

# International Law and Its Histories: Methodological Risks and Opportunities

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## Abstract

*The history of international law has recently come to the forefront of legal debates. Broadly defined as the field of study that examines the evolution of public international law and investigates state practice, the development of given legal concepts and theories as well as the life and work of its makers, the history of international law (HIL) or international legal history has attracted the growing attention of international lawyers, legal historians, and other interested audiences. Despite its flourishing, the history of international law is still in search of a proper methodology. Two cultures of writing compete in the making of international legal history: 'historians' history' and 'jurists' history.' While legal historians are interested in the past for its own sake and put legal history in context, lawyers tend to be interested in the past for the light it throws on the present. The existence of (and sometimes competition between) two methodologies raises an important question: should international legal historians choose either the historians' history or jurists' history and then confine themselves to that approach, or should they adopt a comprehensive and interdisciplinary stance? This Article is exploratory and aims to address this question by investigating the methodological risks and opportunities of writing the histories of international law.*

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## Introduction

The history of international law has recently come to the forefront of legal debates. Defined as the field of study that examines the evolution of public international law and investigates state practice, the development of legal concepts and theories, and the life and work of its makers, the history of international law (HIL) or international legal history has attracted the growing attention of international lawyers, legal historians, and other interested audiences.<sup>1</sup> New monographs and edited books have been published on various aspects of the history of international law; reputable book series and journals have been established in the field.<sup>2</sup> The linkage between international law and history has attracted an increasing wealth of promising research.<sup>3</sup>

Several factors have prompted this renaissance. First, legal historians, who have traditionally focused on the history of domestic law, have started investigating the history of international law, due to the latter being unmapped, under-researched, and in need of systematization. In turn, international lawyers have dedicated sustained attention to the field. The proliferation of international law and its governance of almost any field of human activity has resulted in some growth pains and required some self-reflection as to international law's origins, aims and objectives. Second, the end of the Cold War, the opening of archives which had been previously closed to the public and academic researchers, and the digitization of archives have facilitated access to newly available sources. Third, like in other eras of major political, economic and cultural upheaval, history is perceived as providing new perspectives and a key to understanding the past in order to better forge our future.<sup>4</sup>

Despite flourishing, the history of international law is still in search of a proper methodology. Two cultures of writing history compete in its making: 'historians' history' and 'jurists' history'.<sup>5</sup> Two different epistemic communities—historians on the one hand and international lawyers on the other—put different questions to legal texts. While legal historians are interested in the past for its own sake and put it in context,<sup>6</sup> lawyers tend to be interested in the past for the light it throws on the present<sup>7</sup> and consider it as 'a self-

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<sup>1</sup> This Article uses the terms 'history of international law' and 'international legal history' as synonyms. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion* 17 QUINNIPIAC LAW REVIEW (1997) 99, 99 (using the terms 'international legal history' and 'history of international law' interchangeably).

<sup>2</sup> Matt Craven, *Introduction: International Law and Its Histories*, in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.) *TIME, HISTORY AND INTERNATIONAL LAW* (2007) 1, 2 (noting that "[i]n recent years, there has been an extraordinary outpouring of articles and monographs written on the history of the discipline" and signalling "the emergence of new specialist journals on the topic.")

<sup>3</sup> See e.g. Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.) *TIME, HISTORY AND INTERNATIONAL LAW* (2007) 27, 28 (highlighting that "during the last decade, the interest in the history of international law has suddenly risen.")

<sup>4</sup> Stefan-Ludwig Hoffmann, *Human Rights and History*, *PAST AND PRESENT* (2016) 1–32, at 26 (noting that without past, the present seems bound to regenerate the past and "the future is seen no longer as a promise but as a threat"); Craven, *Introduction*, 5 (noting that "historical reflection may be useful as a way of situating the present" if not "the only way to move on"); Lesaffer, *International Law and Its History*, 29 (noting that at all critical moments in the history of international law, scholars have typically turned to revisit the discipline's foundations)

<sup>5</sup> Lesaffer, *International Law and Its History*, 29 (stressing that "[t]he historiography of international law is an interdisciplinary subject with two natural constituencies: international lawyers and legal historians.")

<sup>6</sup> MICHAEL KAMMEN, *SELVAGES AND BIASES: THE FABRIC OF HISTORY IN AMERICAN CULTURE* 116–17 (1987) (noting the paradigm shift among historians in the mid-twentieth century from searching for a 'usable past' to focusing on the 'pastness of the past,' that is, "accept[ing] the past on its own terms" rather than translating it "into our own contemporary frame of reference").

<sup>7</sup> Edward M. Wise, *Legal History*, in Daniel Robert Woolf (ed.) *A GLOBAL ENCYCLOPAEDIA OF HISTORICAL WRITING*, vol II, (1998) 551–52, at 551; Lesaffer, *International Law and Its History*, 29 (pinpointing that "[o]n

contained universe,' tracing the genealogy of given concepts with little if any attention to the context.<sup>8</sup>

Several questions arise in this context. Should a scholar stick to one discipline only—be it international law or legal history? Or should one adopt a comprehensive and interdisciplinary stance, enabling international lawyers and legal historians to work together in mapping the history of international law? Or, rather, should one adopt post-disciplinary approaches abandoning existing disciplines in order to 'think beyond old boundaries'?<sup>9</sup>

If one reasonably assumes equality between international law and legal history, both should have equal footing in mapping the history of international law. However, as most international lawyers are not historians by training and, in parallel, most historians do not have in-depth expertise in international law, doubts remain as to the proper methodology to be adopted. Should one be concerned with the historical record or its legal afterglow? Should legal 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? If so, which historical method suits their research better? Should they focus on the history of institutions or concepts across time and space, or rather prefer the biographical genre? Should they look at the context in which international law came into being? Can one expect them to visit archives and critically engage with historical sources? Is the history of international law a *sui generis* field of study that in fact requires *ad hoc* methods and approaches?

This Article aims to address these questions by investigating the methodological risks and opportunities of writing the histories of international law. It will explore different methods of writing the history of international law. The history of international law is a sufficiently developed field to merit discussion of rigorous methods. The objective of the article, however, is not to prescribe a certain method to use in all scholarship moving forward; international legal history is a diverse field, and some flexibility will always be required. There is no single history of international law. Rather, multiple histories can and have been written depending on the selected topic, method and perspective. Consequently, there is no single method for writing such histories. Rather, different methods and approaches can co-exist; it is up to the researcher to identify a suitable method for reaching his or her research objectives.

