The Trials and Tribulations of Anne Orford and why contextual history is a gift to law[1]

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Australian lawyer and legal scholar Anne Orford has long been among the most prominent voices in the field of international law. Her research has focused on a number of diverse topics, including human rights and humanitarian intervention, international economic law and dispute settlement and, perhaps most relevant for this special issue, the history and theory of international law. In recent years, however, she has used her sharp pen to criticize the inroads made by historians into the field of the legal history of international law in the last two decades. To Orford it is crucial that legal scholars are allowed to use history for present purposes as an important tool to establish intellectual coherence within the discipline.[2] The methodology of contextual intellectual history according to Orford considers such a use of history as an inadmissible anachronism and thus poses a potentially subversive threat to the legitimacy of international law in a contemporary world where it is sorely needed.[3] She is not the only voice that has expressed concerns about the methodology of historians when working on legal history. Another dominant researcher of the field, Finnish legal scholar Martti Koskenniemi initially supported Orford, arguing that the 'validity of our histories lies not in their correspondence with "facts" or "coherence" with what we otherwise know about a context, but how they contribute to emancipation today.[4] More recently, the critique by historians of the historical methodology of legal scholars has led Koskenniemi to rethink his position on the importance of historical context, anachronism in historical analysis and the importance of archival sources.[5] Yet, he still agrees with Orford in her condemnation of contextual history since these scholars 'rely on a 'positivist' separation between the past and the present that encourages historical relativism and end up suppressing or undermining efforts to find patters in history that might account for today's experiences of domination and injustice'.[6] Essentially, both scholars believe a key feature of law, its existence beyond time and context, is what gives it legitimacy and its aura of progressive transformation. However, this belief in law's capacity to exist outside of history requires constant work by lawyers and legal scholars and an engagement with the past that liberates

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[2] Orford, Anne. 'On International Legal Method', *London Review of International Law* 1(1) (2013), 166-197, 171.
[3] Orford, Anne. 'International Law and the Limits of History', in Wouter Werner, Marieke de Hoon and Alexis Galán (eds.), *The Law of International Lawyers. Reading Marttti Koskenniemi*, (Cambridge: Cambridge University Press, 2017), 297-320.
[4] Martti Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International Law' *Rechtsgeschichte – Legal History* 22 (2014), 119-139, 129. This followed logically from his statement about the methodology underlying one of his major monographs, Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, (Cambridge: Cambridge University Press, 2001), p. 10: 'The essays do not seek a neutral description of the past 'as it actually was' – that sort of knowledge is not open to us – but a description that hopes to make out present situation clearer to us and to sharpen our own ability to act in the professional contexts that are open to us as we engage in our practices and projects. In this sense, it is also a political act.'
[5] See for example Martti Koskenniemi, 'Epilogue: to enable and Enchant – on the Power of Law', in Wouter Werner, Marieke de Hoon and Alexis Galán (eds.), *The Law of International Lawyers. Reading Marttti Koskenniemi*, (Cambridge: Cambridge University Press, 2017), 393-412.
[6] Cited in *ibid.*, 406.

law's normative content from the trappings of context and time.[7] Contextual historians are thus perceived as a serious threat to the very essence of what law is about, which must be addressed.

This is exactly what Orford does in her new book, 'International Law and the Politics of History', where she finally delivers her ultimate argument of why, what she now terms 'empiricist history', poses a danger to the discipline of international law. The book is not, according to Orford, addressed to historians who use their contextual and archive-based methodology to write histories about the past but do not engage actively in the present work of developing international law. Instead, her book is written to the legal scholars and historians who use 'empiricist history' to challenge the ongoing creative work to renew the field of international law. The ambition of Orford is indeed to make those scholars more aware of the political stakes involved in writing legal history for the development of international law by developing a theoretical and conceptual foundation for a new discussion of how to engage with the past of international law. The aim is that scholars can develop methods that contribute to the fruitful development of international law, instead of being imprisoned by the methodology of historians.[8] Orford underlines that the book is not intended to build new walls but is an attempt to rethink the relations between law and history, two disciplines that she argues are already intimately related.[9]

This may all sound constructive, but in Orford's book these aims are reached through a wholesale attack against contextual history and its methodology, although the examples given by the author almost exclusively concern merely one genre of history, namely intellectual history. It seems clear that the rhetoric used by historians to promote their work, such as claims to that they have produced an original history based on new primary sources or traced the origins of international law or international institutions have been perceived by the author as positivist postulates. What is even worse to Orford, who is a stern defender of the realist understanding of law as 'made' not 'found', is the fact that contextual history is now used in contemporary legal debate to promote a neo-formalist approach to law, citing the alleged objectivity of historical research and methodology.[10] To counter neo-formalism she attempts to destroy the reputation of the historical discipline as being able to offer empirical accounts that can be used to trace the original meaning(s) of law and international institutions.

