "Eunomia and The Health of Nations Thinking Another World: This Cannot Be How the World Was Meant to Be"' (2005) 16 European Journal of International Law 255.

[2] See eg Philip Allott, *Eunomia: New Order for a New World* (OUP 1990); Philip Allott, *The Health of Nations: Society and Law Beyond the State* (CUP 2002).

[3] Historical counterfactualism has been on the rise for some time now in academic history and with this research project, it arrives in international legal scholarship. The methodological value of counterfactuality for international law relates to an attempt to uncover contingency and bring back human agency within historical processes after decades of (post-)structuralism in international legal thought. In the words of Simon Kaye: 'Counterfactualism is the handmaiden of agency and its crucial role in human life.' My intervention in this

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experience of contingency and for 'a lesson in self-knowledge' and how this is important for new versions of international law. First and foremost this is motivated by the thought that the future is not an inevitable, natural, necessary continuation of the past. Doing history confirms this thought as it reveals the past as—what our editors call—'a realm of possibility'[4] and it critically questions the beliefs, concepts, and theories with which we come to our choices for the future. Change does not merely depend on a present that could have been different; it also depends on the consciousness of that possibility, which questions what constitutes or defines one's choices. While revealing contingency or possibility in the past provokes methodological questions such as the way in which history should be narrated to reveal this, my main claim in this chapter is the broader proposition that doing history may contribute to change.

An argument underpinning this proposition is that historical awareness nurtures human consciousness and enables the uncovery of false necessity (and false contingency for that matter) in the present international law. Doing history and thus confronting past—perhaps alien—international legal thought evokes critical reflection on what we could easily take for granted as 'necessary', that is, our own conceptions, beliefs, and theories of international law and international society. Could they have been different? Can they be different and thus contribute to a different international law in the future?

In my view, the above-quoted words of Philip Allott hold a range of experiences: bewilderment of the present and the past that brought us here, rejection of the necessity of the present, and a sense of possibility for a different future. In short, it captures a desire for change. More than suggesting another necessary reality, I take 'meant to be' as referring to the possibility of justice and of human agency. This, however, cannot be appreciated without recognising the importance of deep—natural and social—structures, circumstances, and honouring the insights of materialism. Most international legal scholarship draws heavily on these necessitarian assumptions, which consequently makes freedom such a contested belief.[5]

In my view, the increased focus on history in international legal scholarship of the last two decades[6] is as much about the future as it is about the past. This growing interest has now been captured as the 'turn to history': an increase of historical inquiry into international law and—most notably—international legal thought. Whence emerged what may be called 'history and theory of international law'. As a relatively new subfield of international law,[7] it

chapter is equally methodological yet more than interested in alternative pasts, I am interested in alternative futures. The methods of counterfactualism and contextualism bring out histories and facilitate thinking about possible, even plausible alternative courses of history. My argument for historical contextualisations in the history of international legal thought shares with historical counterfactualism the objective to uncover and underscore contingency and human agency. Simon T Kaye, 'Challenging Certainty: The Utility and History of Counterfactualism' (2010) 49 History and Theory 38, 57.

[4] Ingo Venzke, 'Situating Contingency in the Path of International Law', in this volume.

[5] Samuel Moyn, 'From Situated Freedom to Plausible Worlds', in this volume.

[6] In 1990 the European Journal of International Law (EJIL) directly started publishing studies of the life and work of early twentieth-century international lawyers. The Journal of the History of International Law was launched in 1999. This first issue includes a bibliography: Peter Macalister-Smith and Joachim Schwietzke, 'Literature and Documentary Sources Relating to the History of Public International Law: An Annotated Bibliographical Survey' (1999) 1 Journal of the History of International Law 136; see also Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012)

[7] George Rodrigo Bandeira Galindo, 'Force Field: On History and Theory of International Law' (2012) 20 Rechtsgeschichte 86

is not well-defined—and that is a good thing. It brings together history *and theory*, which is not without its tensions and challenges, methodological and otherwise. The responses to a subtitle such as 'Seeking change by doing history' are wonderfully illustrative. Intellectual and legal historians are, in polite terms, *intrigued* by the 'seeking change' part of the title. Critical international lawyers praise the 'seeking change' part, but show some doubt with regards to the 'doing history' element of the title.

In this chapter, I aim to discuss the field of 'History & Theory' somewhat further. First, I will situate the 'turn to history'. Subsequently, I will discuss the relationship between history and theory and how, in my view, this can be a productive one. Here I will discuss the importance of historical contextualisation of law and legal thought while arguing that the law's normative potential is exactly why international lawyers use its concepts to *do* things. In short, I am interested in alternative futures more than in alternative pasts. Finally, as is only fair, I address a self-reflexive question: 'if doing history is a form of seeking change, then what is the change I am seeking?'[8]

II. Situating the 'turn to history'

International legal scholarship turned to history in the late 1990s to early 2000s. To understand this 'turn to history' in international law,[9] we should situate it in the political context of globalisation and the end of the Cold War, as well as in the intellectual context of postmodern or critical thinking.

The end of the Cold War impacted international politics, reinforced globalisation, and triggered high-level discussions on a New World Order. Some liberal internationalists turned to history out of optimism,[10] hoping that the cosmopolitan project of international law might be possible after all.[11] However, disappointment with the state of international law sank in soon after: the envisaged New World Order failed to materialise and instead the War on Terror developed into the new normal.[12] Accelerating economic globalisation and integration put pressure on the culturally diverse world. As a result, international legal scholarship was confronted with questions about the relevance and foundations of international law and institutions. The separation between national and international law, the

[8] This may come close to what Kaye, following Jon Elster, calls an '*ontological* or world-building counterfactual narrative as an exercise in imagination' challenging historical preconceptions of international law. Kaye (n 3) 43ff. Strictly speaking we move here from doing history to doing theory (or philosophy) but the latter emerges from the former. See section III.3 in this chapter.