The identification and calibration of the research method is not an arbitrary endeavor; rather, there is a rich panoply of tested, rigorous and consolidated methods which researchers can use. Analogously, there is no ideal form of research, as histories of concepts, legal biographies and institutional histories all contribute to the complex kaleidoscope represented by the history of international law. This Article contends that the battle of ideas about the proper methodology of the history of international law should be gradually overcome by a growing awareness of the complementarity of expertise of international lawyers and legal historians. The varied disciplinary approaches promote better narrations of the history of international law through acknowledgement of cultural backgrounds and methodological awareness. Rather than merely focusing on consolidated, but passé, intra-disciplinary approaches to the history of international law (that is, approaching the history of international law from a purely legal history or international law perspective), the article also examines interdisciplinary, approaches, given that both legal history and international law are necessary components of the emerging field of the history of international law. While intradisciplinary approaches require researchers working on

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the whole, the interest displayed by international lawyers in their history is functional and is dictated by current needs").

<sup>8</sup> *Id.* at 551.

<sup>9</sup> Bob Jessop and Ngai-Ling Sum, *Pre-disciplinary and Post-disciplinary Perspectives*, NEW POLITICAL ECONOMY 6 (2001), 89–101 (refusing disciplinary boundaries and committing to transcending the same.)

given research questions to use the same set of methods within given disciplinary boundaries (for instance, legal history or international law), interdisciplinary approaches enable the combination and integration of knowledge from various scientific disciplines (including but not limited to legal history and international law).<sup>10</sup>

The Article proceeds as follows. First, it explores why history matters in general and the reasons for the growing interest in the history of international law in particular. Second, it examines the battle of ideas between historians and lawyers on how to write the history of international law. Third, it addresses the question of what kind of history we should have. It explores four dimensions of legal historiography: 1) global/local, 2) internal/external, 3) diachronic/synchronic, and 4) micro/macro. Fourth, it examines the principal historiographical currents for writing the history of international law, analyzing and critically assessing their pros and cons. The Article does not aim to offer a complete summary of the work done in the area. Rather, it provides an introduction to some of the relevant key issues and debates in international legal history, with the goal of stimulating interest in field and contributing to its development. Fifth, it examines discusses three modes of writing history—the history of events, the history of concepts, and the history of individual people—and examines the use of legal biography as a literary genre within international law scholarship, addressing the question of whether the history of international law might benefit from further work in this direction. Finally, after providing a critical reflection on the promises and pitfalls of the turn to history of international law and the international turn of legal history, this Article concludes that there is no single method for writing the history of international law. Rather, scholars can select the appropriate method among a variety of different approaches. The selection of the appropriate method is case-specific and should be based on the specific aims and objectives of the author. Both international lawyers and legal historians can benefit from dialogue, mutual exchange and methodological awareness. This paper argues that excellent history of international law transcends the borders of pure international law or legal history analysis and may constitute an autonomous field of study.

## 1. Does History Matter?

While the history of international law received little if any attention in the past two centuries—historians were not interested in international law, while international lawyers were not interested in legal history—this state of affairs has started to change.<sup>11</sup> The shift in the number of books and the quality of these books has fostered the perceived importance of the field.<sup>12</sup> Reputable book series and journals have been established in the

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<sup>10</sup> See e.g. Friedrich Kratochwil, *A Guide for the Perplexed? Critical Reflections on Doing Inter-Disciplinary Legal Research*, 5 *TRANSNATIONAL LEGAL THEORY* (2014) 541, 541–556 (discussing “the limits and opportunities” of inter-disciplinary legal research.)

<sup>11</sup> See Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 *AMERICAN JOURNAL OF INTERNATIONAL LAW* (1908) 313 (noting that “[I]n spite of the vast importance of this task it has as yet hardly been undertaken; the history of international law is certainly the most neglected province of it.”) A century later, the assessment has not changed. See Stephen C. Neff, *A Short History of International Law*, in MALCOLM EVANS, *INTERNATIONAL LAW* (2003), at 3 (noting that “No area of international law has been so little explored by scholars as the history of the subject.”)

<sup>12</sup> See generally, among others, Pierre Marie Dupuy and Vincent Chetail (eds.) *THE ROOTS OF INTERNATIONAL LAW/LE FONDEMENTS DU DROIT INTERNATIONAL—LIBER AMICORUM PETER HAGGENMACHER* (2014) (analyzing the origins and foundations of the international legal system, with particular focus on Hugo Grotius); DOMINIQUE GAURIER, *HISTOIRE DU DROIT INTERNATIONAL* (2014) (tracing the origins of the law of nations back to antiquity, examining its evolution until the end of the Society of nations in 1945 and using primary sources in abundance); Bardo Fassbender and Anne Peters (eds.), *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* (2012) (analysing the history of international law from the 15th century until the end of World War II, adopting a global history approach and briefly examining the lives and theories

field.<sup>13</sup> International law and legal history journals also increasingly feature articles on the history of international law.<sup>14</sup> Histories of sub-fields of international law have also emerged.<sup>15</sup> This represents a shift from the past, when most legal historians focused on the vicissitudes of domestic law and international lawyers used the past instrumentally to investigate legal concepts or institutions rather than as a specific object of their scientific

