The Places in Between[1]

Daniel Bodansky[2]

Should international lawyers care about history and, if so, why? What is history for? In *International Law and the Politics of History*,[3] Anne Orford frames the possible answers in Manichean terms. On one side are professional historians, who believe that history can "answer once and for all in some determinate, objective manner" questions about the "meaning and understanding of international law" (p. 95). On the other side are critical scholars, like herself, who believe that history is "inevitably partisan and political" (p. 300) and provides lawyers only with arguments, not answers.

Orford is, of course, correct in objecting to hegemonic claims about the role of history in answering legal questions. But that does not necessarily mean that history is politics "all the way down" (a phrase that she uses as the title of a subsection[4] as well as in the text seven times[5]). In presenting only these two extremes, Orford does not consider that there might be places in between – that history might be able to answer some questions but not others; that historians might be more or less objective and more or less partisan; that history might be neither neoformalism nor politics, but simply history.

History as Neoformalism

In her account of the "turn to history" in international law, Orford's *bête noire* are professional historians such as Lauren Benton, Ian Hunter, Randall Lesaffer, Samuel Moyn, and Quinn Slobodian.[6] Orford styles their

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[1] Hat tip to RORY STEWART, THE PLACES IN BETWEEN (2007).

[2] Regents' Professor, Sandra Day O'Connor College of Law, Arizona State University.

[3] ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (2021).

[4] Id., § 7.3.2.

[5] Id., pp. 7, 211, 287, 299, 310, 315, 320.

[6] Their writings include: Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics,* 21 J. HIST. INT'L L. 1 (2019); Ian Hunter, *About the Dialectical Historiography of International Law,* 1 GLOBAL INTELLECTUAL HIST. 1 (2016); Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, in TIME, HISTORY

approach to international law "neoformalist" (pp. 294-96, 319-20), apparently using the term "formalist" to describe any legal theory that claims to provide objective, apolitical answers to legal questions. She interprets the embrace by international lawyers of their methodology as an attempt to provide "a new foundation" for international law that provides "an exit from the uncertainty, self-doubt or existential dread" produced by legal realism's demolition of the old formalism (p. 7).

As Orford describes professional historians and their acolytes, they present an easy target:

- They uncritically believe that history is "value free, impartial and verifiable" (p. 254), oblivious to the various ways that their values and perspectives influence how they write history, including in their choice of problems and their interpretation of facts.
- They believe that professional historical methods provide "a new foundation" for international law that "can lift debates about legal meaning out of the realm of partisan politics and into the calmer domain of empiricist science" (p. 8), seemingly unaware that legal interpretation involves a host of highly contested questions that are not historical in nature and that history could not possibly answer: For example, how much should authorial intent count in legal interpretation of, say, a treaty, as compared to the ordinary meaning of the words or the subsequent practice of the parties? To the extent that intent counts, whose intent? Are the authors of a treaty the states that negotiated it and, if so, how do we determine their intent? Do the views of the individuals who negotiated a particular treaty provision carry extra weight? How do we determine the collective meaning of a multilateral agreement, if the numerous states involved in the negotiations had differing intentions? Given issues such as these, the view of professional historians that history "can produce professional, impartial and verifiable interpretations of past texts, events, concepts, and practices" (p. 5) seems hopeless naïve.

AND INTERNATIONAL LAW, at 27 (M. Craven, M. Fitzmaurice, and M. Vogiazi, eds., 2007); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018).

- Professional historians have highly inaccurate views about international lawyers, whom they view as the "villain of the story," "mindlessly committed to scholasticism" (p. 175) and believing that international law is "timeless, natural, universal, and ahistorical" (p. 250). The reality is quite different: many if not most international lawyers working today have been deeply influenced by legal realism and view international law as "made not found" (p. 252).
- To make matters worse, professional historians combine their naïve, uncritical views about history and legal interpretation with a hegemonic belief that theirs is the one true historical method. Accordingly, they attempt to police their professional turf by correcting what they believe to be flawed accounts of legal history by benighted or politically motivated international lawyers, who either are ignorant of how to study history properly or deliberately "manipulate the past for present political purposes" (p. 255). If international lawyers want to do history, they must join the club and use empiricist, contextual historical methods (p. 100).
- Finally, like many revisionists, professional historians make inflated claims about the novelty of their ideas, ignoring works by international lawyers who have made similar arguments (pp. 102-03, 27).

