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Commentary

# BEYOND THE SURFACE AND ACROSS THE BORDER: THE CRAFT OF THE HISTORIAN AND INTERNATIONAL LAW

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## Abstract

The aim of this article is to analyse the essential methodological function of history in expanding the horizons of the study and practice of international law. Furthermore, showing that to reach a deeper understanding of international law it is not only necessary to use history in general, and the history of international law in particular, but also what Marc Bloch called *the craft of the historian*. The analysis will be conducted on two parallel levels. The first one focused on the work of historians and aimed at understanding methodologies of historical inquiry and techniques of writing and argumentation. This will be done by "dissecting" pieces of particularly relevant scholarly work by authors such as Eric Williams, John Gallagher and Ronald Robinson. The second one, instead, will analyse the transposition of those techniques and methodologies across the disciplinary border, into international law, and consider the (beneficial) effects of such transposition by looking at concrete models of how the craft of the historian can be successfully integrated in both international legal scholarship (José-Manuel Barreto) and international judicial-legal reasoning (Christopher Weeramantry).

**Keywords**: History; Methodology; International Law; Technique; Historians

*"Misunderstanding of the present is the inevitable consequence of ignorance of the past. But a man may wear himself out just as fruitlessly in seeking to understand the past, if he is totally ignorant of the present... This faculty of understanding the living is, in very truth, the master quality of the historian."*

(Marc Bloch, *The Historian's Craft*, 43)

*"...for the only true history, which can advance only through mutual aid, is universal history."*

(Marc Bloch, *The Historian's Craft*, 47)

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## I. Introduction

In the introduction of his book *Il presente come storia* (The Present as History) Luciano Canfora, the renowned Italian classical historian, wrote: "Expanding one's horizons can often result unpalatable, especially in the presence of strong traditions defended by scholars who tend not to easily modify their mental categories, supported by "common sense" and its subsequent, unassailable vulgates." (author's translation)[2].

Canfora's passage suggests what thinking about history, and about the history of international law in this particular case, should be: a continuous exercise in expanding horizons. This also constitutes the aim of this article: analysing the essential methodological function of history in expanding the horizons of the study and practice of international law itself. Furthermore, showing that to reach a deeper understanding of international law it is not only necessary to use history in general, and the history of international law in particular, but also what Marc Bloch called *the craft of the historian*.

The analysis will be conducted on two parallel levels. The first one focused on the work of historians and aimed at understanding methodologies of historical inquiry and techniques of writing and argumentation. This will be done by "dissecting" pieces of particularly relevant scholarly work by authors such as Eric Williams[3], John Gallagher and Ronald Robinson[4]. The second one, instead, will analyse the transposition of those techniques and methodologies across the disciplinary border, into international law, and consider the (beneficial) effects of such transposition by looking at concrete models of how the craft of the historian can be successfully integrated in both international legal scholarship (José-Manuel Barreto)[5] and international judicial-legal reasoning (Christopher Weeramantry)[6].

The conclusion will be that the most effective approach to the history of international law could be the one that materially integrates the historical method (the craft of the historian) into the theory and practice of international law itself. Simply put, the one that looks at international law with the eye of the historian. In order to do it, more attention will be given to methodology rather than to content, to *hows* rather than *whats*.

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[2] Luciano Canfora, *Il presente come storia* (Milano: Rizzoli, 2014), 29. Canfora originally referred to Bernal's work on classical Greece *Black Athena* (1987), and particularly, to the chain of adverse reactions it sparked in the scholarly environment. In *Black Athena,* Martin Bernal unprecedentently placed ancient Greece in a wider civilizational flux coming from the East, rediscovering the Afro-Asiatic cultural roots of classical civilisation. The cardinal point of his argument was that classical Greeks did not see their political institutions, science, philosophy, or religion as original, but rather as derived from the East in general, and Egypt in particular. These Afro-Asiatic influences, Bernal argued, had been then systematically ignored, denied, or suppressed since the eighteenth century, mainly for colonial-racial purposes.

[3] In particular, to Chapter 10 (*Capitalism and Slavery)* in his *From Columbus to Castro: the History of the Caribbean* (Vintage Books, 1970), 136-155.

[4] John Gallagher and Ronald Robinson, "The Imperialism of Free Trade," *The Economic History Review* 6, no. 1 (1953), 1-15.

[5] José-Manuel Barreto, '*Cerberus*: Rethinking Grotius and the Westphalian System' in Martti Koskenniemi, Walter Recht, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press, 2017), 149-175.

[6] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997 (Separate Opinion of Vice-President Weeramantry).

## II. Beyond the Surface: Tools and Techniques of the Historian

The choice of *Capitalism and Slavery* and *The Imperialism of Free Trade* as models of historical inquiry and scholarly writing is, of course, an entirely subjective one. It is based on choosing as models the pieces of scholarly work that exhibit more clearly the fundamental methodological hallmarks of historical inquiry and that, at the same time, relate to periods and phenomena which are particularly relevant to the formation and understanding of international law. Both pieces have, however, a further element in common. As with Canfora making the case for Bernal's *Black Athena*, both Williams' work on the history of the Caribbean and Robinson & Gallagher's article on the hidden relevance of informal empire went beyond commonly held assumptions about the historical phenomena they were writing about.