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of those individuals who shaped the development of international law); AMNON ALTMAN, TRACING THE EARLIEST RECORDED CONCEPTS OF INTERNATIONAL LAW: THE ANCIENT NEAR EAST (2500–330 BC) (2012) (surveying legal theories and practices relating to international relations in the Ancient Near East between 2500 and 330 BC); CARLO FOCARELLI, INTRODUZIONE STORICA AL DIRITTO INTERNAZIONALE (2012) (covering the history of international law from antiquity to the present); EMMANUELLE JOUANNET, LE DROIT INTERNATIONAL LIBÉRAL—PROVIDENCE. UNE HISTOIRE DU DROIT INTERNATIONAL (2011) (placing the origins of international law in the 18th century and suggesting that a dual liberal-welfarist structural framework underlies international law); Alexander Orakhelashvili (ed.) RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW (2011) (analyzing the theory and history of international law from the Middle Ages to the present); GUSTAVO GOZZI, DIRITTI E CIVILTÀ. STORIA E FILOSOFIA DEL DIRITTO INTERNAZIONALE (2010) (examining the evolution of international law from the XVIth century onward); Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.) TIME, HISTORY AND INTERNATIONAL LAW (2007) (identifying and discussing different ways in which the relationship between international law and (its) history may be conceived); LUIS FERNANDO ALVAREZ LONDOÑO, LA HISTORIA DEL DERECHO INTERNACIONAL PÚBLICO (2006) (covering the history of international law from antiquity to the XXth century); PÉTER KOVÁCS (ed.), HISTORIA ANTE PORTAS—L'HISTOIRE EN DROIT INTERNATIONAL – HISTORY IN INTERNATIONAL LAW (2004) (discussing the evolution of selected international law doctrines, cases, and institutions); RAM PRAKASH ANAND, STUDIES IN INTERNATIONAL LAW AND HISTORY: AN ASIAN PERSPECTIVE (2004) (criticizing the Eurocentrism of international law and proposing a different perspective); SLIM LAGHMANI, HISTOIRE DU DROIT DES GENS, DU *JUS GENTIUM* IMPÉRIAL AU *JUS PUBLICUM EUROPEUM* (2004) (investigating the global evolution of the law of nations from antiquity to the end of World War I); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2002) (placing the origins of international law in the 19th century); CARLO FOCARELLI, LEZIONI DI STORIA DEL DIRITTO INTERNAZIONALE (2002) (examining the evolution of international law from antiquity to the present); WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (2000) (English translation of *EPOCHEN DER VÖLKERRECHTSGESCHICHTE* (1984) (dividing the history of international law into periods characterized by the hegemony of specific powers); A. TRUYOL Y SERRA, HISTORIA DEL DERECHO INTERNACIONAL PÚBLICO (1998) (adopting a universalist approach to the history of international law, influenced by the axiom *ubi societas inter potestates, ibi ius gentium*, and transcending the Eurocentric framework of the Westphalian state-centered narrative). For an earlier study, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1947) (focusing on diplomacy and treaty relations); JOHAN H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, 12 vol. (Brill 1968–1998) (considering international law by subject matter). For a general bibliography, see Peter Macalister-Smith and J. Schwietzke, *Literature and Documentary Sources relating to the History of International Law*, 1 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW (1999) 136.

<sup>13</sup> See *JUS GENTIUM—JOURNAL OF INTERNATIONAL LEGAL HISTORY*, the first dedicated journal in the United States addressing the history of international law, launched in January 2016 (“encourag[ing] further exploration in the archives, but welcoming the continued reassessment of international legal history in all of its dimensions”) <http://www.lawbookexchange.com/jus-gentium.php> (last visited 20 September 2016). See also JOURNAL OF THE HISTORY OF INTERNATIONAL LAW, launched in 1999; Ronald Macdonald, *Editorial*, 1 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 1 (1999) 1 (noting that the Journal of the History of International Law aims at “contribut[ing] to the effort to make intelligible the international legal past, however varied and eccentric it may be, to stimulate interest in the whys, the whats and the wheres of international legal development, without projecting present relationships upon the past”).

<sup>14</sup> See, e.g., Amanda Alexander, *A Short History of International Humanitarian Law*, EUROPEAN J. INT’L L. 26 (2015) 109–138 (arguing that “international humanitarian law is not simply an ahistorical code, managed by states and promoted by the International Committee of the Red Cross. Rather, it is a relatively new and historically contingent field that has been created, shaped and dramatically reinterpreted by a variety of actors, both traditional and unconventional”) and Ziv Bohrer, *International Criminal Law’s Millennium of Forgotten History*, LAW AND HISTORY REV. 34 (2016), 393–485 (challenging the consensus that International Criminal Law (ICL) was “born” at Nuremberg, and arguing that ICL’s history spans centuries).

<sup>15</sup> See e.g. PETER H. SAND, THE HISTORY AND ORIGIN OF INTERNATIONAL ENVIRONMENTAL LAW (2015); Jeanriqué Fahner, *The Contested History of International Investment Law—From a Problematic Past to Current Controversies*, 17 INTERNATIONAL COMMUNITY LAW REVIEW (2015) 373 – 388.

inquiry. Scholars have increasingly researched the historical background of institutions,<sup>16</sup> mapped the evolution of key concepts,<sup>17</sup> or narrated the history of the discipline.<sup>18</sup> “Even in the absence of a grand theory about why or how one should go about it,” scholars write about the history of international law whether they see themselves as scholars of both history and international law, scholars of history who happen to study international law, international lawyers who happen to study history, or “scholars in some other discipline entirely who happen to study history and law, or scholars who are resistant to disciplinary categorization altogether.”<sup>19</sup>

Two distinct converging phenomena have contributed to the renaissance of international legal history: the ‘historical turn’ in international law and the ‘international turn’ of legal history. The expression ‘historical turn in international law’ “refers to a constant and growing need on the part of international lawyers to review ... the history of international law and to establish links between the past and the present situation of international norms, institutions and doctrines.”<sup>20</sup>

International law has become increasingly important and governs almost any aspect of ‘life, universe and everything.’<sup>21</sup> The proliferation of international law and its governance of almost any field of human activity have been accompanied by some growth pains and required some reflection as to the origins, aims and objectives of the discipline.<sup>22</sup> History is increasingly viewed as a relevant method of understanding and improving on international law. International lawyers increasingly pay attention to the history of international law in the quest for the meaning, sense, and legitimacy and/or contestation of the discipline. In turn, the history of international law has provided them with a sense of identity, inspiration, and continuity in some cases, or unease, rage, and disruption in others. However, it has also raised a number of interpretative challenges. In some cases, investigating the history of international law has been like opening a Pandora’s box. Far from finding clear-cut, black or white answers to their legitimacy conundrum, international lawyers have found multi-layered complexity, conflicting accounts, and diverging interpretations of past events. This opening of new frontiers has created new opportunities of critical reflection and ongoing research.

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<sup>16</sup> See, e.g., ANTONIO R. PARRA, *A HISTORY OF ICSID* (2012) (narrating the origins and evolution of the International Centre for Settlement of Investment Disputes).

<sup>17</sup> See, e.g., Ruti Teitel, *Transitional Justice Genealogy*, HARVARD HUMAN RIGHTS JOURNAL 16 (2003) 69 (analyzing the evolution of the concept of transitional justice); Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, HARVARD LAW REVIEW 126 (2013) 2043 (analysing competing histories of the origins of international human rights law).

<sup>18</sup> See, e.g., KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* (2013) (delineating investment law’s origins in the quest for imperial control over the resources and peoples of the colonized world); CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* (1985) (investigating how investors have protected their investments abroad in the nineteenth and twentieth century); ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004) (narrating the history of international law from the perspective of the non-European).