Just as those legal scholars who use legal history to bolster their neo-formalist claims, Orford believes that historians themselves think they deliver objective, verifiable, contextual accounts in the positivist tradition. To Orford this mistaken belief in the objective nature of contextual history is easily rejected simply by the fact that legal historians when engaging with international law have to give some form and meaning to their object of study through abstraction and generalisation.[11] This is done, Orford claims, by drawing on contemporary definitions of international law and as a result historians, whether they like or not 'throw their hat into the presentist ring'.[12] All history of international law is consequently to be considered political and 'intrinsically polemical'.[13] Indeed, Orford insists that the history of international law is as much conditioned by the insights of realism

[7] Natasha Wheatley, Law and the Time of Angels: International law's method wars and the Affective Life of Disciplines, *History and Theory* 60, no. 2, (June 2021), 311-330, here 326-328.
[8] Anne Orford, *International Law and the Politics of History*, (Cambridge: Cambridge University Press, 2021), p. 10
[9] Ibid, p. 10.
[10] Ibid, p. 319.
[11] Ibid, p. 255.
[12] Ibid, p. 256.
[13] Ibid, p. 257.

as is the legal discipline. Since historical research depend on the definition of international law, it is just as subjective, partisan and political as the various ways lawyers and legal scholars use the past (so much for leaving historians that focus on historical scholarship in peace!). It is politics all the way through.[14]

Claiming victory over contextual history and its neo-formalist potential, she concludes that the methodology of history cannot resolve the dilemma faced by law due to 'the ambiguous or indeterminate nature of past legal texts, practises, cases, or decisions' by providing 'more evidence and a better understanding of the context in which texts were authored, institutions created, or adjudicative bodies constituted.'[15] The classical historical arguments about motives, ideological understandings, and origins 'turn out to be part of the political struggle for law rather than above it'.[16] Indeed, 'there are no historical methods that can save us from the political character of international legal interpretation.'[17] History is simply not the master discipline for interpreting the past.

To exemplify this Orford takes no prisoners in an acid test of three prominent books of legal history by respectively Laureen Benton and Lisa Ford, Samuel Moyn, and Quinn Slobodian.[18] Her critique of Benton and Ford for drawing their understanding of international law from the present, which then according to Orford renders their analysis completely subjective, seems quite unfounded.[19] But her critique of Moyn and Slobodian, both writing intellectual history, has more sting. The intellectual histories pursued by Moyn and Slobodian for all their revelations about the thinking of key intellectuals, often tend to overblow the importance of the latter. This is particularly problematic, as pointed out by Orford, in the case of Slobodian's claim of how a circle of Geneva ordoliberal lawyers with origins in the interwar period developed the decisive blueprint for the World Trade Organisation, without providing an analysis of the broader international and economic negotiations that led to the establishment of this organisation to back it.[20] Nevertheless, Orford's sample of historical work is exceptionally thin and despite its impact in the field, is taken predominantly from intellectual history considered then to be representative for the entire discipline of history. Moreover, with Moyn and Slobodian she has picked two historians who are well known for their strong political engagement.

Orford also counters the critique by historians of legal scholarship for using history in a selective and ideological way. Historians have not understood the complex and intertwined nature of legal practice and scholarship as she explains in chapter 5. Lawyers are in fact much better at working with the past than historians tend to think.[21] Lawyers and legal scholars use history in their

[14] Ibid, p. 315.
[15] Ibid, p. 283.
[16] Ibid, p. 283.
[17] Ibid, p. 285.
[18] Laureen Benton and Lisa Ford, *Race for Order. The British Empire and the Origins of International Law 1900-1850*, (Cambridge Massachusetts: Harvard University Press, 2016), Samuel Moyn, *The Last Utopia. Human Rights in History*, (Cambridge and London: Belknap Press, 2010) and Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism*, (Cambridge Massachusetts: Harvard University Press, 2018).
[19] Here Orford's citation does not bear out on closer inspection. Benton and Ford do not make the claim their primary inspiration for defining their object of study came from developments of international law in the 1990s. Laureen Benton and Lisa Ford, *Race for Order. The British Empire and the Origins of International Law 1900-1850*, (Cambridge Massachusetts: Harvard University Press, 2016), p. 190 and footnote 20 on 291.
[20] Anne Orford, *International Law and the Politics of History*, (Cambridge: Cambridge University Press, 2021), p. 279.
[21] Ibid, p. 249.

arguments in many different contexts and fora from legal advice to international organisations and governments, arbitration, adjudication to legal scholarship. As she writes, to 'create legal work involves creating plausible patterns, analogies, or narratives by assembling past material from disparate sources in ways that are persuasive to legal audiences.'[22] The key ambition for lawyers is seldomly history in itself but the way that arguments about the past can help persuade the audience of the merits and authority of their legal argument.[23] A return to legal formalism based on falsely claimed objective historical research on the precise meaning of international law or the true nature of international institutions will consequently, according to Orford, stifle the creativity that mark the ways lawyers and legal scholars work with the past in creating new international law for the 21st Century.