At the time of their publication (as in the case of *Black Athena*), both works went clearly against what Canfora defined as "…strong traditions defended by scholars who tend not to easily modify their mental categories, supported by "common sense" and its subsequent, unassailable vulgates.". They both exploited the full potential of the historical method to go *beyond the surface* of established narratives which did not render justice to the complexity of facts. Williams did this with the transatlantic slave trade [7], Gallagher and Robinson with British imperialism. Both works expanded the horizon of historical scholarship on the subjects, and did this by heightening the level of factual complexity taken into consideration. Some of the elements that enabled them to challenge the established, traditional historical narratives[8] were, for example, the sheer quantity of material factors analysed, the depth of the analysis carried out on those factors, and the enlarged geographical scope of their discourse[9].

The authors' decisive choice, from the perspective of both methodology and argumentation, was precisely to look at what was then commonly overlooked, and to look at it more than everything else. From this perspective, especially clear is Gallagher and

[7] Williams' work follows the entire trajectory of the transatlantic slave trade, from the rise to the decline, explaining the historical reasons for both. Analysing the political economy of seventeenth and eighteenth-century colonial powers such as France, Britain, Spain and the Netherlands, Williams explains the material reasons of the rise and success of the slave trade across the Atlantic, rooting them in the mercantilist economic policies of which African slave labour became the engine. In the same way, Williams examines the underlying material reasons for the abandonment of the slave trade and for the emergence of abolitionist movements in metropolitan centres. He identifies them with the move away one type of capitalism to another, from commerce-based mercantilism to what then became industrial capitalism. Despite acknowledging the rise of moral and humanitarian concerns among the "discordant notes in the mercantilist harmony", Williams' explanatory thesis for the gradual abandonment of the slave trade is effectively condensed in that "If and when the slave trade ceased to be profitable, it would not be so easy to defend it." (Williams, *Capitalism and Slavery*, 155).

[8] The narrative of humanitarian abolitionism causing the abandonment of the transatlantic slave trade in the case of Williams, and the one about "mid-Victorian indifference" to imperial expansion in the case of Gallagher and Robinson.

[9] In both *Capitalism and Slavery* and *The Imperialism of Free Trade*, the authors built their analysis on material factors such as numerical data, the strategic character of economic policy or the geography of shipping routes. Their methodological choices enabled them to consider the real weight of what was materially happening in other parts of the world, and the decisive influence of those events and dynamics on metropolitan centres. This is the case, for example, of Caribbean West Indies in Williams' triangular trade, or of the expanding Mid-Victorian informal empire (e.g. Latin America, India and China) in Gallagher and Robinson.

Robinson's choice on how to approach the study of British imperialism, both formal and informal:

"The imperial historian, in fact, is very much at the mercy of his own particular concept of empire. By that, he decides which facts are of 'imperial significance'; his data are limited in the same way as his concept, and his final interpretation itself depends largely upon the scope of this hypothesis (…) The orthodox view of nineteenth-century imperial history remains that laid down from the standpoint of the racial and legalistic concept which inspired the Imperial Federation movement (…) In this way the nineteenth century was divided into periods of imperialism and anti-imperialism, according to the extension or contraction of the formal empire and in the value of British rule overseas."[10].

By sustaining the "informal empire" thesis, Gallagher and Robinson ran contrary to widely accepted factual and methodological assumptions:

"Ironically enough, the alternative interpretation of 'imperialism', which has began as part of the radical polemic against the Federationists, has in effect only confirmed their analysis. Those who have seen imperialism as the highest stage of capitalism and the inevitable result of foreign investment agree that it applied historically only to the period after 1880. (…) Consequently, Hobson and Lenin, Professor Moon and Mr Woolf have confirmed from the opposite point of view their opponents' contention that late-Victorian imperialism was a qualitative change in the nature of British expansion and a sharp deviation from the innocent and static liberalism of the century"[11].

The thesis which contrasted "mid-Victorian indifference" or "anti-imperialism" with "late-Victorian enthusiasm" or "imperialism", in the words of the authors was "welcomed by one school, condemned by the other, and accepted by both". They added: "The trouble of this argument is that it leaves out too many of the facts it claims to explain."[12].

The overlooked facts considered and analysed by Gallagher and Robinson, instead, pointed in the opposite direction. According to their interpretation, the bigger picture of imperial expansion was much more complex and differentiated than it seemed by exclusively looking at the increase or decrease in number of "those colonies coloured red on the map"[13].

Gallagher and Robinson's key findings rejected the notion of "mid-Victorian indifference" to imperial expansion, uncovering the geographically differentiated patterns

[10] Gallagher and Robinson, *The Imperialism of Free Trade*, 1-2.
[11] Gallagher and Robinson, *The Imperialism of Free Trade*, 2.
[12] Gallagher and Robinson, *The Imperialism of Free Trade*, 2. "Their argument may be summarized in this way: the mid-Victorian formal empire did not expand, indeed it seemed to be disintegrating, therefore the period was anti-imperialist; the later-Victorian formal empire expanded rapidly, therefore it was an era of imperialism; the change was caused by the obsolescence of free trade.".
[13] Gallagher and Robinson argue that also from the perspective of sheer territorial occupations and annexations, the end result of the mid-Victorian period was still expansion. "Consider the results of a decade of 'indifference' to empire. Between 1841 and 1851 Great Britain occupied of annexed New Zealand, the Gold Coast, Labuan, Natal, the Punjab, Sind and Hong Kong. In the next twenty years British control was asserted over Berar, Oudh, Lower Burma and Kowloon, over Lagos and the neighbourhood of Sierra Leone, over Basutoland, Griqualand and the Transvaal; and new colonies were established in Queensland and British Columbia." Gallagher and Robinson, *The Imperialism of Free Trade*, 2-3.