Orford's portrayal of professional historians bears little resemblance to any historian I ever encountered when studying history in college or graduate school. But perhaps the historians of international law she discusses do hold the extreme views that Orford ascribes to them.[7] If so, then Orford's vexation and even annoyance are understandable. It is never pleasant being talked down to by self-important scholars from another field, trying to protect their turf. And it is particularly annoying when their views are themselves flawed, like the claims that history is value free, impartial, and verifiable, and can provide objective answers to legal questions.

To the extent professional historians make hegemonic claims about the role that history can play in answering legal questions, Orford's criticisms are well founded. History cannot tell us what international law is, since that is a conceptual rather than an empirical question. And it cannot tell us

[7] I am not familiar with their work, so I do not have any independent judgment on the accuracy of Orford's depiction.

what role history should play in legal interpretation, since that is a normative rather than an historical question. As she concludes, "questions about the 'meaning and understanding' of international law … are not questions that can be answered once and for all in some determinate, objective manner through reaching for the correct tools" (p. 97).

History as Politics

In justifiably pushing back against the pretensions of professional historians to provide objective answers, however, Orford goes to the other extreme. The alternative she offers to "history as formalism" is "history as politics," an equally one-dimensional standpoint. In her view, if history is not value free, impartial, and verifiable, then it must be politics "all the way down."

Orford's account of history as politics has both a descriptive and a normative element. Descriptively, Orford argues that there is "no stable referent or fixed object," "no neutral story to be told" (p. 256). Even "application of historical best practices, she says, "cannot correct "partisan and distorted legal interpretations of past texts, cases, practices or concepts" (p. 300). History is "inevitably partisan and political" (p. 300) and the accounts of historians are "necessarily as partisan and political as those produced by the most pragmatic of lawyers" (p. 255).

Normatively, Orford argues that international lawyers need to recognize and make the most of that reality. History does not offer a hiding place that allows one to avoid political judgment and reach objective, value free conclusions. Rather than pretend it does, international lawyers should accept that, in studying the past, they necessarily make value choices, and take responsibility for "actively constructing accounts of the law's past" (p. 9). The last chapter of her book purports to explore "ways that creative lawyers might actively use the past as part of an overtly political and value-driven engagement with international law in the present" (p. 287).

Much of what Orford says about the politics of historiography is unexceptionable:

- Presentist concerns play a role in the choice of historical problems to study.

- Historians' political perspectives can color how they interpret the facts.
- History often plays a role in political debates and can be used for partisan purposes.
- Some historians are themselves partisans.

But, granting all of this, it does not follow that history is "intrinsically" polemical or that historians are necessarily partisans. Consider an analogy. COVID policies have now become highly partisan. As a result, studies of the effectiveness of COVID vaccines figure prominently in partisan debates. But this does mean that vaccine studies are themselves partisan, if by "partisan" we mean "not objective." Using the term "partisan" to describe both a randomized double-blind study of the Pfizer vaccine and an anecdotal report about the efficacy of ivermectin is more misleading than illuminating, since it obscures the significant differences between the two.

Similarly, the use of history in political argumentation does not necessarily make it partisan. Consider the so-called Gulf of Tonkin incident in 1964, which led to greater engagement by the United States in the Vietnam War. At the time, the United States claimed that Vietnamese boats had attacked a U.S. naval vessel, but later historical research concluded that the attack never happened.[8] Both the initial account and the later revision were "political" in the sense that they had political implications: the initial account as a justification for U.S. escalation in Vietnam and the more recent historiography as a critique of US involvement and the Johnson Administration. But does Orford really think that the two accounts are equally polemical? Does she really believe that there was no fact of the matter about whether the North Vietnamese attacked the U.S. naval vessel?