Although, I belong to the first category of historians, who do not actively contribute to the development of international (or European) law, and apparently according to Orford should ignore her book, this is hard to do due to the serious misunderstandings about historical writing and methodology that underpins her argument. Before addressing these crucial flaws in the book, let me first make clear that I do not question Orford's impressive analysis of contemporary debate and practice in the field of international law. Her realist claim that law is 'made', not 'found', certainly corresponds to my own research in the legal history of European integration although with the caveat that the process of law making in most cases was constrained by both written law and informal disciplinary methods and practices of lawyers.[24] Likewise, I fully accept that lawyers and legal scholars both when practicing law and contributing to academic scholarship use examples from the past, just like they may use philosophical arguments or social science research, to make their case or construct a convincing empirical basis for their normative choices.

What I want to address is therefore, firstly, what role context and empirical methodology play in the discipline of history to dispel some of the misunderstandings promoted by Orford. Secondly, I will introduce the genre called the 'use of history' from identity and memory studies to help categorise the way lawyers and legal scholars use the past in their 'making' of international law. By differentiating between the different ways, the two disciplines approach the past, I believe it is possible to shift the ground of the debate over law and history and avoid some of the heated arguments that have characterized the interdisciplinary exchange in the last decade. This does not imply, however, as I argue in the final section of the article that legal scholars working directly with the legal history of international law can safely ignore historical methodology.

What is History? Approach and Methodology

The notion of a positivist 'empiricist history' is a strawman created by Orford, which bears little resemblance to the way historians work today.[25] By explaining in some detail key features of how

[22] Ibid, p. 285.
[23] Ibid, p. 293-29
[24] To see how complex the process of law 'making' vacillates between written law and creative innovation in a seminal case consult: Morten Rasmussen, Revolutionizing European law: A History of the Van Gend en Loos judgment, *International Journal of Constitutional Law*, January 2014, 1-28. On a discussion of the constructed nature of European law see also Morten Rasmussen, 'Constructing and Deconstruction European 'Constitutional' European Law. Some reflections on how to study the history of European law', in Henning Koch, Karsten Hagel-Sørensen, Ulrich Haltern and Joseph Weiler (eds.), *Europe. The New Legal Realism*, DJØF Publishing: Århus, 2010, 639-660, p. 652.
[25] This is also remarked in a new review article of Orford book. Alonso Guermendi, *Borderline History at Borderline Jurisprudence: Some Thought on Anne Orford's International Law & the Politics of History* (Part 1)

historians actually do their research, this section rejects Orford's central claim that historical writing is as subjective and political, as when lawyers and legal scholars engage in 'making' international law. Instead, it argues that it belongs to an altogether different genre of scientific inquiry.

Taking a closer look at Orford's treatment of what she calls 'empiricist history' a major flaw quickly becomes apparent. Her focus is almost exclusively on a subfield of the discipline of history called intellectual history, in which the Cambridge school led by Quentin Skinner, and the linguistic methodologies associated with this school, as well as Reinhart Koselleck's conceptual history play a prominent role.[26] The reason for this narrow focus is probably best explained by the close affinity between the work of Marrti Koskenniemi and his school of intellectual legal history and the Cambridge school. However, as a result Orford overlooks the emergence of a new type of legal history of international law in the last two decade written by historians, who do not pursue intellectual history but have a background in the much broader fields of international, social, economic and political history.[27]

The work of Lauren Benton, for example, on the ways the legal practises of the British empire shaped international law in the 19th Century, has been cited as spearheading this new group of historians who in the words of Andrew Fitzmaurice apply 'full scale contextualism' in their work.[28] However, the movement is actually much broader than realised by most international law scholars and comes from all directions. This new legal history approaches international (or European) law as a social and professional practice that need to be studied in a much broader political, economic, social, and institutional context than typically done in intellectual history. Bringing with them the toolbox of political, social, and economic history, arguably the mainstream approach and methodology of the discipline of history, these historians build their narratives on systematic archival studies and contextualisation. The publications have been pathbreaking in several ways. A group of European integration historians have established a whole new field of legal history dealing with European integration.[29] Other historians have redefined and enlarged the scope of the legal

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http://opiniojuris.org/2021/10/21/borderline-history-at-borderline-jurisprudence-some-thoughts-on-anne-orfords-international-law-the-politics-of-history-part-i/

[26] See for example Quentin Skinner, *Visions of Politics. Volume 1. Regarding Method*, (University of Cambridge, 2012) and the excellent biography on Koselleck: Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck*, (Berghahn Books, 2014).

[27] This has recently also been argued by Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics', *Journal of the History of International Law*, 21 (2019) 1-34.

[28] Andrew Fitzmaurice, Context in the History of International law, Journal of the History of International Law 20, (2018), 5.30, p. 16. See Laureen Benton, *A Search for Sovereignty. Law and Geography in European Empires, 1400-1900*, (Cambridge University Press, 2010) and Laureen Benton and Lisa Ford, *Race for Order. The British Empire and the Origins of International Law 1900-1850*, (Cambridge Massachusetts: Harvard University Press, 2016).