of British imperial foreign policy, which included the flows of foreign investment, the delicate choices between interventionism and *laissez-faire*, between direct rule, indirect rule and informal control[14]. The coexistence of the mercantilist policies imposed upon India with the informal techniques of free trade used to control Latin America could not be explained only by looking at the colour of countries on the map, or just in function of metropolitan economic growth. The authors concluded that a satisfactory understanding of those phenomena could only be reached by engaging with the complexity of facts. Therefore, measuring themselves with the various, geographically differentiated dimensions of trade, investment, migration, culture, social and political organisation, economic integration and infrastructure development.[15]

*The Imperialism of Free Trade* offers a perfect example of what it means to fully exploit the epistemological potential of the historical method, constructing explanatory hypotheses through the interpretation of facts, confirming or rejecting them following to the analysis of those facts themselves. This type of methodological choices also offers an explanation for Williams' apparent obsession with numbers in *Capitalism and Slavery*. To discard the established narrative about slavery and abolitionism, the future prime minister of Trinidad and Tobago had to demonstrate the actual magnitude of the slave trade as a global phenomenon, and its vital function in the economies (and not only) of colonial powers. What he was painstakingly trying to convey to his readers was awareness of how *indispensable* the transatlantic slave trade had been for almost three centuries. Only showing how indispensable, and seemingly irreplaceable the slave trade had been, could Williams expose the underlying reasons for its decline and abandonment.[16]

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[14] Gallagher and Robinson, *The Imperialism of Free Trade*, 6. "Whether imperialist phenomena show themselves or not, is determined not only by the factors of economic expansion, but equally by the political and social organization of the regions brought into the orbit of the expansive society, and also by the world situation in general. It is only when the polities of these new regions fail to provide satisfactory conditions for commercial or strategic integration and when their relative weakness allows, that power is used imperialistically to adjust those conditions.".

[15] Gallagher and Robinson, *The Imperialism of Free Trade*, 6. "In this hypothesis the phasing of British expansion or imperialism is not likely to be chronological. Not all regions will reach the same level of economic integration at any one time; neither will all regions need the same type of political control at any time. As the British industrial revolution grew, so new markets and sources of supply were linked to it at different times, and the degree of imperialist action accompanying that process varied accordingly. The mercantilist techniques of formal empire were being employed to develop India in the mid-Victorian age at the same time as informal techniques of free trade were being used in Latina America for the same purpose. (…) From this vantage point the[15] Gallagher and Robinson, *The Imperialism of Free Trade*, 6. "Whether imperialist phenomena show themselves or not, is determined not only by the factors of economic expansion, but equally by the political and social organization of the regions brought into the orbit of the expansive society, and also by the world situation in general. It is only when the polities of these new regions fail to provide satisfactory conditions for commercial or strategic integration and when their relative weakness allows, that power is used imperialistically to adjust those conditions.".

[15] Gallagher and Robinson, *The Imperialism of Free Trade*, 6. "In this hypothesis the phasing of British expansion or imperialism is not likely to be chronological. Not all regions will reach the same level of economic integration at any one time; neither will all regions need the same type of political control at many-sided expansion of British industrial society can be viewed as a whole of which both the formal and informal empires are only parts. (…) If this is accepted, it follows that formal and informal empire are essentially interconnected and to some extent interchangeable.".

[16] For a critical assessment of the disrupting impact of Williams' earlier work (*Capitalism and Slavery*, 1944) and of its subsequent miscomprehensions in the American scholarship on slavery, capitalism and abolitionism, see: Reuben H. Neptune, "Throwin' Scholarly Shade: Eric Williams in the New Histories of Capitalism and Slavery," *Journal of the Early Republic* 39, no. 2 (2019), 299-326.

To do this, the already impressive collection of statements present in the chapter had to be substantiated and supported with factual information. The most effective way to achieve the objective and to show, at the same time, the magnitude of the phenomenon, was through the extensive use of numerical data. Williams demonstrated that the Negro slaves were "the strength and sinews of this western world" with data on the annual importation and exportation of slaves, the trade balance of colonial powers, the expenses and revenues of chartered companies, the mortality and life expectation of slaves in West Indian colonies, the type of goods that circulated in the triangular trade, the shipping routes, the number of ships and sailors employed, the enrichment of Atlantic port cities such as Liverpool, Bristol, Nantes and Bordeaux.

Without necessarily focusing on all details of Williams' thorough analysis, it is evident that his argumentative technique responded to precise methodological choices. The most important of them was to convey the global impact of the slave trade as a phenomenon, and to place it at the centre of an historical narrative covering three continents and spanning from the sixteenth to the nineteenth century. The *geographical* choice made by Williams also suggests that his intent had been to relocate the very sources of metropolitan prosperity, the roots of capital accumulation, the foundations of industrial revolutions in West Indian sugar plantations. It is not by accident that *From Columbus to Castro: The History of the Caribbean* accounts for one of the first, if not for the first, comprehensive work on the modern history of that part of the world.