[9] George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 The European Journal of International Law 539; Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (Asser Press 2012) 99; Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 Temple International and Comparative Law Journal 215, 216; Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 166, 171; Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP 2017) 297.

[10] For 1990s optimism, see, eg Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 Houston Law Review 623.

[11] Martti Koskenniemi, 'Why History of International Law Today?' (2004) 4 Rechtsgeschichte 61.

[12] Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' in Maria Vogiatzi, Matthew Craven, and Malgosia Fitzmaurice (eds), *Time, History and International Law* (Brill 2007) 27, 29; see also Koskenniemi (n 11) and Koskenniemi (n 9) 215, 216: Koskenniemi points to what he captures, I think well, as a sense of failure and disappointment.

primacy of states and invisibility of non-state actors, state sovereignty and territorial jurisdiction, and universality of human rights are all illustrative of the traditional doctrines that were scrutinised. Dissatisfied with the conditions of international society, scholars started to ask about the history of the international legal system as well as about their own role in the development of international law. The unreflexive pragmatism that had dominated mainstream international legal scholarship during the Cold War decades and that had left little space for history or theory now became untenable for many international legal scholars.[13] This was all the more so because of the developing intellectual context. For years we have been aware that doing history of thought is a profoundly *hermeneutic* exercise: it is about the *interpretation* of historic texts and the construction of historical narratives, which necessarily has a subjective element.

In the course of the twentieth century, the grand narratives of Western thought came under scrutiny. 'Postmodernist' or 'critical' theories challenged the assumptions of mainstream international legal scholarship too.[14] Post-structuralist theory, post-colonial theory, linguistic studies, and other postmodern theories—which, in short, may be referred to as the 'linguistic turn' in the philosophy of history—have profoundly impacted the historical narratives of international law.[15] Post-structuralist philosopher Michel Foucault and post-colonial critic Edward Said revolutionised our thinking about doing history of thought as focus shifted to discontinuity and contestation. With his 'history of the present', Foucault stimulated the writing of genealogies of fundamental concepts that define a field, such as 'sovereignty' in international law.[16] Edward Said was one of the scholars who sensitised our discipline to the ongoing reproduction of orientalist and imperialist knowledge, to the link between the Western Enlightenment and colonialism, and to the possible value of doing history of thought as a *critique* of imperialism.[17] It is impossible to discuss all these '-isms' and 'post-somethings' here. I will come back briefly to their impact on international legal thought later but postmodern thinking shattered existing certainties and paradigms, such as the separation of object and subject. The discontent with international law and legal theory converged with a discontent with the orthodox teleological, Eurocentric, and hagiographic *histories* of international law.[18] When critical thinking arrived in international law scholarship, it hit hard, which for some resulted in having a cynical outlook on international law's possibilities.

[13] David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 Nordic Journal of International Law 385; Fleur Johns, 'International Legal Theory: Snapshots from a Decade of International Legal Life' (2009) 10 Melbourne Journal of International Law 1; Janne Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Asser Press 2004); Martti Koskenniemi, '"The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2002) 65 Modern Law Review 159, 175.

[14] Joan Wallach Scott, 'History-Writing as Critique' in Keith Jenkins, Sue Morgan, and Alun Munslow (eds), *Manifestos for History* (Routledge 2007) 19.

[15] Daniel Woolf, *A Global History of History* (CUP 2011) 493–99.

[16] Jens Bartelson, *A Genealogy of Sovereignty* (CUP 1995).

[17] Edward Said, *Orientalism: Western Conceptions of the Orient* (Penguin 1995).

[18] That is, histories that portray international law merely as a force for progress of humanity and international lawyers as prophets of peace. The EJIL series mentioned earlier in n 6 broke with that hagiographical writing of history. See also, eg, Thomas Skouteris' work on progress, also in history writing on international law: Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Asser Press 2010). On the Eurocentric nature of international legal history, see, eg Arnulf Becker Lorca, 'Eurocentrism in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1034.

The recent 'turn to history' and historiography by international law scholars and the new orientation towards international affairs by intellectual historians[19] has been mutually reinforcing. The recent 'turn' also spurred a vibrant new scholarship that is different from the orthodox forms of international legal history because of the extent to which it is intertwined with international legal theory. As such, the field of 'History and Theory of International Law' may be characterised by historical work that is open to theory, and international legal theorisation that is grounded in the history of international legal thought.[20]

III. *Why* and *how* 'History and Theory of International Law'?

Let me first explore what the study of the history of international legal thought is *for*. Closely related to this is the question of *how* to study it. Twenty years on, 'History and Theory of International Law' is marked by what I would call a *Methodenstreit*—a debate about the methods of the field. For reasons of clarity, I stage three positions that mark the field. On the one hand, there are scholars who do international legal history for the sake of *history*. On the other hand, there are international lawyers who do history exclusively as critique or *theory*. Moving beyond these two positions, there is a third that I call 'history and theory'. I would argue that the significance of this field lies in the opportunity to organise a fruitful dialogue between history of international legal thought and philosophy or theory of international law.