[29] For a selective sample of this new historiography consult: Davies B. and M. Rasmussen, Special issue on the history of European law (2012) *Contemporary European History* 21, 3; Bill Davies, *Resisting the ECJ - West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press, 2012.), Davies B. and M. Rasmussen, 'From International Law to a European Rechtgemeinschaft: Towards a New History of European Law, 1950-1979', in Laursen J. (ed.), *The Institutions and Dynamics of the European Community 1973-83*, (Bloomsbury, 2014), 97-131, A. Boerger and M. Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) 10 *European Constitutional Law Review*, 199-225; A. Boerger, 'At the Cradle of Legal Scholarship on the European Union. The Life and Early Work of Eric Stein' (2014) 62 *American Journal of Comparative Law*, 859-892; M. Rasmussen, 'How to enforce European law? A new history of the battle over the direct effect of directives, 1958-1987' (2017) *European Law Journal* 23, 290-308; R. Byberg, 'The History of the Integration through Law Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18, 6 *German Law Journal*, 1531-1556; V. Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972)*, (Kolstermann, 2018); Morten Rasmussen and Dorte Sindbjerg Martinsen, EU Constitutionalisation

history of human rights.[30] Recently also the legal history of international law of the first half of the Twentieth Century have seen the publication of a number of new books and articles that go significantly beyond intellectual history and place international law in a much broader institutional, political and societal context.[31] All these publications have been setting a new standard for empirical work on the legal history of international law, emphasising in particular the importance of systematic archival work. Although this new body of legal history shares a focus on context and archival documentation, it is also relatively diverse. It nevertheless shares with the broader fields of social, economic and political history some core features in terms of approach and methodology. Below I will attempt to explain these, conscious that it will not cover all nuances and almost certainly underestimate the diversity at play.[32]

At the very core of social, economic and political history is a focus on primary sources, most often found through systematic archival research. Since we cannot go back to the past, what we have in order to reconstruct history are relics or primary sources (typically in the shape of documents, artifacts or memories) that have been preserved by institutions, associations, and individual actors. This is the basis for any kind of analysis of the past, and it requires that the historian allows for the fact that most sources from the past do not survive and thus there are important events and processes that we cannot easily describe.[33] When exploring a topic historians will go to great length to identify the best possible primary sources to reconstruct and explain it. This is what is meant when historians talk about *systematic* archival research, a research strategy that is not satisfied with

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revisited: Redressing a central assumption in European Studies, *European Law Journal*, 2019, 1-22 and Morten Rasmussen, *Agents of Constitutionalism - The Quest for a Constitutional Breakthrough in European Law, 1945-1964*, in Marcus Payk and Kim Christian Priemel (eds.), *Crafting the International Order. Practitioners and Practices of International Law since c. 1800*, (Oxford: Oxford University Press, 2021), 249-276.

[30] For example: Sarah B. Snyder, *Human Rights Activism and the End of the Cold War. A Transnational History of the Helsinki Network*, (Cambridge University Press, 2011); Steven Jensen, *The Making of International Human Rights. The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press, 2016); Kim Christian Priemel, *The Betrayal. The Nuremberg Trials and German Divergence*, (Oxford University Press, 2016); Marco Duranti, *The Conservative Human Rights Revolution. European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017), Jan Eckel, *The Ambivalence of Good. Human Rights in International Politics Since the 1940s*, (Oxford University Press, 2019), Rasmus Søndergaard, Reagan, Congress and Human Rights: Contesting Morality in US Foreign Policy, (Cambridge University Press, 2020), and Dzonivar Kévonian, *La danse du pendule. Les jurists et l'internationalisation des droits de l'homme, 1920-1939*, (Paris: Édition de la Sorbonne, 2021).

[31] Key works are: Lorna Lloyd, *Peace through Law. Britain and the International Court in the 1920s* (The Boydell Press: London, 1997); Mark Lewis, *The Birth of the New Justice. The Internationalization of Crime& Punishment, 1919-1950*, (Oxford: Oxford University Press, 2014); Natasha Wheatley, 'New Subjects in International Law and Order', in G. Sluga and P. Clavin (eds.) *Internationalism. A Twentieth-Century History*, (Cambridge: Cambridge University Press, 2017), 265-286; Marcus Payk, *Frieden durch Recht? Der Austieg des modernen Völkerrechts und der Friedenschluss nac dem Ersten Weltkrieg*, (Berlin and Boston: Walter De Gruyter GmbH, 2018); Maartje Abbenhuis, *The Hague Conference and International Politics, 1898-1915*, (London: Bloomsbury, 2019); Megan Donaldson, The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order, *The American Society of International Law*, 2017, Vol. 111: 3, 575-627; Peter Becker and Natasha Wheatley (eds.), *Remaking Central Europe. The League of Nations and the Former Habsburg Lands*, (Oxford University Press, 2020) and Karin Van Leeuwen and Morten Rasmussen, 'A Political and Legal History of the Advisory Committee of Jurists and the Foundation of the Permanent Court of International Justice', in Sean Morris (ed), *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations*, (London and New York: Routledge, 2021), 69-106.

[32] John Lewis Gaddis, *The Landscape of History. How Historians Map the Past*, (Oxford University Press, 2002) offers a wonderful guide to historical methodology situating it in modern science. The classics remain Marc Bloch, *The Historian's Craft*, (Manchester: Manchester University Press, 1992) and E. H. Carr, *What is History?*, (New TYork: Penguin, 1987, first published in 1961).