<sup>19</sup> Catherine L. Fisk and Robert W. Gordon, “*Law As . . .*”: *Theory and Method in Legal History*, UC IRVINE L. REV. 1 (2011) 519–541, at 523–4 (adding, at 523, that “it is perfectly possible, and indeed very common, to write first-rate history uninformed by a grand theory”).

<sup>20</sup> George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, EUR. J. INT’L L 16 (2005), 539–559, 541 (arguing that Koskenniemi’s *THE GENTLE CIVILIZER OF NATIONS* “led to a historiographical turn in Koskenniemi’s work and has ... encouraged a historiographical turn in the field of international law as a whole”).

<sup>21</sup> I am borrowing this expression from Catherine Redgwell, *Life, Universe and Everything: A Critique of Anthropocentric Rights*, in Alan Boyle and M. Anderson (eds.) *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* (1996) 71.

<sup>22</sup> Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMPLE INT’L&COMP.L.J. (2013) 215 (“what seems needed is a better understanding of how we have come to where we are now—a fuller and a more realistic account of the history of international law”).

The jurist's history has been promising, albeit it still remains beleaguered with traditional assumptions. Often international lawyers equate the history of international law with international law. However, the two fields remain conceptually distinct. International legal history and international law are not the same thing: international legal history narrates the historical evolution of international law, while international law is the output of such development and broadly indicates the law governing transnational relations. International lawyers' histories often lack any reference to non-legal sources, including historical sources. Not rarely, international lawyers have authored 'histories' of their field, relying almost completely on lawyerly accounts, as if the history of international law was a self-contained regime, completely detached from history itself. However, the matter is very much in flux. Some international lawyers have adopted a more reflexive approach to the field and various methods to successfully overcome the disciplinary boundaries of international law and enter into the world of international legal history.<sup>23</sup> Others have conducted painstaking work in archives to map too long neglected jurisprudence.

**Comment [KK1]:** This newly-added paragraph seems to contain some assertions that should be footnoted.

In parallel, the term 'international turn of legal history' refers to the growing interest of historians for global phenomena.<sup>24</sup> Why are legal historians interested in transnational phenomena? Historians of law have taken global phenomena, such as imperialism and subsequent decolonization, more seriously for two principal reasons. First, globalization has led to the realization that domestic histories are a component of global histories and that they participate in and reflect their broader contexts. Second, international law and comparative law have become more important in legal education. In most countries, legal education has become more internationalized.<sup>25</sup> Because international law has grown tremendously in breadth and importance, legal historians have gradually started investigating its origins and evolution.

Characterized by historical investigation, archival research and a variety of historiographical methods, the historians' history of international law has been quantitatively limited, producing only a few pieces of work, but qualitatively impactful.<sup>26</sup> By unveiling archival information, mapping intellectual networks, contextualizing legal texts in their historical background, the legal historians' histories have contributed depth to the field.

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<sup>23</sup> Alexandra Kemmerer, *Völkerrechtsgeschichten – Histories of International Law*, EJIL: TALK! January 6, 2015 (pinpointing that "historians and lawyers discuss, debate and dispute (their) histories of international law" and highlighting the need of "intellectual encounters and spaces for conflict and cooperation that will in turn challenge and promote reflexive disciplinarity in the respective fields. Of crucial importance here is the researcher's awareness of her own position and situatedness").

<sup>24</sup> DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT* (2013) 17 (noting the "international turn in intellectual history").

<sup>25</sup> Anne-Marie Slaughter, *The International Dimension of Law School Curriculum*, 22 PENN STATE INTERNATIONAL LAW REVIEW, (2004) 417, 418 (arguing that legal education should "teach students not only to be boundary-crossers but to be cosmopolitan").

<sup>26</sup> See e.g. Randall C.H. Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *TIME, HISTORY AND INTERNATIONAL LAW* (2007) 27–41, 29 (identifying the history of international law as 'an interdisciplinary subject with two natural constituencies: international lawyers and legal historians'); Randall C.H. Lesaffer, *The Classical Law of Nations (1500-1800)* in Alexander Orakhelashvili (Ed.), *RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW* (2011) 408-440 (examining the evolution of international law from the sixteenth century to the nineteenth century); Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, BRITISH YEARBOOK OF INTERNATIONAL LAW, 73 (2002) 103-139, 103 (noting that 'For a long time, the history of the law of nations has been neglected by legal historians and over-simplified and distorted by international lawyers'); Alain Wijffels, *Early Modern Scholarship and International Law*, in Alexander Orakhelashvili (Ed.), *RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW* (2011) 23–60, 23 (examining the development of international law scholarship from the 16<sup>th</sup> until the 18<sup>th</sup> century).

Moreover, after the Cold War, the increasing accessibility of historical sources has made it more possible to do insightful, reliable and ground-breaking research. The opening of long-classified archives has enabled access to materials not available before. The digitization of resources and their accessibility online has also facilitated access to the same.

In conclusion, history matters. As the French medieval historian and Resistance leader Marc Bloch pointed out, knowledge of the past enables our understanding of the present.<sup>27</sup> As in other eras of major political, economic and cultural upheaval, history is perceived as a master key to understanding the past and the present, as well as to providing new perspectives.<sup>28</sup> Like other linkages such as law and anthropology,<sup>29</sup> law and geography,<sup>30</sup> law and literature,<sup>31</sup> and law and culture,<sup>32</sup> law and history provides new views and a tool kit to understanding the international legal system. It can “unravel [international law’s] blind spots, biases and ... hidden emancipatory potentials.”<sup>33</sup> Hence, the history of international law “constitutes a major field of inquiry for those engaging critically with international law.”<sup>34</sup> Not only can the history of international law explain the features of the current international legal framework,<sup>35</sup> but it can also provide a critical lens through which to investigate the past and envisage the future of the field.

## 2. The History of International Law as a Battlefield

Two visions of history compete in the making of international legal history. On the one hand, international lawyers are naturally driven to explore the origins of their discipline, and tend to investigate the field using traditional international legal interpretive tools. They “value the ‘historical pedigree’ of legal concepts, and mine the past in search for precedents and customs.”<sup>36</sup> Yet, they lack awareness of historiographical methods, and this has

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<sup>27</sup> MARC BLOCH, *THE HISTORIAN’S CRAFT* (Peter Putnam trans.) (1992), at 43 (noting that “[m]isunderstanding of the present is the inevitable consequence of ignorance of the past,” while one cannot “understand the past, if he is totally ignorant of the present”).

<sup>28</sup> Hoffmann, *Human Rights and History*, at 26.