Why do international lawyers study the past? Clearly, international lawyers turn to the past all the time. It is where lawyers go to find whether legal obligations have been forged through treaties or customary law. They also turn to the past to determine 'original title' of sovereignty. For example, in the 2008 *Malaysia/Singapore* case at the International Court of Justice, judges read Grotius' work to find evidence of the territorial sovereignty of the Sultanate of Johor.[21] In the context of 'history and theory of international law', by 'turning to history' and with 'doing history' we mean research and teaching focused on international legal thought, ideas, concepts, *mentalités*, historiographical narratives, principles, and so on and so forth. We also focus on the jurists who developed and worked with these, often in response to a contemporary event such as a peace treaty.

Let me turn to the three positions I mentioned before (with some necessary simplification) on why and how we study past international legal thought.

1. History for history's sake: history *without* theory

First, doing history for history's sake. There are those who argue that we do—and should do—history *out of sheer curiosity* about the past. These historians aim to 'approach the past

[19] David Armitage, 'The Fifty Years' Rift: Intellectual History and International Relations' (2004) 1 Modern Intellectual History 97; also David Armitage, 'The International Turn in Intellectual History' in Darrin McMahon and Samuel Moyn (eds), *Rethinking Modern European Intellectual History* (OUP 2014) 232–52.

[20] I use history or intellectual history of international law and history of international legal thought somewhat interchangeably.

[21] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Reports 12.

"in its own right, for its own sake, and on its own terms"',[22] as Quentin Skinner put it. Doing history of thought then is a technique to *conserve* political or legal ideas. It is empiricist and antiquarian in nature and it insists on *objectivist* representation as a standard for dealing with past thought.[23] Any social utility approach to history is rejected; the past should be respected as the past and not be taxed with today's concerns.[24]

Some international legal historians accordingly defend the position that historical inquiry into international law should come from a genuine, non-instrumentalist interest in past events and ideas. Randall Lesaffer has repeatedly condemned the tendency of doing international legal history out of a 'functional interest' and for needs and concerns of the present.[25]

The tone of the *Methodenstreit* gets quite harsh at times. Ian Hunter speaks of '*debilitating* anachronism' and 'self-congratulating' post-colonial moralism.[26] While I agree that avoiding anachronisms is valuable when doing history of international legal thought, I find these statements questionable. I would argue that respect for the context and intentions of a historical author when seeking to understand his ideas does not preclude an evaluation of how past texts and concepts produced *present* repression and injustices.

It is too easy to set aside evaluation as anachronistic, provided that historic contextualisation plays a role. It is, moreover, not true that moral concerns with the Vereenigde Oostindische Compagnie (VOC)'s violent conduct overseas are altogether anachronistic, as is often suggested. The VOC's violence in the protection of its trade interests around the globe was, for example, subject to serious criticism by its Anabaptist and Mennonite shareholders.

My main concern with this approach's sharp criticism of bringing the present to the study of past thought is its overly *objectivist* claim about the production of historical knowledge and the recovery of meaning. It fails to recognise the inseparability of subject and object, and it fails to recognise fully that any historian seeking to *understand* Francisco de Vitoria or Hugo Grotius, for example, comes with questions, assumptions, and categories that draw on a theorisation formed in the present. It also fails to see that reconstruction of the intended meaning of a text by de Vitoria or Grotius cannot be fully identified with the text's meaning. 'History for history's sake' resists *theorisation* and a *proper dialogue* with present-day international legal theory.

On a related side note, there is always more than one history in any event: thus the sixteenth-century Spanish scholar de Vitoria, who lectured and advised on Spanish rule in the Americas, expressed moral criticism of Spanish violent conduct against the Native Americans. At the same time, we should mention that by positing *equal* standing and natural *rights* to *both* Spaniards and Native Americans, he effectively constructed a legal framework for Spanish *domination* in the Americas. This *inclusion* of the non-European into the

[22] Quentin Skinner, 'Sir Geoffrey Elton and the Practice of History' (1997) 7 Transactions of the Royal Historical Society 301, 304. Doing history for a historian like Geoffrey Elton then is 'a search for the truth' by reconstructing the 'true facts' of the past.

[23] Wallach Scott (n 14).

[24] Geoffrey Elton's anti-theoretical empiricism set him in opposition to someone like Michel Foucault or Hayden White, whose *Metahistory* (Johns Hopkins University Press 1973) played a significant role in the 'linguistic turn' in history too.

[25] Lesaffer (n 12) 29.

[26] Ian Hunter, 'The Figure of Man and the Territorialisation of Justice in "Enlightenment" Natural Law: Pufendorf and Vattel' (2013) 23 Intellectual History Review 289.

legal system to then *disempower* the non-European is shown to be reproduced by the structure of international law, even today.[27]

2. History for the sake of critique: history *as* theory

At the opposite side of the spectrum we find 'doing history as *critique*'. This approach *deconstructs* disciplinary truths and underlying assumptions.[28] I mentioned Michel Foucault and Edward Said already. Critical international lawyers took on board the understanding that the production of knowledge, including historical knowledge, is never neutral and always political.[29] Historiography is always contextual and contingent upon power structures.[30] Therefore, the grand narratives that have presented international law as a naturally progressive project for humanity,[31] bringing civilisation and replacing power politics with the rule of law, were challenged.[32]

Harvard professor David Kennedy built on Foucauldian insights for his history as *critique* of human rights. While he values the emancipatory, humanitarian cause, he points to what he calls 'the dark sides of virtue': the humanitarian and human rights activist exercises power too; she too is 'a ruler'.[33] International legal scholars like Antony Anghie and Martti Koskenniemi have brought to light the violence of the 'civilizing mission' of international law in the colonial and post-colonial age; the language of rights comes with the risk of domination.[34] Anne Orford explains how history as *critique* involves a heads-on confrontation with—in her words—the 'willed forgetting of international law's imperial past'.[35] She explains how the colonial conception of sovereignty continues 'to shape international law in the post-colonial era'.[36] This perspective helps us discern that many of today's problems in the Global South are 'the *effects* of a historically constructed global political and economic system'. This sensitivity is crucial in order to prevent that the institutionalisation of domination continue today, for example in a United Nations or International Monetary Fund (IMF) and World Bank context where global policies are developed and international law is shaped.[37]

[27] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004).