[33] John Lewis Gaddis, *The Landscape of History. How Historians Map the Past*, (Oxford University Press, 2002), 36.

using one or two archives, but systematically make sure that all relevant archives are explored ranging from institutional archives (states and international organisations), transnational archives (transnational associations, networks ect.) and private papers (which can often be very difficult to identify but are often exceptionally revealing). It is this focus on producing new empirical knowledge about the objects of study that is behind the seemingly arrogant claims by historians (in the eyes of lawyers and social scientists) that a historical analysis presents a more accurate or 'new' history of a topic. Most historians are content with the claim that this offers a different perspective, that calls into question some of the established interpretations in historiography. However, is this focus on empirical research simply untenable positivism, as Orford claims, that is used to disguise that historical analysis is just as subjective and political as the creative process of 'law 'making' by lawyers? This I contend is a fundamental misunderstanding of how history is practiced today and what historical methodology offers.

Across the discipline of history, the reconstruction of the basic empirical features of an object of study is considered a central task. This process of reconstruction typically involves an empirical exploration of the world view and thinking of key historical actors, a fine-grained mapping of their agency and relations with other actors, the reconstruction of key events and the identification and documentation of central causal processes. The historical truth is unreachable due to its infinite complexity and because historians when they pick which aspects to focus on as a result co-create the object of study.[34] Nevertheless, the historian still attempts to create the best fit or the most plausible empirical explanation based on the relics or primary sources available from the object of study. If we can never reproduce the full picture an accurate sketch is still useful to our understanding of both the past and the present.[35] Historical methodology is thus not unlike the court room where the criminal lawyer needs to provide enough evidence to get the accused convicted. Similarly, within history, it is quite often possible to establish historical facts, reconstruct events, identify causal links – or establish the meaning(s) of treaty clauses or law – with such high plausibility that it makes little sense to question the empirical conclusions. This does not mean that these conclusions cannot later be changed, even if it may in some cases be highly unlikely. Perhaps new evidence emerges that makes the implausible plausible. Or a new method can be used – such as DNA analysis in criminal law – that can override other types of evidence. In this sense historical empirical analysis is always provisional. However, what is important to note here is that provisional

[34] Ibid, 26-29.

[35] Source criticism is at the heart of historical methodology. Simply put it deals with how to identify and use the best possible written sources that can help the historian to analyse a particular research question. The validity of sources is a fundamental question that sometimes is central to the analysis. Can we trust that the documentation found is original and not a falsification? Reliability is a second important question. In the British tradition a distinction is made between primary sources and secondary sources. Primary sources are first-hand evidence or accounts of a historical topic that are more reliable when reconstruction a historical fact, whereas secondary sources typically are scholarly work that deal with the same topic and may not have. The Scandinavian tradition of source criticism has introduced a very useful distinction when working with primary sources that also concerns the reliability of sources. Depending on what topic you study the relevant primary sources can be divided either into 'relics' or 'narratives'. 'Relics' are typically the paper trail of a particular historical event or process; the administrative documentation of an institutional process or the minutes of meetings that are more reliable when attempting to get an accurate understanding of what happened. 'Narrative' primary sources are for example diaries or letters of involved actors that offer their own account of what happened either simultaneously with or in the case of memoirs long time after the event. These are considered less reliable. When working with the past most topics, but not all, require the use of public or private archives to find the best possible primary evidence. This is most certainly the case with legal history because the social processes that produced law normally took place behind closed doors. The writing of legal history consequently must rely heavily on archival research in order to capture the full picture. Sebastian Olden-Jørgensen, (2001). *Til Kilderne: Introduktion til Historisk Kildekritik*, (Copenhagen: Gads Forlag, 2001).

is not to deny that some empirical explanations fit the evidence better than others. To produce the best fit or the most plausible explanation is thus at the very heart of the historical discipline and in this sense the relics tempers the subjectivity of the historian. This separates the discipline of history fundamentally from literature for example, where authors can use relics from the past to spark their imagination and write fiction.[36] Or from the lawyer and legal scholar, who use relics, not as sources on basis of which to reconstruct the past, but as selective pieces of evidence to bolster a legal argument.

The focus on empirical research does not mean that the writing of history is somehow severed from the present. At any point during the research process will the temporal and spatial positionality of the historian play into the mix. Whether it is the choice of topic, the approach chosen, or the archives selected, all these decisions are partly shaped by the positionality of the researchers.[37] This subjectivity becomes even more evident when the historians go from the phase of empirical reconstructing to constructing a historical narrative, which typically is the final product presented in articles and books. Essentially narratives are complex representations of reality that has gained increasingly credence also in the social sciences in recent years.[38] They constitute a complex simulation of the development of the object of study over time. But while the theoretical and historiographical toolbox that historians bring to the table, and which depends on her/his positionality, obviously shape how the empirical research is interpreted, the need to developed a narrative that fits the empirical evidence also limited the way the story can be told.