<sup>29</sup> Sally Engle Merry, *Anthropology and International Law*, ANNUAL REV. OF ANTHROPOLOGY 35 (2006) 99–116 (showing “how anthropological theory helps social scientists, activists, and lawyers understand how international law is produced and how it works”).

<sup>30</sup> LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1460–1900* (2010) (approaching world history by examining the relation of law and geography in European empires between 1400 and 1900); Upendra V. Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law*, INDIANA J. OF GLOBAL LEGAL STUDIES 23 (2016) 15–37 (examining the interplay between the boundaries in international law and the production of geographies of injustice); Tayyab Mahmud, *Colonial Cartographies, the Postcolonial Borders, and Enduring Failures of International Law: The Unending War Along the Afghanistan–Pakistan Frontier* BROOKLYN J INT’L L 36 (2010) 1–74, 73 (noting that the colonial rule “reconfigured space” and that these territorial demarcations “often cut across age-old cultural and historical social units,” thus determining “a host of endemic political and security afflictions”); Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, EUROPEAN J. INT’L L 25, (2014) 9–24 (looking at the changing place of geography in the international system and the challenges that this poses to international law).

<sup>31</sup> See CHRISTOPHER N. WARREN, *LITERATURE & THE LAW OF NATIONS* (2015) (charting a new literary history of international law); Matthew Windsor, *Narrative Kill or Capture: Unreliable Narration in International Law*, LEIDEN J. INT’L L. 28 (2015), 743–769 (evaluating the benefits of a “turn to narration” in international legal scholarship).

<sup>32</sup> RICHARD NED LEBOW, *A CULTURAL THEORY OF INTERNATIONAL RELATIONS* (2008) (examining the influence of culture and identity on the development of international political order).

<sup>33</sup> Ntina Tzouvala, *New Approaches to International Law: The History of a Project*, EUROPEAN J. INT’L L. 27 (2016) 215–233 (reflecting upon critical international scholarship), at 224.

<sup>34</sup> *Id.*

<sup>35</sup> Matthew Dyson, *If the Present were the Past*, AMERICAN J. OF LEGAL HISTORY 56 (2016), 41–52, at 50 (noting that “the historical connection allows us to see the inner substance of the present”).

<sup>36</sup> Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997–1998), at 107 (also noting that lawyers “treat the past as legitimating”).



affected the quality of some of their historical inquiries. Lack of consultation of primary sources and limited engagement with secondary historical sources have also contributed to make some of the histories of international law, as narrated by international lawyers, fundamentally flawed. Moreover, most international lawyers consider international law as the product of “progress in the evolution of ideas.”<sup>37</sup> By presuming that international law is a force for good, international law scholars often assume that its progress is underway.<sup>38</sup> They “have little appreciation for detailed contextualisation”.<sup>39</sup> They tend to adopt genealogical, and a-historical approaches “to generate data and interpretations that are of use in resolving modern legal controversies.”<sup>40</sup> Yet, genealogical and a-historical histories of international law can “lead to anachronistic interpretations of historical phenomena” and neglect their historical context.<sup>41</sup>

On the other hand, legal historians claim that the history of international law is just a subfield of legal history and, therefore, requires the adoption of historiographical methods. They disfavor the ‘idea of a usable past’ and focus on ‘the pastness of the past.’<sup>42</sup> They aim to “understand the past ... for what it meant to the people living in it” rather than “for what it brought about”.<sup>43</sup> In their narratives, they look for ‘alternative paths’, ‘roads not taken’, and “elective affinities that do not seem to be obvious connections.”<sup>44</sup> The perceived downsides of this focus are: 1) the possible lack of focus and/or expertise on issues that are perceived as crucial by international lawyers; 2) painstaking attention to historical details and data which may seem irrelevant to international lawyers; and 3) little if any attention to the current relevance of international legal history.

Therefore, a turf war has erupted between ‘historians’ and ‘lawyers’ on what kind of history of international law we could and/or should have. Far from being a merely theoretical debate, with little or any practical impact,<sup>45</sup> this is a struggle for the soul of international legal history, and arguably international law itself, that has transformed the

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<sup>37</sup> Philip Alston, *Book Review – Does the Past Matter? On the Origins of Human Rights*, HARVARD L. REV. 126 (2013) 2043–2081, at 2063 (noting that “international law scholars have long been accused of portraying their discipline as an intrinsically or inexorably progressive one”).

<sup>38</sup> See e.g. Ian Hurd, *Enchanted and Disenchanted International Law*, GLOBAL POLICY 7 (2016) 96–101, at 96 (suggesting the existence of two attitudes to international law: 1) an enchanted attitude, which presumes the normative valence and political wisdom of following international law, and 2) a disenchanted one, which treats the merit of and compliance with international law as open questions for inquiry and discussion, and noting that international lawyers usually adopt the former). For a critical view of the progressive nature of international law, see generally THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* (2010) (examining the notion of progress in international law). See also NATHANIEL BERMAN, *PASSION AND AMBIVALENCE. COLONIALISM, NATIONALISM AND INTERNATIONAL LAW* (2011) (rejecting the so-called history of events (*histoire événementielle*) meant as a progress narrative tracking landmark developments in the field, and focusing on less evident, but allegedly more deeply significant historical events).

<sup>39</sup> Marcus M. Payk, *The History of International Law – or International Law in History? A Reply to Alexandra Kemmerer and Jochen von Bernstorff*, EJIL: TALK!, January 8, 2015 (pinpointing that “those who see international law as a force for good per se and who are interested only in tracing the success story of its development will have little appreciation for detailed contextualisation.”)

<sup>40</sup> Kalman, *Border Patrol*, at 115; Steven Wilf, *Law/Text/Past*, 1 UC IRVINE L. REV. 543 (2011) at 553 (examining legal historians’ complex relationship with text); Anne Orford, *On International Legal Method*, LONDON REV. INT’L L. 1 (2013) 166–197, 171 (noting that “anachronism is today treated as a ‘sin against the holy spirit of history.’” But arguing that law resists easy temporal divisions as “judges, advocates, scholars and students all look to past texts precisely to discover the nature of present obligations?”)

<sup>41</sup> Randall Lesaffer, *International Law and Its History: a History of Unrequited Love*, in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.) *TIME, HISTORY AND INTERNATIONAL LAW* (2004), 27–41 at 34–35.

<sup>42</sup> Kalman, *Border Patrol*, at 114.

<sup>43</sup> Lesaffer, *International Law and Its History*, at 34–35; See also Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY AND THEORY (1969) 3–53, 28 (cautioning against the dangers of “approaching materials with preconceived paradigms” as a “form of conceptual parochialism” and of “writing historical nonsense”).