[28] Wallach Scott (n 14).

[29] Doing history is doing politics. See, eg Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (CUP 2015) 16, 22–24. Anne Orford argues that 'historical work is itself a politics': Orford, 'International Law and the Limits of History' (n 9) 311.

[30] Paul Veyne, 'Foucault Revolutionizes History' in Arnold Davidson (ed), *Foucault and His Interlocutors* (University of Chicago Press 1997) 146.

[31] Becker Lorca (n 29) 15; See also Skouteris (n 18).

[32] Martti Koskenniemi, 'The Politics of International Law' 1 European Journal of International Law (1990) 4.

[33] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) 329.

[34] Antony Anghie (n 27); see also Martti Koskenniemi, 'International Law and the Emergence of Mercantile Capitalism: Grotius to Smith' in Pierre-Marie Dupuy and Vincent Chetail (eds), *The Roots of International Law* (Martinus Nijhoff 2013) 3–37.

[35] Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (2012) Institute for International Law and Justice Working Paper 2012/2 <https://ssrn.com/abstract=2090434> accessed 12 August 2019.

[36] ibid 2. A Third World Approach scholar like BS Chimni has also pointed to the negative consequences of treating the past as history. It would create blindspots for how colonialism-imperialism shaped contemporary international law. While I share his desire to prevent these blindspots and to reveal this impact, I would argue that doing history and theory enables us to do this with credibility.

[37] ibid.

The unravelling of these long-time 'givens' has contributed to the much needed 'unsettling' of the orthodox, self-congratulatory histories of international law.[38] That said, most of the new histories of international law take up another 'given': international law as a necessarily imperialist force or project. While I take no issue with uncovering international law's role in domination and (economic) imperialism, I do challenge the necessity motivating these new histories. That would mean we would forego the possible added value of doing history and risk replacing one 'History' with another, closing off possible alternative pasts and futures.[39] Paraphrasing Wendt to comment on our current state of global capitalism: inequality is what we made of it.[40]

In the *Methodenstreit* regarding doing history of international law, Anne Orford calls upon lawyers to adopt deliberately and wholeheartedly anachronistic devices,[41] or—in Kemmerer's words—to employ 'radical anachronisms'.[42] In increasingly sharp language, Orford distinguishes the 'historical method' from what she calls the 'international legal method', where the latter is 'necessarily anachronistic'. In my view, this distinction is exaggerated. While I fully concur with Orford's critical agenda, I disagree with the caricature she makes of the Cambridge School's contextualist approach as necessarily 'conservative'[43] and thus without any critical potential.[44] In a more general sense, to make the past fully subservient to the present amounts to effacing the *historicity* of international legal thought; *history dissolves into theory* altogether. As such, *history as critique* fails in creating a *true dialogue between* past and present international legal thought. The past dissolves into a politics of the present and thus loses its dialogic force.

3. History for self-knowledge and an enlarged sense of possibility: History *and* theory

From my perspective, beyond 'history for history's sake' and 'history *as* mere theory' lies a third possible approach: 'history *and* theory of international law'. This represents a conversation between past and present international legal thought that questions the strict distinction between what is 'merely historical' and what is 'genuinely philosophical'.[45] For it to be a fertile conversation, it should start with doing good history, which in turn enables us to

[38] Orford, 'International Law and the Limits of History' (n 9) 310.

[39] It seems to replace one foundation with another while the Cambridge School has made a persuasive argument for doing anti-foundationalist history.

[40] Alexander Wendt, 'Anarchy is What States Make of it: The Social Construction of Power Politics' (1992) 46 International Organization 391.

[41] Orford (n 35); Orford, 'On International Legal Method' (n 9); Orford, 'International Law and the Limits of History' (n 9).

[42] Alexandra Kemmerer, '"We Do Not Need to Always Look to Westphalia … " A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17 Journal of the History of International Law 1, 2.

[43] Orford, 'International Law and the Limits of History' (n 9) 301: 'The conservative effects of history as method.'

[44] Kemmerer (n 42) 2: Jacob Katz Cogan has pointed out that many international law scholars 'focus only on the precursors to contemporary law, its institutions and actors, and seek merely to provide the law as it stands with an affirmative historical foundation.' Skinner is not affirmative history, on the contrary.