## III. Across the Border: Integrating the Craft of the Historian in the Theory and Practice of International Law

As the first half of this article has examined the methodological choices of historians challenging widely accepted interpretations of historical phenomena, the second half shows the impact that similar methodological choices can have when applied across the disciplinary border of international law. The two following sections present two selected cases in which *the craft of the historian* has been successfully integrated in both the theory and practice of international law, with the result of expanding the horizons of the discipline and generating a deeper understanding of both its past and its present.

### III.1 Barreto: *Cerberus* and the History of International Law

José-Manuel Barreto, in his contribution to the volume *International Law and Empire. Historical Explorations* edited by Koskenniemi, Recht and Fonseca, answers the question about the relationship between international law and imperialism by challenging the traditionally State-centred structure of modern international law.

Barreto critiques one of the key tenets in the conventional understanding of the modern international order, namely the principle according to which only the State can be part of the exclusive club of "full subjects" under international law. Rethinking and analysing the political and economic history of international law at the time of the events of the Peace of Westphalia, the core of Barreto's thesis is that not only the State, but also the

Empire and the Company should be considered, and treated as, full subjects of international law when looking at the history of the discipline. According to Barreto, the resulting three-headed structure has the aspect of Cerberus, the mythical creature guarding the gates of Hades. This representation makes evident not only that there was a lot more than just States involved in the genesis of modern international law, but also that without the action of Cerberus' other two heads (the Empire and the Company), the emergence of the modern State as the conventional subject of international law would not have been possible at all[17].

One of the pillars of Barreto's thesis is, indeed, the necessary connection between one of the main theatres of the Thirty Years War (the one that viewed the Dutch struggle for independence from the Spanish Empire) and the vital commercial hubs in the context of Dutch colonial expansion and trade (represented by the Asian Southeast, and mostly by the Indonesian archipelago). Barreto's geographical choice resembles the one made by Williams: he considers the history of Europe *within* Europe and the history of Europe *outside* Europe as inextricably connected. He claims that one cannot be fully understood without one another, just as Cerberus' body cannot be represented without one or more of his heads. The use of history allows him to extend the geographical scope of the analysis, to expose the dependency of Dutch statehood on colonial trade and capital accumulation by the Dutch East India Company (VOC, Vereenigde Oostindische Compagnie)[18].

He importantly highlights that those capitals allowed the United Provinces to sustain a war of independence against the global hegemon of the time, and to sit at the table of negotiations at Münster as a sovereign State. He does this by highlighting that during the Dutch Revolt, the VOC lent money and warships to the Dutch States General, as the States General had previously chartered the VOC and invested naval-military resources and public money in the company[19]. Barreto's efforts are aimed at conveying the inextricable connection between the making of the modern interstate system and the action of powerful forces beyond States themselves. He argues that, in their chameleonic nature, early-modern trading companies acted as Cerberus' third, and in many ways *invisible* head, playing a decisive role in the creation of the Westphalian myth, in the making of international law and of the modern world.

He encourages the reader to "put aside positivistic approaches that hide the actual actors and forces pulling the threads in the scenario of international law" and to look at "its material constitutive conditions"[20]. He retakes and reinforces a position which has usually

[17] Barreto, *Cerberus*, 149-150.
[18] Barreto, *Cerberus*, 168.
[19] Barreto, *Cerberus*, 168.
[20] Indeed, Barreto takes into consideration the material factors that defined the VOC and its activities in order to understand the actual magnitude of its influence on the history of international law. He considers the sheer volume of its material means and resources, reporting that the company controlled trade in almost all types of luxury goods: spices, opium, tea, porcelain, textiles, metals and exotic animals and that, in 1670, it employed 50,000 people and 30,000 soldiers, maintaining a fleet of 200 ships. In one passage, Barreto also mentions the VOC' size and turnover as determining factors. Furthermore, the author describes the global outreach of the VOC' shipping routes that welded together the Netherlands with South East Asia, China, India, Persia and Japan. Barreto also maps the actual extent of the political, legal, economic and financial power of the company. He reports that the VOC could settle colonies, build fortifications, war fleets and conscript military force, administer justice, imprison people, execute convicts, that it had the

been held by historians (rather than by international legal scholars) and does it by quoting historians such as Burbank and Cooper: "the VOC, not the state of the Netherlands, made an empire, and it did so by combining the joint-stock company's capacity to accumulate capital with the mechanism of armed, coercive commerce pioneered by the Portuguese."[21] He does it by reasoning himself as an historian.

Barreto considers the dynamics and the outcomes of the Thirty Years War as decisively influenced by what was happening on the other side of the world. Then he admits that from the point of view of the historian these connections have never been a mystery, but that a "legal mind" (be it of the academic or of the practitioner), might find hard to accept the idea that the European origins of the modern interstate system are deeply rooted in the colonial practices of hybrid subjects such as trading companies. He shows, through the material dimension of historical inquiry, that it is not possible to think about the rise of the modern State and the making of the international system without adequately taking into consideration the action of other, and equally important (if not even more decisive) forces other than States themselves.