Given the positionality of the legal historian and the possible inspiration from contemporary debates on international law, does this imply that a historical narrative is merely a subjective analysis as Orford would claim? Here the answer is both yes and no. There is no doubt that the legal historian will be influenced by her/his contemporary positionality and probably also from contemporary debates about how international law should be understood. However, at the same time historians do not first define their object of study and then approach their empirical work from that subjective starting point. Central to historical investigations is the so-called hermeneutic circle through which historians test their theories or preconceptions against the empirical evidence they identify and then gradually make sure that their interpretation corresponds to the empirical evidence in the end. This implies that historians will typically avoid defining the precise features of their object of study before they have worked a long time with the primary sources, and they will also apply a relatively broad approach to a new topic to avoid missing key features of the latter that may be crucial but could be overlooked due to the contemporary positionality of the historian. The use of primary sources and historical methodology thus implies that historical analysis is not fully subjective, even though it is also shaped by the historians' positionality and excellence (or not), and it most certainly means that historical writing is not systematically political.

In addition, to the hermeneutics of historical analysis, historians have also over time developed a set of methodological tools to improve the correspondence of their narrative and interpretations with the empirical analysis, focusing in particular on how to mitigate the effects of their positionality and

[36] John Lewis Gaddis, *The Landscape of History. How Historians Map the Past*, (Oxford University Press, 2002), 42.
[37] For an introductory discussion of the multidimensional positionality of historians in a global history perspective, consult: Sebastian Conrad, *What is Global History*? (New Jersey: Princeton University Press, 2016), pp. 162-185.
[38] On the scientific qualities of historical narratives see in particular the illuminating book by John Lewis Gaddis, *The Landscape of History. How Historians Map the Past*, (Oxford University Press, 2002). For an in-depth social science and philosophical analysis of the role of empirical narratives in the social sciences consult: Bent Flyvberg, *Rationality and Power: Democracy in Practice*, (Chicago: Chicago University Press, 1998).

subjectivity. Firstly, it is crucial that all sources are cited so other historians and researchers can test whether the empirical reconstruction is reproducible and corresponds to the narrative and interpretation.[39] Secondly, historians attempt to avoid the most glaring features of presentism such as anachronisms and analogies imposed across time. Thirdly, they work hard to ensure that the historical actors they deal with are not judged on basis of contemporary norms, but instead treated as part of the past society in which they lived with a focus on understanding their motives and values. Finally, historians err on the side of complexity in order for their narratives to accurately correspond to their empirical analysis, rather than simplifying or generalising the historical experience.[40] The positionality of historians still to some degree colour their narratives, but the systematic attempt to avoid normative or political judgments, stands in stark contrast to lawyers and legal scholars, who selectively use examples from the past for present purposes.

Historical research is part of a long scientific tradition that obviously does not represent the last word on how to study the past. Historians and other disciplines continue to push the boundaries in developing new theory and methodologies of how to study the past. A good example is recent work on the concept of time in historical analysis for example.[41] However, all in all the discipline delivers a body of research that is marked by a high degree of careful empirical studies, the production of new empirical insights as sources are released from relevant archives, as well as multicausal explanations and interpretations that are placed in time and can be used by other disciplines to improve the understanding of how past developments and trajectories form the present. Historical research as a result informs contemporary public debate in a multitude of ways and in this sense all history is potentially political. Not because, as I hope to have made clear above, that historical research is subjective and political all the way through, as claimed by Orford, but simply because historical research often confirms contemporary understandings or bring to light new insights that impact political debates about how to both organise the present and confront the future.

To conclude this section, history delivers complex narratives about the nature of the past and the historical processes that impact the contemporary world. In the field of legal history of international law, contextual and archive-based history brings about new empirical understandings of the making of international law. It delivers new insights into the origins of international law, treaties, legal norms, and techniques. Occasionally, and depending on the quality of the primary sources, it can even make highly plausible arguments about the original meaning(s) of treaty articles, legal norms, and court judgments. It can explore the history of international institutions in new rich details, including the constellations of state interests and motives that lay behind their establishment. So, it is simply wrong when Orford claims that careful historical analysis makes no difference to the analysis of all these questions by lawyers who are engaged in the 'making' of international law. Instead, contextual history arguably offers lawyers and legal scholars an important fond of knowledge about the legal discipline and the history of international law that can only increase their own reflexivity when 'making' of international law.

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[39] On the dangers of not producing an account that is not based on verifiability in terms of course base see: Andre Fitzmaurice, 'Context in the History of International Law' *Journal of the History of International Law*, 20(1) (2018), 5-30.

[40] On the role of complexity consult John Lewis Gaddis, *The Landscape of History. How Historians Map the Past*, (Oxford University Press, 2002, pp. 71-89.

[41] To reflect on the use of time is an ongoing exercise in the discipline. For a recent example: Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley (eds.), *Power and Time. Temporalities in Conflict and the Making of History*, (Chicago and London: The University of Chicago Press, 2020).

The Use of History in Identity and Memory Studies

When compared to the way mainstream history is produced, it becomes clear that the use of the past by lawyers and legal scholars when 'making' international law today is fundamentally.[42] To understand the nature of this difference not only help us untangle the interdisciplinary battle that has raged over the last decades between lawyers and contextual historians; it also makes it easier to rethink what approach and methodology is best suited to write legal history.