[45] Quentin Skinner, 'Interpretation and the Understanding of Speech Acts' in Quentin Skinner, *Visions of Politics Volume 1: Regarding Methods* (CUP 2002) 125.

question present international law and legal thinking and produce alternative theories. In my view, the Cambridge School approach may well facilitate such a conversation.[46]

The famous historian and philosopher RG Collingwood said that 'history is "*for*" human self-knowledge'.[47] Cambridge School historian Quentin Skinner builds on this insight. He says:

> [T]he very reason for regarding […] histories [of ideas] as indispensably 'relevant', [is] not because crude 'lessons' can be picked out of them, but because the history itself provides a lesson in self-knowledge. To demand from the history of thought a solution to our own immediate problems is thus to commit not merely a methodological fallacy, but something like a moral error. But to learn from the past—and we cannot otherwise learn at all—the distinction between what is necessary and what is the product merely of our own contingent arrangements, is to learn the key to self-awareness itself.[48]

The point is firstly that, from doing history, we may learn how present international legal concepts result from past political choices. This means that doing history of thought is an opportunity to realise that the concepts we use are in fact not 'timeless'; they change over time. They are not inevitable and necessary, but contingent on a different (past) society—a specific historical and linguistic context within which they were used with a scholar's 'complex intention'[49] to address a timely problem or question. Doing history of ideas assists us in seeing how our beliefs and arrangements are 'the merest contingencies of our peculiar history and social structure'.[50] Doing history helps us realise that we live in a political but also legal world, that we have constructed through thinking—and thus doing—and to understand where possibilities lie for deconstruction and reconstruction. For history of international legal thought to be such a learning experience and to assist us in questioning our own assumptions, conceptualisations, and theories, the material initially needs to be distinctively historical. As such, the study of history offers the experience of an 'overwhelming element of contingency' and alienation (not in a teleological or pejorative sense). It is precisely the 'alien character' of past international thought, beliefs, and concepts as products of their time that makes them so 'relevan[t]' to our thinking about international law, and the questioning of it.[51] Doing history of thought crucially is about 'preventing' our current moral, political, and legal theories from, as Skinner puts it, 'degenerating into uncritically accepted ideologies'.[52]

Doing history of international legal thought creates a necessary *distance* from our own understandings, beliefs, assumptions, and theories about international law. Thus, it also offers a means to question these in a more self-critical manner and allows us to test them against 'alternative possibilities'.[53] With this self-critical perspective comes what Skinner

[46] 'History wishes to be objective but it cannot. … It wishes to make past events contemporary, but it must at the same time restore the distance and depth of historical remoteness': Paul Ricoeur, *History and Truth* (Charles Kelbley tr, Northwestern University Press 1965) 76.

[47] RG Collingwood, *The Idea of History* (Jan van der Dussen ed, rev edn, OUP 1993) 10; He gave the epistemological debate on doing history a definite hermeneutical turn.

[48] Quentin Skinner, 'Meaning and Understanding in the History of Ideas' in James Tully (ed), *Meaning and Context: Quentin Skinner and His Critics* (Princeton University Press 1988) 29, 67.

[49] ibid 63.

[50] ibid.

[51] Quentin Skinner, 'A Reply to My Critics' in James Tully (ed) (n 48) 231, 287.

[52] ibid 287.

[53] ibid 286.

calls an 'enlarged sense of possibility' of *changed* assumptions, conceptualisations, and theories.[54]

I return to this sense of possibility below. First, I would like to concentrate a bit more on the Cambridge contextualist approach to history by providing an example, while making three methodological points in passing.[55]

For history of international legal thought to have the alienating—and thus critical—force just mentioned, the method of interpretation must recognise that a classic text, for example Leibniz's 1693 *Praefatio* to his *Codex Iuris Gentium*,[56] was written in response to a specific political 'issue at stake' at the time. Therefore, reading such a historical text is not about learning timeless answers to 'perennial problems'.[57] To understand the text, its intellectual and political ideological contexts should be reconstructed. Additionally, the prevailing discursive conventions should be identified, in order to understand what Leibniz was *doing* by writing the text and developing his ideas. Leibniz lived during the disintegration of the Holy Roman Empire into what would become the modern Europe of sovereign states, which is characterised as a time of disorder, diplomatic confusion, and warfare. The traditional 'universal' legal order headed by Emperor and Pope was in disarray. Leibniz worked as a legal advisor to both the weakening Emperor and the emerging new actors on the international stage such as the Elector of Hannover, who wanted to be recognised as an international player. For Leibniz, the prime concern was the restoration of order and justice in Europe. In that context, Leibniz in the *Codex* argued for *relative* sovereignty for all those who were powerful enough to influence international affairs—that is, those who had a degree of military or treaty-making capacity. He also introduced *international* legal personality (a key doctrinal concept and tool of international law). As legal persons, *all of these new actors* counted as lawful and thus legitimate players at the international stage. At the same time, they were all conferred with the moral *and* legal *obligation* to comply with the demands of universal law and justice. A brilliant conceptual move.[58]

This brings me to my first methodological remark. A contextualist approach prevents oversimplified interpretation induced by meta-narratives.[59] In the late 1990s/early 2000s, the predominant narrative was (still) that the 1648 Westphalian Peace Treaties established a European order of *absolute* sovereign states and therewith the inter-state legal order. In light of this idea, an interpretation of Leibniz's 1693 text would have never allowed for the findings just mentioned. Contextualist studies of this text have contributed to a critique of the Westphalian Myth because it revealed the unfamiliar understanding of *relative* sovereignty and the *innovative* character of Leibniz's introduction of international legal personality. (What if this conception had taken hold all along?)

That leads to the second methodological remark. The Cambridge School approach avoids anachronisms, yet it allows us to recognise that a scholarly reconstruction of the context of a text and the identification of the author's intentions involves assumptions, understandings, beliefs, and theories that a scholar brings to the reading of the historical text. In other words,

[54] ibid 287.

[55] This example holds an implicit counterfactual—as history often does—but my concerns are elsewhere.