<sup>44</sup> Wilf, *Law/Text/Past*, at 558.

<sup>45</sup> Alston, *Does the Past Matter?*, at 2066.

field into a battlefield.<sup>46</sup> It is not only about methods, form and procedure, but also about substance, aims and objectives of international legal history. Such clash is “a struggle for interpretive power,” with the resulting ability to impose a hegemonic discourse and domesticate “divergent narrative visions.”<sup>47</sup> The outcome of this debate is important because, far from simply determining the form of legal research, it will likely influence the types of questions/investigations of the same. Moreover, the history of international law can influence the evolution of international law itself and become an instrument of power.

The debate between historians and lawyers has taken place in various areas of international law. One example is human rights law. International lawyers and legal historians debate whether genealogy matter in human rights law. While international lawyers adopt a genealogical approach, and agree that human rights have an old pedigree eventually acquiring different political and legal meanings over time,<sup>48</sup> legal historians see them as a contingent phenomenon.<sup>49</sup>

On the one hand, human rights lawyers tend to trace the origins of human rights back to the origins of human history itself. For instance, adopting a distinctively genealogical approach, which characterizes international lawyers’ histories, several international lawyers have assimilated ideas of ‘rights’, as mentioned in the abolitionist debates, to current meanings of ‘human rights’, arguing that the abolition movement was an early victory for human rights.<sup>50</sup> While other international lawyers admit that there are differences between the use of ‘rights’ in earlier centuries and today, they agree that genealogical and analytical approaches matter.<sup>51</sup>

On the other hand, legal historians consider that the past should not be read as a mere precursor of the present and are wary of genealogical frameworks. For instance, for Moyn, human rights emerged in 1977, because “they were widely understood as a moral alternative to bankrupt political utopias”, such as socialism, communism and nationalism.<sup>52</sup> Accordingly, the human rights movement would be “of such recent provenance as to lack

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<sup>46</sup> Jenny S. Martinez, *Human Rights and History*, HARVARD L. REV. FORUM 126 (2012) 221, 239 (noting that “there are deeper issues at work in the debate” about the history of international law).

<sup>47</sup> Windsor, *Narrative Kill or Capture*, 743.

<sup>48</sup> LYNN HUNT, *INVENTING HUMAN RIGHTS* (2007) 22 (arguing for commonalities and continuities between the French Revolution and the postwar human rights moment); Alston, *Does the Past Matter?* 2074 (pinpointing that “genealogy matters”); 2045 (“arguing that genealogy matters a great deal in these debates”).

<sup>49</sup> Several scholarly works describe the human rights moment as a direct result of the end of World War II. See, e.g., ANDREW FAGAN, *HUMAN RIGHTS: CONFRONTING MYTHS AND MISUNDERSTANDINGS* (2009), 7, 10, 64; MARK FREEMAN AND GIBRAN VAN ERT, *INTERNATIONAL HUMAN RIGHTS LAW* (2004), 19; JIM IFE, *HUMAN RIGHTS FROM BELOW: ACHIEVING RIGHTS THROUGH COMMUNITY DEVELOPMENT* (2009), 78. *But see* MOYN, *THE LAST UTOPIA*, 3 (arguing that human rights “emerged in the 1970s seemingly from nowhere” and suggesting that earlier concepts that appear similar in certain respects to contemporary human rights are false cognates (*faux amis*) to the current concept).

<sup>50</sup> See, e.g., JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012) 6 (suggesting that “slave courts were the first international human rights courts”) and 13 (arguing that “the abolition of the transatlantic slave trade remains the most successful episode ever in the history of international human rights law”); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550, 550 (2008) (contending that international courts for the suppression of the slave trade established under bilateral treaties between Britain and other countries between 1817 and 1871 were the first international human rights courts). See also SEYMOUR DRESCHER, *CAPITALISM AND ANTISLAVERY: BRITISH MOBILIZATION IN COMPARATIVE PERSPECTIVE* (1986) x (considering abolitionism—the historical movement to end the slave trade— as “the first and, in a narrow sense, the most successful human rights movement”).

<sup>51</sup> Alston, *Does the Past Matter?* 2077 (noting “the intrinsic polycentricity of the human rights enterprise.”) and 2063 (cautioning that international legal historians should not move “from one historical moment to another” without showing causality, verifying continuity, or considering the historical context. For Alston, they should not overemphasize “coherence and continuity,” because such approach risks “marginaliz[ing] competing understandings, and can be used to delegitimize alternative visions.”)

<sup>52</sup> MOYN, *THE LAST UTOPIA* (2010) 227.

a genealogy worthy of the name”.<sup>53</sup> Moyn’s theory has been described as the big bang theory of human rights, evoking the idea of rights emerging suddenly from nothingness.<sup>54</sup> Moyn’s path-breaking monograph, *The Last Utopia: Human Rights in History*, relies on two conceptual steps. First, Moyn articulates some major criticisms to the lawyers’ history of international law (*pars destruens*). Human rights may currently be “so firmly entrenched in our moral landscape that it is almost impossible for us to imagine what an alternative landscape would look like,” but this may not have always been the case.<sup>55</sup> Moyn cautions not to read history through the lenses of the present with insight, but to read it through the lenses of the past for what it was.<sup>56</sup> Second, he develops a thought-provoking (albeit debated) theory about the origins of the current notion of human rights (*pars construens*). He argues that the contemporary meaning of human rights emerged only in the 1970s.<sup>57</sup> Such provocative iconoclasm has two major merits. First, it “revitalized the historical study of human rights by contesting the relevance of a long-term perspective.”<sup>58</sup> Second, it compelled a deep and healthy rethinking of the history of international law. While Moyn may be stretching the argument to a breaking point in his *pars construens* discussion, he deserves praise for raising fundamental methodological issues in the *pars destruens* of his work, which can be summarised as follows: the past should not be read as a mere precursor of the present.

This framing dichotomy—the clash between lawyers’ histories and historians’ histories—is an analytical effort to depict the heart of the matter. It delineates competing Weberian ideal types,<sup>59</sup> that is, conceptual tools for the scrutiny and systematic characterization of how scholars approach the history of international law. The divide represents a valuable methodological tool to achieve a deeper understanding of how the relevant epistemic communities—international lawyers and legal historians—approach the history of international law. The splitting-in-half is not meant to be an accurate description of how each scholar approaches the field. Rather, it functions as a research tool for scrutiny, classification, and comparison. It highlights that most scholars struggle to find a proper language in narrating the histories of international law and that there is a dialectical relationship or dialogue between its constituencies.