The difference between law and history is best understood with reference to the field of identity and memory studies or more precisely the subfield focused on the different 'uses of history' ('historiebrug/historibruk' in Scandinavian) existing in society.[43] Research on the 'use of history' has obtained a prominent position in Scandinavia in recent decades. Danish historian, Niels Kayser Nielsen, has defined it in the following way: '…the use of history is a concept that covers a combination of the selection, emphasis and omission of persons, events and epochs from the total knowledge about history with the purpose to further certain interests of an often political, informative, entertaining or identity character.'[44] Only a few scholars have until now engaged in defining typologies of the 'use of history', however, they tend to differentiate between the scientific history produced by historians and different types of 'use of history'. The latter range from the existential use of history by all humans to produce memory, the use of history for commercial reasons, the use of history to construct identities, the use of history for educational purposes, which is often intertwined with the latter use, namely the use of history for political or ideological reasons.[45] Danish historian Bernard Erik Jensen comes closer to a definition that is helpful in this context. He argues in favor of a category where the 'use of history' is used to clarify or to legitimate or delegitimate principles, interests, and values.[46] This covers the way lawyers and legal scholars 'use history' when making international law quite accurately, however, it obviously does not go deeper into the precise techniques used by lawyers and legal scholars when engaging with the past.[47]

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[42] This has already been hinted at in Andre Fitzmaurice, 'Context in the History of International Law' *Journal of the History of International Law*, 20(1) (2018), 5-30, p. 12.

[43] The sub-field focusing on the 'use of history' emerged out of studies on memory and identity in the 1990s has primarily been developed by historians. The field is closely related to studies of memory, dating back to the French sociologist Maurice Halbwach, *Le mémoire collective*, (Paris Presses Universitaires de France, 1950) and continued in the famous work: Benedict Anderson, *Imagined Communities*. *Reflections on the origins and spread of nationalism*, (Verso: London, 1983). The terminology of 'uses/user of the past' was first fully developed in the pathbreaking work by Roy Rosenzweig and David Thelen in a research project from 1989 to 1998 published as: Roy Rosenzweig and David Thelen, *The Presence of the Past. Popular Uses of History in American Life*, (Columbia University Press, 2000). For an introduction to the field: Anette E. Warring, Erindring og historiebrug: Introduktion til et forskningsfelt, *TEMP – tidsskrift for historie*, 2011, 2, 6-35.

[44] Niels Kaiser Nielsen, *Historiens forvandlinger – Historiebrug fra monumenter til oplevelsesøkonomi*, (Aarhus: Aarhus universitetsforlag, 2010), 34.

[45] This typology follows Klas-Göran Karlsson, Historiedidaktikens teori, in Klas-Göran Karlsson and Ulf Zander (eds.), *Historie är nu* (Lund, Studenterlitteratur, 2004), 21-66.

[46] Bernard Erik Jensen, *Historie, - Livsverden og fag*, (Copenhagen: Gyldendal, 2003), 66-70.

[47] For an interesting analysis of the role of history in international law by an insider see Martti Koskenniemi, The Past according to International Law. A Practice of History and Histories of Practice, Annabel Brett, Megan Donaldson and Martti Koskenniemi (eds.), *History, Politics, Law. Thinking through the International*, (Cambridge University Press, 2021), 49-68.

This is done in a recent article by Natasha Wheatly, who analyses the techniques that law uses to escape context and time thereby producing a normative system that exists beyond the social world.[48] To achieve this result it is necessary for lawyers and legal scholars to make 'meaning move across time', according to Anne Orford, or in the vocabulary of Koskenniemi create an 'intermingling' of past and present.[49] Since the purpose of the exercise is to escape context and time, it is not so odd that historians have criticised the way lawyers and legal scholars use the past to 'make' law because it essentially moves in the exact opposite direction of the discipline of history that is focused on situating history as precisely as possible in context and time in order for their representation. Likewise, it is easier to understand the instinctive reaction of dread that some lawyers and legal scholars feel when confronted with the methodological requirements of contextual history, because they would fundamentally undermine law making. Historians, suggests Wheatley, 'are free from the imperative to endorse law's capacity to escape context and shed the all-too-human conditions of its production – free from the imperative to naturalise its time travel as real'.[50] Thus, an important task for legal historians is to historicise how lawyers and legal scholars have constructed law beyond context and time in order to better come to grips with the world view, ideology and thinking of the legal protagonist analysed.[51]

But what are the implications to lawyers and legal scholars that their disciplinary work with the past can be categorised as a particular 'use of history' to clarify and legitimate principles, interests, and values? To Orford this might not make a big difference since her focus is to preserve the aura of law, which she considers crucial to preserve the progressive nature of international law and for reasons of legitimation. After all the main thrust of her book was to defend her practise by claiming that 'empiricist history' was simply as subjective and political as law 'making'. To other lawyers and legal scholars, it may instead cause pause and force a rethinking about the limitations, distortions and mythmaking that is involved in a selective and ideological use of the past for present purposes. How can lawyers and legal scholars be sure which side they are on normatively, if they engage in mythmaking or the manipulation of the past to create law?[52] History have indeed clearly demonstrated that courts, lawyers, and legal techniques can also serve totalitarian regimes.[53] The problem with the 'use of history' for present purposes is that it does not in itself provide a check on the perpetuation of a particular ideological position or the creation of persistent blind spots.