Barreto's *Cerberus* can be pictured as a successful model of integration between the material dimension of historical inquiry and the history of international law. Cerberus' three heads are distinct, but inextricably connected parts of the same body. The three-headed creature has been used by Barreto to conceptualise relations of power during a precise historical time, namely, the early-modern dualism between the rise of the modern State and the Westphalian myth on one side, and aggressive competition for colonial expansion carried out and regulated by other subjects (such as trading companies) on the other. However, this does not mean that the "Cerberus framework" cannot be adapted to other stages in the history of international law (possibly including the present one). In this perspective, the author makes a compelling example related to the translation of the *Cerberus* framework into the reality of contemporary international law, with its practical implications:

"However, in as much as it remains silent about the part played by empires and companies in seventeenth- century international law, and in the contemporary global order, the state-centric Westphalian theory is immersed in a crisis of legitimacy. Resisting neoliberal globalization or neo-colonialism today requires elaborating a theory of international law in which empires, companies, and states have a role, and are under the law, with no prerogatives but, above all, with responsibilities derived from general international law, human rights law, humanitarian law, international economic law, international criminal law, and environmental law, at least to start with."[22].

## III.2 Weeramantry: Expanding the Horizon of Legal Reasoning

authority to conclude treaties with other political entities, wage war, exert territorial control and capture ships by privateering. He also goes further, highlighting that fact that the company could also issue currency, fix prices, and directly manage the production of spices.

[21] Jane Burbank and Frederick Cooper, *Empires in World History* (Princeton University Press 2010), 159 quoted in Barreto, *Cerberus*, 169.

[22] Barreto, *Cerberus*, 171.

The last, and arguably the most precious example of integration between the material dimension of historical inquiry and international law has been given by Christopher Weeramantry, then vice-president of the International Court of Justice, in the landmark *Gabčíkovo-Nagymaros* case. What makes his separate opinion invaluable is not only the prestigious context of the ICJ in which it has been written, nor the fundamental dilemmas it addresses (e.g. sustainable development, environmental protection), but how it integrates and synthesizes the material dimension of historical inquiry, the analysis of the history of international law and the practical dimension of judicial-legal reasoning. For what concerns the use of history (and of its methodology) in the field of international law, Weeramantry's opinion represents an actual bridge between theory and practice.

As in the cases of Williams, Gallagher and Robinson and Barreto, what is revolutionary about Weeramantry's opinion are his methodological choices. One can encounter the first (and perhaps the most groundbreaking) of these choices in the title of paragraph *d*: *The Need for International Law to Draw upon the World's Diversity of Cultures in Harmonizing Development and Environmental Protection*[23]. Once again, the fundamental methodological choice is about the *geography of history* and, in particular, about the geography of the history of international law. Simply put, the choice of which parts of the world to include in his reasoning.[24]

Weeramantry's words draw their force also from the what he interpreted as the Grotian tradition of "drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration"[25]. The second, crucial methodological choice is to cross the disciplinary border of international law to think about international law itself. A choice which is heavier, much harder to make in the context of an ICJ decision than in a piece of scholarly writing[26], but that Weeramantry perceives as directly flowing from the universal nature of the Court as an institution[27].

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[23] ICJ Reports, 96.

[24] "This case, which deals with a major hydraulic project, is an opportunity to tap the wisdom of the past and draw from it some principles which can strengthen the concept of sustainable development, for every development project clearly produces an effect upon the environment, and humanity has lived with this problem for generations. This is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants.". Weeramantry also quotes a passage from Sir Robert Jennings, in which he advocated for an expansion of the geography of international law (and of the history of international law): "It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions." ICJ Reports, 96.

[25] Weeramantry further refers to his interpretation of the "Grotian" approach in the course of the same page: "In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles a priori for the new discipline of international law, he sought them also a posteriori from the experience of the past, searching through the whole range of cultures available to him for this purpose.". ICJ Reports, 96.

[26] "Moreover, especially at the frontiers of the discipline of international law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose." ICJ Reports, 97.

[27] "Especially where this Court is concerned, "the essence of true universality"'~ of the institution is captured in the language of Article 9 of the Statute of the International Court of Justice which requires the "representation of the main forms of civilization and of the principal legal systems of the world" (emphasis added). The struggle for the insertion of the italicized words in the Court's Statute was a hard one, led by

The third choice of method is a chronological one. Namely, the choice of which historical periods and forms of civilization can inspire international law and its principles (in Weeramantry's case, the one of sustainable development). When reading the separate opinion one can see that, once having exhausted the recent normative history of international environmental law[28], the Sri-Lankan judge faces a methodological crossroad: drawing the temporal limits of historical analysis and legal reasoning.

Again, Weeramantry decides to extend those limits as far as possible, both in space and time: "In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia - in fact, the whole world. This is a rich source which modern environmental law has left largely untapped."[29]. In the course of the opinion, he integrates historical analysis and legal reasoning, looking at the contemporary principle of sustainable development through the lenses of various forms of civilisation and their approaches to environmental issues.

Weeramantry starts with the ancient civilisation of Sri-Lanka and its sophisticated system of irrigation[30], continues with the Sonjo and Chagga civilisations of Tanzania[31], touching

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the Japanese representative, Mr. Adatci, and, since this concept has thus been integrated into the structure and the Statute of the Court, 1 see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it. The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law." ICJ Reports, 97.