As the dichotomy between historians’ histories and lawyers’ histories is not a description of reality but is a construct to understand and analyze the history of international law, no scholar fits neatly within given categories. By no means are the historiographical methods of the history of international law endorsed by legal historians only. Rather, several international lawyers have adopted historiographical approaches and/or cautioned purely legalistic approaches to international legal history.<sup>60</sup> For instance, Martti Koskenniemi, has

<sup>53</sup> Alston, *Does the Past Matter?* 2063 (reporting the findings of the revisionist school).

<sup>54</sup> Alston, *Does the Past Matter?* 2074 (calling Moyn’s “theory that sees human rights emerging almost out of nowhere in 1977” as the “big bang theory of human rights”); Martinez, *Human Rights and History*, at 237 (reporting that “as Alston describes it, Moyn’s theory is one of a Big Bang: from nothingness, matter”).

<sup>55</sup> Adam Etinson, *The Last Utopia: Human Rights in History*, HUMAN RIGHTS QUARTERLY 34 (2012), 294, 296 (reviewing Moyn’s THE LAST UTOPIA and suggesting that “rather than worrying about how we might preserve the utopian status of human rights into the future, ... [we should] allow human rights to simply remain there in their proper place, *i.e.*, as rights and not as utopia”).

<sup>56</sup> MOYN, THE LAST UTOPIA, at 11 (arguing that “[i]f the past is read as preparation for a surprising recent event, both are distorted”).

<sup>57</sup> MOYN, THE LAST UTOPIA, at 43 (offering a “broken history of human rights”).

<sup>58</sup> Lynn Hunt, *The Long and the Short of the History of Human Rights*, 233 PAST AND PRESENT (2016) at 323.

<sup>59</sup> Susan J. Hekman, *Weber’s Ideal Type: A Contemporary Reassessment*, POLITY 16 (1983), 119, 119 (arguing that Weber’s use of ideal concepts is methodologically sound and logically consistent).

<sup>60</sup> See also Alston, *Does the Past Matter?* 2043 (noting that “Until fairly recently, little attention was paid to the historiography of human rights, and the mainstream histories mostly reflected an uncritical narrative of relatively steady progress in the evolution of ideas .... But these ... genealogies have come under strong challenge from a variety of critics”).

adopted multiple approaches to the history of international law in his works.<sup>61</sup> By the same token, some legal historians have adopted a conceptual approach to history.<sup>62</sup> To sum up, scholars attempt to bridge the gap between the historians' histories and the lawyers' histories adopting different approaches.

### 3. What Kind of History of International Law Should We Have?

The flourishing of international legal history prompts us to reflect on what *kind* of history of international law we should have. Should one be concerned with the historical record or its legal afterglow? Should legal historians be cognizant of current international law? Is there anything to be gained by developing a primarily legal rather than historical method in writing the history of international law? Should juridical thinking frame the issues the author raises and shape the archival choices she makes throughout her research and the construction of her narrative?<sup>63</sup> In parallel, should international law scholars be cognizant of historical method(s)? If so, which historical method suits their research better? Should they focus on the history of institutions and concepts or rather prefer the biographical genre, studying the lives of prominent legal scholars? Should they look at the context in which international law came into being? Can we expect them to visit archives and critically engage with historical sources? Is the history of international law a *sui generis* field of study which in fact requires *ad hoc* methods and approaches? I

In order to address these questions, this section proceeds as follows. First, it discusses the converging divergences of international law and legal history. If one reasonably accepts the equivalence between international law and legal history, ideally, both should have equal footing in mapping the history of international law. Therefore, it is vital to examine their respective subject matters, languages, and cultures.<sup>64</sup> Second, this section illustrates the four dimensions of international legal historiography: 1) global/local; 2) internal/external; 3) diachronic/synchronic; and 4) micro/macro. It then concludes discussing the discernible trends of international legal history across these various dimensions.

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<sup>61</sup> See, e.g., MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA—THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006) 603 (noting, albeit not necessarily endorsing his colleagues' suspicion that Koskenniemi was "taking (postmodern) delight in an endless repetition of paradoxical formulations"); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2002) chapters 5 and 6 (adopting, inter alia, the biographical genre and studying key figures such as Hersch Lauterpacht, Hans Morgenthau and Carl Schmitt).

<sup>62</sup> Hayden White, Foreward, in REINHART KOSELLECK, THE PRACTICE OF CONCEPTUAL HISTORY—TIMING HISTORY, SPACING CONCEPTS (2002) ix (defining Koselleck as "the foremost exponent and practitioner of *Begriffsgeschichte*, a methodology of historical studies that focuses on the invention and the development of the fundamental concepts (*Begriffe*) underlying and informing a distinctively historical (*geschichtliche*) manner of being in the world").

<sup>63</sup> Orford, *On International Legal Method*, at 166 (arguing that "there is something to be gained—theoretically, politically and empirically—by developing a primarily juridical (rather than historical, philosophical, economic or sociological) method as a basis for exploring ... contemporary international developments" and explaining that in a previous monograph that she authored "[j]uridical thinking frame[d] the problems that the book raise[d], shape[d] the archival choices made throughout its research and the construction of its narrative, structure[d] its argument and provide[d] its conceptual underpinnings."). See also ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011) (arguing that the philosophical roots of the responsibility to protect principle are to be found in the dilemma of political authority in times of civil war and revolution).

<sup>64</sup> Gerry Simpson, *The Sentimental Life of International Law*, LONDON REV. INT'L L. 3 (2015) 3–29, 6 (noting that international law can and has been conceived "as a language, or culture or collection of people who call themselves 'international lawyers' and do things in particular ways employing distinctive speech patterns or tics, and operating within an identifiable set of cultural mores"); Dyson, *If the Present were the Past*, at 50 (reflecting on legal history and its future).