[56] Gottfried W Leibniz, 'Praefatio to the Codex Iuris Gentium' in Gottfried W Leibniz, *Leibniz: Political Writings* (Patrick Riley ed, CUP 1988) 165–76.

[57] Skinner (n 45) 3.

[58] Nijman (n 13).

[59] Skinner's contextualist approach was itself a methodological response to—and a break away from—the grand narratives of British imperialism and colonialism.

a subjective element exists when determining the 'relevant' or 'appropriate context' for an historical text's interpretation. As Skinner observes, '[t]here is no implication that the relevant context need be an immediate one'.[60] Denying that the present-day context marks the questions with which we turn to the past is scientifically obsolete. I turned to Leibniz' *Codex Iuris Gentium* wondering why he needed the concept of international legal personality because I was triggered by the vibrant debate on new actors and the subjects of international law in the late 1990s. Similarly, it is no coincidence that at a time of economic globalisation and violent capitalism, there is a marked revival of interest in the Dutch East and West India Company (VOC and WIC) and Hugo Grotius as a corporate lawyer of the VOC. Research on the legal history of the trade companies is an antidote to the forgetfulness regarding the dark history of Dutch trade wars and slave trade and their justifications. It is not uncommon for such research to be motivated by questions about the possibilities to hold multinational corporations accountable under international law for corporate injustices today. This so-called 'motivational presentism'[61] of course *impacts* our reconstructions. Perhaps more than Skinner, I would argue that contextual readings additionally generate new, different histories through time.

The third methodological remark goes to the critical potential of the contextualist approach by focusing on so-called 'evaluative-descriptive terms'.[62] These are terms that perform both a descriptive and evaluative function. As such, they are crucial disciplinary terms where thought and action meet and agency happens. They are used to legitimise 'untoward' action as moral and/or legal. An agent does something by using such a term; she manipulates an existing normative vocabulary to seek, for example, support for conduct that previously was not considered moral/legal. Analysing the use of such a term enables us to get a hold of conceptual innovation. Approaching the history of ideas, in a Wittgensteinian sense, as the history of the *use* of ideas or concepts enables us to wonder what is done in using these concepts in context.

This is particularly relevant when it comes to intellectual history of international legal thought where the legal practice or argumentation is all about using existing concepts to legitimise conduct and if needed to change their meaning and therewith change what is legitimate practice. International law concepts may thus be used to perform a particular (linguistic) task within a timely context to address a timely problem. History of international legal thought then is about what international law scholars were *doing in* using these core concepts in their intellectual context. As such, interpretation highlights choice and agency, strategy and tactics.[63]

With the introduction of 'international legal personality', Leibniz coined such a term for international law. As fundamental *and* ambiguous concepts of political or legal thinking, these terms are the *locus* of change: their meanings are contested, 'manipulated' and

[60] Skinner (n 45) 116. He explains in 1988 in 'A Reply to my Critics' and in 2002 even more concisely that '[t]he *appropriate* context for understanding the point of such writers' utterances will always be *whatever context enables us to appreciate the nature of the intervention* constituted by their utterances. To recover that context in any particular case, we need to engage in extremely wide-ranging as well as detailed historical research.'

[61] David Armitage, 'Modern International Thought: Problems and Prospects' (2015) 41 *History of European Ideas* 116, 119.

[62] Quentin Skinner, 'Some Problems in the Analysis of Political Thought and Action' in James Tully (ed) (n 48) 97, 112; Nijman (n 13) 23.

[63] Here we also find an implicit possibility for counterfactualism.

'moving', and create change in a thought system as a whole.[64] 'International legal personality' has been such a place of political struggle over the international legal system and the moral identity of international society.[65] This is visible in the work of Leibniz, whose political agenda and theory of universal justice as, in his words, 'wise charity' were the drivers for his introduction of the concept of international legal personality. It meant to ground a new *universal* system of law and justice that applied to European, Chinese, Indian, and Russian rulers alike and obliged them to rule justly—that is, wisely and charitably.

In the nineteenth century, another struggle over who did and did not 'count' in international law defined the use of international legal personality as a legal concept. By denying full international legal personality to so-called 'uncivilised' nations, international law was reinforced as a system of domination and subordination, while the injustices of colonisation and exploitation were facilitated. In the twentieth century, Hersch Lauterpacht among others focused on international legal personality (or in his time: the subjects of international law) in order to argue for radical change of the international legal system. Lauterpacht held that the human individual, not the 'State', was the true international legal person with rights and duties in international law. These intellectual histories challenge us to question the politics and morality of today's conception of international legal personality. Thus, a historical inquiry into a fundamental concept turns into an inquiry into the politics and justice concerns behind the conceptual innovations or commitments of today.

As such, *doing history* opens up a critical space for dialogue between past and present international legal thought, which enables us to question our present-day conceptions underlying politics and notions of justice. Subsequently, this allows us to theorise change of present-day international law and international legal thought.[66] This is the philosophical value of *doing history* of international legal thought.

Skinner describes this as 'a kind of exorcism' that historical inquiry offers to prevent our thinking from 'fall[ing] under the spell of our own intellectual heritage' and be paralysed by it. He calls upon us to 'do our own thinking [for the future] for ourselves'.[67] Residing at the interface of history and theory/philosophy provides an opportunity to liberate our capacity for imagination from the constraints—now recognised—that past thought and beliefs place upon our thinking (and doing):

> An understanding of the past can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about these values, reflect a series of choices made at different times between possible worlds. This awareness can help to liberate us from the grip of any one hegemonial account of those values and how they should be interpreted and understood. Equipped with *a broader sense of possibility*, we can stand

[64] The study of these fundamental concepts as places of political struggle gives us insight into how conceptual change happens, how concepts change while moving through time, and where and how 'ideological innovation' is sought.