[28] ICJ Reports, 91-95.

[29] "As the Court has observed, "Throughout the ages mankind has, for economic and other reasons, constantly interfered with nature." (Judgment, para. 140.) The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age." ICJ Reports, 98.

[30] "I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs - development and environmental protection - in its ancient literature. I refer to the ancient irrigation-based civilization of Sri Lanka. It is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, game sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage. (…) This system of tanks and channels, some of them two thousand years old, constitute in their totality several multiples of the irrigation works involved in the present scheme. They constituted development as it was understood at the time, for they achieved in Toynbee's words, "the arduous feat of conquering the parched plains of Ceylon for agriculture". Yet they were executed with meticulous regard for environmental concerns, and showed that the concept of sustainable development was consciously practised over two millennia ago with much success." ICJ Reports, 98-100.

[31] Among the Sonjo, it was considered to be the sacred duty of each generation to ensure that the system was kept in good repair and all able-bodied men in the villages were expected to take part. The system comprised a fine network of small canals, reinforced by a superimposed network of larger channels. The water did not enter the irrigation area unless it was strictly required, and was not allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and water-borne diseases avoided. (…) Sir Charles Dundas, who visited the Chagga in the first quarter of this century, was much impressed by the manner in which, throughout the long course of the furrows, society was so organized that law and order prevailed (…) The furrow was a social asset owned by the clan." ICJ Reports, 104-105.

upon Persian *qanats*[32], ancient Chinese philosophy and hydraulic engineering[33], the use and conservation of soil among the Inca[34], also mentioning Islamic law[35], the traditional wisdom of Amerindian and Australasian populations[36] and several cultural references to pre-industrial Europe[37]. What strikes the reader, beyond the extent of the cultural, geographical and disciplinary diversity which sustains Weeramantry's entire reasoning, is the level of detail and analytical depth which permeates his approach to the historical dimension of sustainable development, both material and conceptual. Apart from

[32] "Another example is that of the qanats of Iran, of which there were around 22,000, comprising more than 170,000 miles 59 of underground irrigation channels built thousands of years ago, and many of them still functioning. Not only is the extent of this system remarkable, but also the fact that it has functioned for thousands of years and, until recently, supplied Iran with around 75 per cent of the water used for both irrigation and domestic purposes." ICJ Reports, 105.

[33] "China was another site of great irrigation works, some of which are still in use over two millennia after their construction (…) Needham describes this as "one of the greatest of Chinese engineering operations which, now 2,200 years old, is still in use today (…) Such action was often inspired by the philosophy recorded in the Tao Te Ching which "with its usual gemlike brevity says 'Let there be no action [contrary to Nature] and there will be nothing that will not be well regulated'". Here, from another ancient irrigation civilization, is yet another expression of the idea of the rights of future generations being served through the harmonization of human developmental work with respect for the natural environment." ICJ Reports, 106.

[34] "Regarding the Inca civilization at its height, it has been observed that it continually brought new lands under cultivation by swamp drainage, expansion of irrigation works, terracing of hillsides and construction of irrigation works in dry zones, the goal being always the same - better utilization of all resources so as to maintain an equilibrium between production and consumption. In the words of a noted writer on this civilization, "in this respect we can consider the Inca civilization triumphant, since it conquered the eternal problem of maximum use and conservation of soil. Here, too, we note the harmonization of developmental and environmental considerations." ICJ Reports, 106.

[35] "This survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law - the principle of trusteeship of earth resources - is thus categorically formulated in this system." ICJ Reports, 108.

[36] "In relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe. When Native American wisdom, with its deep love of nature, ordained that no activity affecting the land should be undertaken without giving thought to its impact on the land for seven generations to when African tradition viewed the human community as threefold - past, present and future - and refused to adopt a one-eyed vision of concentration on the present ; when Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce, and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed the need for harmony with nature; and when Aboriginal custom, while maximizing the use of all species of plant and animal life, yet decreed that no land should be used by man to the point where it could not replenish itself, these varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied." ICJ Reports, 107.

[37] "Europe, likewise, had a deep-seated tradition of love for the environment, a prominent feature of European culture, until the industrial revolution pushed these concerns into the background. Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe - traditions whose gradua1 disappearance these writers lamented in their various ways7'. Indeed, European concern with the environment can be traced back through the millennia to such writers as Virgil, whose Georgics, composed between 37 and 30 BC, extols the beauty of the Italian countryside and pleads for the restoration of the traditional agricultural life of Italy, which was being damaged by the drift to the cities." ICJ Reports, 108.

referring to, and regularly quoting the work of historians (such as Toynbee, Needham, Parker and many others), in several passages Weeramantry himself seems to take the role and enter the *habitus* of the historian even before the one of the ICJ judge.

With the aim of surveying the modalities in which various forms of civilisation balanced the common human needs for development and sustainability, he analyses their approach to the surrounding environment and their relationship with it, in both its material and intangible aspects. Therefore, including law (both written and unwritten), social values, custom, tradition, technology, engineering, economy, agriculture, religion, philosophy, art and literature.