Orford is not altogether clear how she would answer those questions. She acknowledges that the persuasiveness of an historical account depends "in part on whether the details appear accurate" (p. 293), invoking a concept – accuracy – that assumes a distinction between truth and falsity. But she also asserts that history has "no stable referent or fixed object" (p. 256) and that there is no truth out there (p. 9), suggesting that, as an ontological matter, objective historical facts do not exist. Although Orford

[8] EDWIN E. MORSE, TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR (rev. ed. 2019).

seems to feel that accusations by professional historians are unfair that critical writers like herself are "suspending 'empirical history altogether' … in the pursuit of … 'academic anti-positivism,'" she invites such criticisms when she speaks of "empiricist *dogmas*" (p. 81, emphasis added); expresses skepticism about the "linear conception of time" (p. 87); and questions the "normative desirability" of methodological rules such as not placing a text in the "wrong" historical context, not "cherry-picking" events, or using "evidence-based findings" to correct "partisan or instrumentalist misuses of history" (p. 106).

Passages such as these raise the question, how far does Orford carry her view that history is politics "all the way down"?

- Does Orford really consider it permissible for international lawyers to cherry-pick examples, citing only those examples that confirm their argument and omitting those that undermine it?
- Does she believe that there is any difference between history and propaganda and, if so, what distinguishes them methodologically? If the claim by Chinese lawyers that China differs from other major powers in not interfering in other states (p. 61) is simply an "innovative reading of history" (p. 65), as she calls it, rather than pure propaganda, is the same true of Russia's historical justification for annexing Crimea, or former President Trump's assertion that the 2020 election was stolen from him?
- Does Orford believe that anachronistic readings of history are unproblematic, or does the concept of "anachronism" simply not have any meaning in her theory of history? Would it be permissible to interpret a fourteenth century text that referred to a person as "nice" on the basis of the term's current meaning, as opposed to its meaning at the time, which was silly or foolish?[9] In Shakespearean interpretation, does it matter that the word "cunning" had a different meaning in Shakespeare's time than in our own and, if so, how?[10] Or, in Orford's view, is this fact irrelevant – or not, in fact, a "fact"?

[9] Emma Law, "10 English Words that Have Completely Changed Meaning," *Culture Trip* (2018), available at: https://theculturetrip.com/europe/articles/10-english-words-that-have-completely-changed-meaning/.
[10] C.T. ONION, A SHAKESPEARE GLOSSARY (3d ed., 1986).

Orford says her book "should not upset historians whose professional commitment is to produce an accurate or verifiable account of the past" (p. 10). But to the extent she questions whether such an account of the past is possible – to the extent that "histories" are simply stories about the past told for partisan purposes – it is hard to see how historians wouldn't be upset, since that seems to do away with the concept of history as history.

History as History

Why study the history of international law, if history is politics "all the way down," as Orford believes? That is the question that Orford seeks to address in the last chapter of the book (pp. 285-320) but does not clearly answer.

At times, Orford seems to suggest that we should study history because it can be a useful polemical tool to advance our values; it can be persuasive in the adversarial game that constitutes international law. People respond to stories and history is a form of storytelling. It is a way of trying to win an argument by telling a persuasive story. But, in that case, should we evaluate historical scholarship based entirely on whether it tells a good story? Or does it matter whether the story is true or false, accurate or inaccurate? Is there a difference between history and historical fiction? Or are we in a post-truth world where the concepts of true and false do not apply?

Consider, for example, the TWAIL critique that imperialism and colonialism are "ingrained in international law as we know it today" (p. 34) and that the doctrine of humanitarian intervention was "closely tied to nineteenth century imperialism" (p. 32). On what basis should we evaluate this claim? What would count as an argument for or against it? Should we decide whether to accept it based on whether it confirms our prior beliefs, advances our interests, or is emotionally appealing? Does the evidence presented in support of the claim matter and, if so, then would disconfirming evidence serve to undermine it? How would one argue in favor of the claim to someone who did not accept it, except on the basis of empirical evidence?

Orford does not provide clear answers to these questions. She does not attempt to set forth methodological rules to replace the methodological "dogmas" that she questions. In arguing that history is simply a polemical

tool that people use to achieve their presentist values and goals, Orford does not explain what makes it a distinctive enterprise – how it differs from politics, storytelling, and propaganda. She tells us what history is not, but not what it is.