[65] Skinner (n 62) 112: 'It is essentially by manipulating this set of terms that any society succeeds in establishing and altering its moral identity.'

[66] The subjectivist dimension of contextual readings recognises the generation of new, different meanings through time. It suffices to add here that theorising change may be fostered by including what Paul Ricoeur called the acquired 'public meanings' of a historic text. Paul Ricoeur has taught us that any text always has more meaning than the one intended by the author. See Ricoeur (n 46).

[67] Skinner (n 48) 66.

> back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we think of them.[68]

Here, intellectual history moves into the domain of political philosophy and possibly of politics. It creates a conception of historical or political change that allows for both structures and agent—*what the past gives us, is not such a 'given' after all*.[69]

I think this is really where Quentin Skinner and Roberto Mangabiera Unger meet. Doing history of political or international legal thought—and therewith the experience of contingency—provides us with an awareness that comes very close to the empowerment Unger is after: realising that our present social arrangements are not necessary or natural but socially constructed. Therefore, these social arrangements can be deconstructed and/or reconstructed provided that such 'social reconstruction [does not] fail to respect our nature',[70] which in this sense refers to 'who we are, and how we can and should remake ourselves. The living person lies at the center of these ideas as the agent and the result, the subject and the object of history.'[71]

Unger's image of 'frozen politics' for domestic society and institutions applies equally to international society and institutions.[72] Doing international legal history—and thus taking a lesson in self-knowledge—provides us with a critical stance towards our theories and assumptions and towards our social arrangements and institutions; it empowers us to reconstruct them. As Unger says: 'We are our fundamental practices. But we are also the permanent possibility of revising them.'[73] In Skinner's words, '[w]e may be freer than we sometimes suppose.'[74] Doing history then produces awareness of the contingency of received beliefs, values, and institutions, and as such produces a sense of possibility—and arguably—responsibility. It suggests/recognises a capacity to reimagine and act. It is transformative and empowers to establish (institutional) change and get our (global) act together.[75] This is an empowerment we desperately need.

IV. Seeking change by doing history

If I claim that 'history and theory' projects are also about the present and about theorising change, it is only fair to say something about my own normative interests or the change I would be seeking.

[68] Skinner (n 45) 6.

[69] Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (new edn, Verso 2001) xxviii: 'What seems to be given and presupposed is merely what we have temporarily refrained from challenging and remaking.'

[70] Unger explains his ambition very clearly: 'We must explain society and history in a way that takes the fate institutions impose on society and on us as decisive but not definitive: for real, but not for keeps. Then we shall already be doing transformative politics in the mind even before we have begun to do it in society.' ibid xxvii.

[71] ibid.

[72] ibid xxviii.

[73] ibid 351.

[74] Quentin Skinner, 'Introduction: Seeing Things Their Way' in Quentin Skinner, *Visions of Politics Volume 1: Regarding Method* (CUP 2002) 7.

[75] cf Moyn, in this volume. Doing history and theory in the way I argue here adds another productive use of contingency to this list.

I would like to engage with this question while drawing on recent research on Hugo Grotius' understanding of the human subject, society, and law. Reading Grotius and Hobbes together provided a means to ensure that I did not uncritically accept the so-called 'Westphalian model' of the international legal system, which is grounded on a Hobbesian anthropology. Rather, it allowed an experience of 'an enlarged sense of possibility' and to theorise an alternative conception of international law and justice that is based on the social or intersubjective nature of international life.

Hobbes transposed what he conceived of as the characteristics of humans living in a state of nature—solitary, fearful, distrustful, and pre-emptively aggressive—to the state agent in international affairs. The fully autonomous, self-interested and shrewdly calculating state then has defined the liberal tradition: self-preserving and self-serving actions are by definition legitimate. International life is nothing more than a perpetual struggle for survival. The so-called Westphalian model of sovereignty and international order then has effectuated a strict separation between subjects of law and justice within the territorial state—mostly its citizens—and outside the state. Justice only exists *within* the state, not *among* states. International law and institutions then are merely pretextual.

I have two problems with this reading. Firstly, in my view, the emphasis on Hobbes is unwarranted and has set mainstream positivist thinking about international society and international law on the wrong track.[76] All the more so—and this brings me to my second contention—as the globalised and hyperconnected world of today demands an alternative for the traditional Westphalian, let us say Hobbesian, model.

For Grotius, humans are not solitary but social creatures by nature. They have the capacity to reason, will freely, care, make a promise, and keep their word.[77] As such, they are capable of being trustworthy and acting responsibly, individually and collectively. In Grotius' understanding, international society is also a natural society of subjects or agents seeking personal as well as impersonal—that is, institutionally mediated—relations. International legal thought that builds on Grotius' insights thus tends to explain international law and institutions as developing *naturally* from social life, enabling production of trust and solidarity. *Naturally* in this context does not refer to being 'necessary'; it is rather meant to describe the natural capacity of human judgement of what serves the social.[78] Notwithstanding the ambivalence of Grotius' thinking, the recovery of his anthropology of the capable subject is an important counterpoise to the prevailing Hobbesian anthropology of contemporary international law; it creates the earlier mentioned 'enlarged sense of possibility' about international society and international law. Bringing Grotius into a conversation with the philosophical anthropology or 'hermeneutics of the self' of the French philosopher Paul Ricoeur[79] helps us theorise and operationalise human potentiality in this respect.