The in-depth historical analysis of all these aspects is used by Weeramantry to draw and isolate traditional approaches, practices and principles applicable to modern environmental law "not merely in a general way, but with reference to specific principles, concepts, and aspirational standards". Among the most important, Weeramantry re-proposes the principle of trusteeship of earth resources dear to the aboriginal wisdom of Australasia and traditional Islamic law, the concept of intergenerational rights, the collective ownership of natural resources and community-based forms of responsibility, all deeply rooted in sub-Saharan and Native American cultures, the equilibrium between use, preservation and regeneration achieved by the hydraulic engineers of ancient China, Persia and Sri-Lanka[38].

It can be safely said that the ultimate reason of Weeramantry's separate opinion is to demonstrate that the untapped potential of these ancient approaches, practices and principles is not confined to mere inspiration, but that it is of *direct and practical relevance* to both the development of modern international environmental law and the resolution of the dispute at hand between Hungary and Slovakia[39]. For the purposes of this article, it can also be said that the then vice-president of the World Court could not have done it without making the fundamental methodological choices described in the first part of this section.

## IV. Law as History and History as Law? Integrating the Craft of the Historian as Methodological Awareness

In recent years, some scholars have been arguing that "International legal history does not seem to constitute an autonomous discipline yet; rather, it remains a hybrid field of study at the crossroads between legal history and international law. The history of

[38] ICJ Reports, 110.

[39] "Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them - embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival. Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law." ICJ Reports, 110.

international law has become a "source of tension" between legal historians and international lawyers. These epistemic communities have different aims, objectives, and approaches"[40]. In the context of the history of international law, the means to resolve the existing tension between "historians' history" and "lawyers' history"[41] should go beyond interdisciplinarity, dialogue, and cross-fertilization. In order to break the disciplinary boundaries between history and international law, the quest is going beyond "mere" interdisciplinarity and give rise to dynamics of *immedesimation*.

As sustained by Vadi: "Only through methodological awareness can the history of international law evolve from its status as a 'sub-discipline' of both international law and history to an independent mode of analysis. In this manner, "law becomes history, [and] history becomes law." International legal history has the potential to break down the boundaries between international law and history. It does not aim to explain "history for the sake of history" or international law for the sake of international law; rather, it aims to "understand[ ] law as history [and] history as law"[42].

A further step could be added to the reasoning. Namely, that the path towards full methodological awareness in the history of international law passes through what could even be defined as process of cross-disciplinary empathizing. Putting it rather bluntly, trying to walk in the shoes of the other. While it might be expected that "International lawyers are not writing like historians and legal historians are not writing like international lawyers"[43], it might be the case that they might be trying to enter the perspective of the other. The sole immedesimation *effort* of attempting to think or write "as historians" or vice versa is revolutionary in itself. The complementarity between one and the other, between historical approaches founded on the contextualization of the law for the sake of the past or rather on its genealogy for the sake of "the light it throws on the present", cannot express its full potential without this immedesimation effort.

Whether this reasoning can be taken to its extreme consequences to advocate for a *post-disciplinary* approach[44], aimed at overcoming the existing disciplines altogether, exceeds the scope of this article, just as the extreme variety of existing methods and perspectives cannot be accounted for in the length of it. What, however, is crucial to underline is that, while "most international lawyers are not historians by training and most historians do not have in-depth expertise in international law", the benefits of attempting to "walk in each other's shoes" in terms of writing and methodology, can be extensive. Even asking oneself questions that would have never come up while thinking in one's own habitual disciplinary perspective. Doing this requires a good dose of methodological awareness, immedesimation and also, if you will, empathy. A similar process, for instance, can lead the lawyer to see the law as one part of a larger historical context shaping the law itself, and the historian to think more extensively to the possible genealogical ramifications of

[40] Valentina Vadi, "International Law and Its Histories: Methodological Risks and Opportunities," *Harvard International Law Journal* 58 n. 2 (2017), 351.
[41] Anthony Musson and Chantal Stebbings, 'Introduction', in Anthony Musson and Chantal Stebbings (eds) *Making Legal History: Approaches and Methodologies* (2012).
[42] Roman Hoyos, "Legal History as Political Thought," *American Journal of Legal History* 56, n. 13 (2016), 80.
[43] Vadi, *International Law and its Histories*, 348.
[44] On the concept of post-disciplinary see Bob Jessop and Ngai-Ling Sum, "Pre-disciplinary and Post-disciplinary Perspectives," *New Political Economy* 89 n.6 (2001).

legal histories in the present. As much of the present article has been focused on the discussion of certain key methodological choices in selected works of historians and international lawyers, it should be underlined that a fundamental component of this methodological awareness by authors is for them to "consciously reflect about the choices they make…" trying as much as possible to be "explicit and transparent about them"[45].

It has been argued, for instance, that legal biographies as "A mere description of the principal events of public and private lives without an analysis of their historical context would not contribute to the history of international law"[46]. Importantly, this reasoning can be extended to all other types of histories, to the history of events, institutions, of concepts and ideas. Therefore "Should historians be cognizant of current international law to understand its past? In parallel, should international law scholars be cognizant of historical method(s) for writing the history of the field?"[47]. To a certain extent, yes. They could also go a step beyond being "cognizant" of other methods. They could start questioning themselves on how an historian would contextualize a specific legal norm or on how a lawyer would analyze the evolution of that norm over time. However, this is not to say that historians should start turning into lawyers or vice versa, but the "historical" or "historiographical turn"[48] of international law and the "international turn"[49] of legal history suggest how much the lawyer can benefit from an increased ability to see and confront historical complexity.