In my view, what distinguishes history from storytelling is that history purports to tell true stories, and what distinguishes historians from propagandists is that historians seek to tell those stories as best they can. Orford is entirely within her rights if she wishes to argue that history should play a diminished role in legal scholarship because it cannot certain questions – for example, what was the intent of the drafters of a treaty. But, to the extent she thinks that history matters, which she clearly does, then it is important to get the history right, insofar as possible. It is important, that is, to have a conception of history *as history*. For example, if we think that the meaning of a document depends in part on the intentions of the drafters, or that states should be held responsible for the harms they cause, then we need to determine the historical facts relevant to authorial intent and causation as accurately as possible. In that context, interpreting a term based on its current rather than its historical meaning is a mistake rather than a legitimate choice. The same is true of citing only the evidence regarding a single cause, while ignoring evidence about alternative causes. The methodological rules against anachronisms and cherry-picking evidence are not dogmas but rather important elements of studying history as history.

Orford is justifiably skeptical of historians claiming to answer legal questions. But we should be equally skeptical of legal advocates claiming to do history, since the goals and regulative standards of legal advocates and historians are very different. The job of a legal advocate is to start with a conclusion and then look to history to support it. In contrast, the job of the historians is to start with the evidence and draw the best supported conclusions. This is not to say that an international lawyer advocating a partisan position is incapable of producing excellent history. We should not fall prey to the genetic fallacy. Even if a piece of historical scholarship has a political motivation, this does not invalidate the research. We should evaluate historical claims based on the available evidence, rather than dismiss or accept them based on their source. Nevertheless, it is important to distinguish the role of the lawyer and the historian.

Of course, no one sees the world from a completely neutral vantage point; we are all influenced, to some degree, by where we stand. Both the concept of the neutral scholar and the concept of the advocate are ideal types. In practice, most people reside in the places in between. Their reasoning is more or less motivated and their histories more or less polemical. Some international lawyers act more like historians than advocates; they seek simply to understand the past, rather than use it instrumentally to advocate for a predetermined goal. Conversely, some historians use history to advocate an ideological position; in doing so, they act more like partisans than scholars.

Two further caveats are in order. First, history involves much more than a report of facts; it involves questions of interpretation and explanation, which do not have objective answers -- for example, what was the cause of the French Revolution? was Abraham Lincoln a racist? Questions such as these lie in the places in between: they do not have objective answers, but that does not mean that anything goes. The objective facts matter. A theory that explained the French Revolution in terms of increasing poverty would be undermined by evidence that incomes were, in fact, rising in pre-Revolutionary France.

Second, even when an historical question is factual, determining the facts may be difficult if not impossible. I remember reading in high school a book entitled, *What Happened on Lexington Green*?,[11] for a course on theories of history. The book was intended to illustrate how hard it is to ascertain historical facts – in this case, the fact about whether the British or American forces fired first, in the incident that initiated the American Revolutionary War. American and British accounts of the incident were clearly polemical – they were written with a political purpose in mind. But, in 1973, when I took the class, I doubt many of my classmates had a preferred answer – I think I can honestly say that I did not. So we sifted through the evidence as best we could. We tried to play the role of historian rather than polemicist, albeit in an untrained manner. My memory is that there was no clear answer; the question was open to dispute. But neither was it simply political. It lay somewhere in between.

[11] P. BENNETT, WHAT HAPPENED ON LEXINGTON GREEN? AN INQUIRY INTO THE NATURE AND METHOD OF HISTORY (1970).

Conclusion

Orford justifiably objects to professional historians making international lawyers the "villain of the story" (p. 3) and accuses them of a "binary" view of the world (p. 111). But although she says she wants to move beyond a "hermeneutic of suspicion," she falls prey to the same sins that she attributes to historians: she makes them her foil and offers a binary approach to international legal history, in which the only two options seem to be history as neoformalism and history as politics. In doing so, she fails to explore what is distinctive about history and how it can contribute to legal issues, even if it cannot solve them.