[76] Again, there is an element of implicit counterfactualism here.

[77] Grotius' theorisation of the capable subject was in a way an early modern version of what we deal with today as the necessity/contingency debate: in his days, the predestination and salvation debate—and the possible role of human will on (determination of) salvation—was central. See Janne Nijman, 'Grotius' *Imago Dei* Anthropology: Grounding *Ius Naturae et Gentium*' in Martti Koskenniemi and others (eds), *International Law and Religion: Historical and Contemporary Perspectives* (OUP 2017) 87–110.

[78] Anthony Carty and Janne Nijman (eds) *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (OUP 2018) In this book, Carty and I reconceive natural law thinking as found in Grotius in terms of the natural judgement of humans.

[79] Paul Ricoeur, *Oneself as Another* (Kathleen Blamey tr, University of Chicago Press 1992); Paul Ricoeur, *The Course of Recognition* (David Pellauer tr, Harvard University Press 2005)

Drawing on Ricoeur, I argue for a reconceptualisation of 'international legal personality' as a stage in the phenomenology of the human subject, as the ethico-legal identity of humans.[80] I concur with Ricoeur on the point that human desire for the good life includes the desire 'to live well with and for others in *just* institutions'.[81] International legal personality then is reconceived as a dimension of the capable human subject, who seeks just institutions to constitute selfhood reflexively through relations with others.[82] In my view, Ricoeur's philosophy helps us conceive of international law and institutions as ways to mediate mutual recognition and respect globally and to effectuate international or transnational social life. There are obvious reasons—both for normative and explanatory power—to move from the understanding of international life as a struggle for survival to its understanding as a struggle for mutual recognition.[83]

As a second and related point, in today's hyperconnected and globalised world, I would argue that the human desire for life together in just institutions moves rapidly beyond so-called Westphalian, modern territorial state-based thinking and traditional notions of citizenship to a scale that includes international or global institutions. I see this paradoxically confirmed in the current backlash against these institutions. For example, disappointment with the EU and with neo-liberal global trade regimes that fail to safeguard social justice. The traditional notions and beliefs that define our thinking today rely on past, highly contingent political, moral, and legal thought. *Doing history* such as the history of the international economic order undermines the current neo-liberal beliefs and arrangements as necessary. They are a form of 'frozen politics' and therefore challengeable on the basis of our 'exorcised' or scrutinised politics and justice concerns. For me, this is where Ricoeur and Unger come together and where the reimagination of *just* institutions—and thus an alternative future—becomes available to us.[84] It is where doing history offers a space for the human subject capable of reimagination. Drawing on Erasmus, Grotius, Ricoeur, Skinner, and Unger we find a space for responsible human agency between necessity and hyper-contingency.

Being self-critical in relation to past thought challenges us to do 'our thinking for ourselves'. This is a necessary, albeit not a sufficient, condition for change. The first step to an alternative future for international law is an enlarged sense of possibility. Subsequently, a philosophical discussion is needed about our moral, political, and legal values for the future. We can then do our thinking with new, enlarged horizons of expectation.[85]

[80] Janne Nijman, 'Paul Ricoeur and International Law: Beyond "The End of the Subject"—Towards a Reconceptualization of International Legal Personality' (2007) 20 Leiden Journal of International Law 25.

[81] Ricoeur, *Oneself as Another* (n 79) 239; Paul Ricoeur, *The Just* (David Pellauer tr, Chicago University Press 2000) 1–10.

[82] Nijman (n 80) 25–64.

[83] Understanding international life as a struggle for recognition rather than for survival helps us better understand international relations and the possibility of international law. It remedies, moreover, the traditional obfuscation of international theorisation. International theory in the sense of speculation about relations between states becomes *possible*. Martin Wight, 'Why is There No International Theory?' in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (Allen and Urwin 1966) 33.

[84] Both Ricoeur and Unger aim to bring our thinking beyond structuralism, naturalism, and positivism and allow for human freedom, human agency, and institutional reimagination and reconstruction. If human existence is a gift that unfolds in a constructed social world, looking back provides us with the realisation that what limits our freedom today can be cast off.

[85] Ricoeur draws on Koselleck in *Time and Narrative Volume 3* (University of Chicago Press 1990).

V. Conclusion: Between cynicism and commitment

'This Cannot Be How the World Was Meant to Be.' Philip Allott's words bespeak a disappointment with the world as he found it. Here the citation points to a general dissatisfaction with international law and international legal historiography that actuated the field of 'History and Theory of International Law'.

I have argued that doing history is not merely about understanding past and present-day international legal thought; it is also about seeking change. It is about stepping outside old assumptions, conceptualisations, and theories, and about creating a critical space to question them and then theorise alternatives in order to *change* international law and society.

Allott's complaint may reflect one part of what Martti Koskenniemi has described as an inherent condition of the international law profession: the life-time oscillation 'between commitment and cynicism'.[86] On one side, there is commitment to international law and institutions because of their potential for emancipation and justice. On the flip side, there is looming cynicism, or at least profound doubt, because of the dark sides of international law. I agree with Koskenniemi that we cannot escape these two positions, but that is not the same as being trapped. For the international lawyer doing history, this oscillation is no longer unreflective. Freely and consciously navigating the critical space that has opened up between present and past international legal thought, the international lawyer is able to situate herself historically and orient herself morally and politically to new horizons when reimagining international law and institutions.

[86] Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2011) 271–93.