The key ability of the international lawyer in relation to history is the one of seeing connections across time and space in the evolution of concepts and institutions, of identifying commonalities and continuities. As put by Anne Orford "lawyers are trained in the art of making meaning move across time"[50]. This ability, however, faced as it is with the ever-growing relevance of the history of international law and with the compenetration, to say, the mutual interfusion of historical methods with the subject, along with the increasing availability of means for historical research, requires to be complemented by a similarly enhanced ability to "tame" historical complexity[51]. Therefore, to develop the ability of questioning diachronic analyses from a synchronic perspective. In a way, developing the ability to *think as historians*.

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[45] Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 15.
[46] Vadi, *International Law and its Histories*, 346.
[47] Vadi, *International Law and its Histories*, 313.
[48] George Rodrigo Bandeira Galindo, "Martti Koskenniemi and the Historiographical Turn in International Law," *European Journal of International Law* 16 (2005), 541.
[49] David Armitage, *Foundations of Modern International Thought* (Cambridge University Press, 2013), 73.
[50] Anne Orford, "International Law and the Limits of History" in Wouter Werner, Marieke de Hoon and Alexis Galan (eds) *The Law of International Lawyers: Reading Marti Koskenniemi* (Cambridge University Press, 2017), 172.
[51] An historical complexity which can present itself in a chaotic and unsettling way, as noted by Bederman "…even in cases of abundant historical materials, the historical record can still be ambiguous or contradictory. History does not provide answers, or at least not in a form recognized by international lawyers" David J. Bederman, "Foreign Office International Legal History" in Matthew Craven et al. (eds) *Time, History and International Law* (Brill, 2007), 63. As also noted by Bederman, this extreme and unsettling complexity clashes with the "result-driven" thinking of lawyers as opposed to the one of historians (not to say that the work of historians or their thinking is never "result-driven" under different aspects).

The work of Martti Koskenniemi is also particularly important in this sense, as the one of the decisive authors, probably *the* one most decisive author in articulating the "historical turn" in the scholarship of international law. The work of Koskenniemi on the history of international law is particularly revealing for the purposes of this article, since his research and writing methodologies synthesize the "political" ability of international lawyers "to make meaning move across time" with the master qualities of the historian initially described by Bloch. This can be observed in works such as *From Apology to Utopia*[52]; *The Gentle Civilizer of Nations*[53]; *Histories of International law: Dealing with Eurocentrism*[54] or *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870*[55]. The methodological operation performed by Koskenniemi in his trajectory of works on the history of international law is very similar to the ones already observed in the previous sections. Koskenniemi's histories of international law are, indeed, primarily intellectual histories, but always considered into the material contexts of power at the roots of historical complexity. In substance, the primary aim of Koskenniemi's works is to see, to uncover the historical complexity behind a number of apparently universal and timeless legal concepts, showing their inextricability from certain historical contexts, projects, interests, and material conditions.

## V. Conclusions

The approach to the history of international law that one can observe in Barreto and Weeramantry is undistinguishable from the approach of these authors to international law in general. One step further, analysing their methodological choices, their argumentative techniques, and the outcomes of their reasoning, one can also see that their approach to history constitutes an integral part, if not the keystone, of their approach to international law altogether. Indeed, it can be argued that the two approaches are, and should be, closely intertwined, mutually reinforcing, and inseparable from one another. The conclusions these authors reach with regard to the theory and practice of international law are inseparable from the use of history they make in order to reach them. They produce an understanding of international law which is shaped, enhanced, reinvigorated by a methodological approach to history which is no different from the one used by historians.

They do not only use history as such, but the methodology, the mentality, the tools and techniques of historians, with whom they maintain a continuous dialogue through reference and interpretation. What makes their approach particularly effective is that they often *think as historians*, more than as international lawyers, when seeking to narrate, understand and explain the history of international law. This type of approach renders more effective attempts to formulate, support and prove counter-hegemonic theses, and to expand the horizons of international law as a discipline. It also confers the

[52] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Lakimiesliiton Kustannus, 1989).
[53] Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).
[54] Martti Koskenniemi, "Histories of International law: Dealing with Eurocentrism," *Rechtsgeschichte* 19 (2011), 152-176.
[55] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press, 2021)

methodological flexibility, when necessary, to go *beyond texts* and focus on what Barreto calls "material constitutive conditions". As seen with regard to the work of Robinson, Gallagher and Williams, they concluded that a satisfactory understanding of historical phenomena (such as imperialism and slavery) could only be reached by engaging with the complexity of facts, measuring themselves with the various, geographically differentiated dimensions of those phenomena.

Integrating the craft of the historian in international legal expertise compels both the scholar and the practitioner to look at the history of international law, and therefore at its present state and future developments, without the constraint of temporal, geographical and methodological blinkers derived from the (oftentimes unconscious) mental division of disciplines into watertight compartments. In Bloch's words, *the faculty of understanding the living* is the master quality of the historian. Why should not it be the one of international lawyers as well?