So perhaps the way forward for lawyers and legal scholars is to combine the 'use of history' when they 'make' international law with an engagement with the broader contextual historiography relevant to the questions dealt with. In this manner, lawyers and legal scholars can make significant gains in reflexivity, allowing them to move beyond the worst blind spots and biases inherent in their discipline or their positionality in the contemporary world. Contextual history should thus serve as key tool to understand both the past and the way it has shaped the present, just as a good

[48] Natasha Wheatley, Law and the Time of Angels: International law's method wars and the Affective Life of Disciplines, *History and Theory* 60, no. 2, (June 2021), 311-330.
[49] Cited from ibid, p. 316.
[50] Ibid, pp. 327-328.
[51] Here legal sociology can serve as an important theoretical inspiration for how to approach the double move of censorship of law that allows it to claim universality and separation from politics. See for example Julie Baileux, Comment l'Europe vint au droit. Le premier congré international d'etudes de la CECA (Milan-Stresa 1957), *Revue française de science politique*, vol. 60, no. 2, 2010, 296-318.
[52] Andre Fitzmaurice, 'Context in the History of International Law' *Journal of the History of International Law*, 20(1) (2018), 5-30, 13.
[53] Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Traditions*, (Hart Publishing: Oxford and Portland, Oregon, 2003).

understanding of the social sciences is necessary to obtain a solid understanding of contemporary society and philosophical knowledge can be used to inform normative choices. Contextual history is thus not a threat, but a gift, to lawyers who want to improve the international law of the future.

Beyond Polarisation: How to Develop a Fruitful Interdisciplinary Dialogue in the Field of Legal History of International Law

In more than a decade, legal scholars and historians have engaged in a heated debate about the relationship between law and history to which Anne Orford's new book is the latest contribution. This article has shown why this debate has often deteriorated into a polarized shouting contest. Essentially the way lawyers and legal scholars use the past when 'making' international law, in order to detach law as a normative system from context and time, is the exact opposite of the discipline of history that focus on developing representations of history that is as precise as possible when it comes to context and time. No wonder that some lawyers and legal scholars have felt an existential threat when historians have criticized their use of the past or that historians have felt genuinely chocked by the seemingly disregard for the most basic methodologies of their own discipline.

By establishing that the way lawyers and legal scholars engage with the past should be catagorised as a genre within the 'use of history' that is fundamentally different from the discipline of history, I have attempted to shift the ground of the debate. This has consequences to both legal scholars and historians. Firstly, it does not mean that lawyers and legal scholars cannot use the past to 'make' international law. But it implies that to avoid outright historical mythmaking when creating law, lawyers and legal scholars need to temper their creativity through a solid knowledge of the historiography that deals with the history they exploit. Secondly, by understanding that the way lawyers and legal scholars engage with the past when 'making' international law is fundamentally different from the discipline of history, historians can focus their critique not on the fundamental methodology and purpose of legal scholarship, but instead on the results. Is the legal argument based on historical mythmaking or does it manage to reflect some degree of understanding of the historical context that it involves? Finally, the relationship between the two disciplines in the field of legal history also needs to be reconsidered.

In order to do this, let me first try to clarify the disciplinary relationships of the field. At the most fundamental level, the field of legal history of international law belongs equally to the disciplines of history and law. Neither historians nor legal scholars can be said to be outsiders. The legal history of international law is after all an integral part of the legal discipline of international law, just like it forms a natural part of the broader international history that historians study. What does this mean for interdisciplinary dialogue? In my view, it is crucial that historians carefully listen to and learn from scholars of international law to improve their understanding the complexities of international law from the technical and legal details to the broader understanding of the legal discipline and broader normative and ideological worldviews that it entertains. In my own experience, as a legal historian who has never received a legal education, working with the history of European integration law required a strong interdisciplinary dialogue with EU legal scholars to improve my technical and legal understanding of European law without which my publications would have seriously suffered.

However, the interdisciplinary learning process should not only go in one direction. Legal scholars have to systematically differentiate between whether they engage in the 'use of law' or whether they attempt to produce as accurate a representation of the past as possible. If they do the former, there are in the ballgame of directly contributing to the 'making' international law. If they do the latter the discipline of history does offer multiple approaches, methodologies and techniques and thus, do I dare say it, constitutes the 'master discipline' of how to study the past. Legal scholars would therefore do well to learn from historical methodology when they work in the field of legal history. As contextualist historians have moved into the field of the legal history of international law, the standards of research have also changed in terms of methodology and the demands for archival work. Arguably, therefore, legal scholars who today enter the field cannot escape the need to explore and consult archival resources that relate to their object of study, to have a good grip of relevant context as well as historiography, if they want to produce high quality research.