International law and legal history diverge on a number of issues, including subject matter, language and culture. Whereas international law constitutes a well-established and flourishing area of law that governs international relations, legal history studies the evolution of law and the reasons for change.<sup>65</sup> What matters to a lawyer can be irrelevant for the historian, and vice versa.<sup>66</sup>

International law scholars and practitioners generally adopt a deliberately lucid, objective, and terse language,<sup>67</sup> relying on the use and re-use of terms in a rather conservative fashion.<sup>68</sup> In fact, “[e]xcept in hard cases, the law doesn’t reward creativity. It rewards logic and experience”.<sup>69</sup> Whether it is displayed in norms or briefs or academic works, such language is an instrument of persuasion and power, often claiming to be definitive, “inevitable in [its] conclusions”<sup>70</sup> and thus preventing “more emancipatory or dissident” discourses about the international order.<sup>71</sup> For instance, the use of apparently interchangeable terms such as autonomy and self-determination can dilute or overstate given claims.<sup>72</sup> The language of historians differs from law, as it bypasses legal technicalities,<sup>73</sup> requires some literary qualities<sup>74</sup> and “the ability to convey a vivid representation of characters and situations.”<sup>75</sup> Moreover, historians are aware of the contingent nature of their writings, that their historical accounts “never exhaus[t] all future possibility”.<sup>76</sup>

International law scholars and practitioners share an identifiable cultural capital, *i.e.* “a certain way of understanding ... the world.”<sup>77</sup> International lawyers “look to the past for authority” and often assume that “there is continuity between past and present”.<sup>78</sup> By

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<sup>65</sup> Dyson, *If the Present were the Past*, at 50 (discussing legal history).

<sup>66</sup> Ginzburg, *Checking the Evidence: The Judge and the Historian*, at 85 (noting that “sometimes cases a judge would dismiss as juridically nonexistent turn out to be fruitful to a historian’s eye”).

<sup>67</sup> Simpson, *The Sentimental Life of International Law*, 11 (noting that legal scholars have tended “to express [themselves] in a highly particular... form” and that “the ideal” has been “a deracinated, anti-biographical, depersonalised, [and] formula[re] prose style”).

<sup>68</sup> Wilf, *Law/Text/Past*, at 550.

<sup>69</sup> Gerald Lebovitz, *Legal Writing Myths*, 16 SCRIBES JOURNAL OF LEGAL WRITING (2015) 113, 115 (pinpointing that “Lawyers must rely on precedent. A scientist who invents a novel approach is an innovator. Not so the lawyer.”).

<sup>70</sup> Wilf, *Law/Text/Past*, at 550.

<sup>71</sup> Simpson, *The Sentimental Life of International Law* 6, (noting that international law is “a form of rhetoric or a diplomatic language that forbids more emancipatory or dissident ... ways of going about things”).

<sup>72</sup> HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990) 4 (noting “an expressed desire for greater political autonomy on the part of some segment of ... a state”); Nathaniel Berman, *book review of Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. By Hurst Hannum. Philadelphia: University of Pennsylvania Press, 1990. AMERICAN J. INT’L L. 85 (1991) 731–32 (criticizing Hannum’s monograph for “his discussions of international legal history” and for “assum[ing] that history is not an intrinsically tragic clash of irreconcilables,” as well as for his “preference for “autonomy,” ... rel[ying] on established state power as the persistent structuring element of international law and society”).

<sup>73</sup> Kemmerer, *Völkerrechtsgeschichten – Histories of International Law* (noting that “[h]istorians ... don’t like the technicalities, the complex institutional architectures, the intricate cases and convoluted judgements.”) \*\*\* this is a blog, it does not contain page numbers \*\*\*

<sup>74</sup> Hayden White, *The Question of Narrative in Contemporary Historical Theory*, 23 HISTORY AND THEORY (1984) 1 (arguing that historians’ narratives of the past are based on literary models and that historians resort to literature to convey meaning to their history).

<sup>75</sup> Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, CRITICAL INQUIRY 18 (1991), 79–92 79 (noting that for centuries “history and law has been very close”, and highlighting the convergences and divergences between the historians and lawyers’ professions).

<sup>76</sup> Koskenniemi, *International Law Histories*, 239.

<sup>77</sup> Simpson, *The Sentimental Life of International Law*, at 8–9.

<sup>78</sup> George Rodrigo Bandeira Galindo, *Force Field: On History and Theory of International Law*, RECHTSGESCHICHTE - LEGAL HISTORY (2012) 86, 87 (also noting that “Arguments grounded on the past have been omnipresent in international lawyers’ discourse, in the making of their doctrines or in their statements before international courts”).

contrast, legal historians examine the past in its context. Often ‘skeptical of theory,’<sup>79</sup> they rely upon empirical and inferential methods.<sup>80</sup> They gather information from dusty archives often “scattered across vast distances,”<sup>81</sup> with restrictive access policies and short opening hours. Their narratives are “often said to be provisional, insofar as further research in the archives might ... demand revisions.”<sup>82</sup> Despite having been described as ‘a dry and dusty subject’,<sup>83</sup> as well as ‘nonprofessional’ in its development,<sup>84</sup> legal history nevertheless has quite a long tradition.

Yet, these divergences should not be overstated. There are interesting convergences between international law and history.<sup>85</sup> Both historians and lawyers are required to offer reconstructions of past events.<sup>86</sup> Whereas lawyers’ writings do not have a literary aim, their texts “can have literary qualities.”<sup>87</sup> Moreover, several international lawyers have benefitted from historiographical insights, and intellectual legal historians share methodological affinities with international lawyers focusing on the genealogy or evolution of concepts and investigating the *status quo ante*, the *status quo*, and the future of given ideas.<sup>88</sup>

However, as most international lawyers are not historians by training and, in parallel, most historians do not have in-depth expertise in international law, doubts remain as to the proper methodology to be adopted. This Article does not take a position on whether a given history of international law is better than another; rather it highlights that several histories of international law can and have been written, and illustrates a range of available methods. Despite its flourishing, the history of international law is still in search of a proper methodology. Should one stick to intra-disciplinary approaches, working within the boundaries of only one discipline, be it international law or legal history? Or should we endorse a comprehensive and inter-disciplinary stance, enabling international lawyers and legal historians to work together in mapping out the history of international law? Or, rather, should one adopt post-disciplinary approaches abandoning existing disciplines in order to ‘think beyond old boundaries’?<sup>89</sup>

While it seems clear that “historians have no monopoly on the past,”<sup>90</sup> it is also clear that international law scholars have no monopoly on the past of international law. Rather, this Article suggests that the history of international law is an interdisciplinary field that bridges

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<sup>79</sup> Maks del Mar and Michael Lobban, *Preface*, in Maks del Mar and Michael Lobban (eds.), *LAW IN THEORY AND HISTORY—NEW ESSAYS ON A NEGLECTED DIALOGUE* (2016) (exploring the dialogue between legal theory and legal history).

<sup>80</sup> Ginzburg, *Checking the Evidence: The Judge and the Historian*, 84 (clarifying that “A piece of historical evidence can be either involuntary (a skull, a footprint, a food relic) or voluntary (a chronicle, a notarial act ...). But in both cases a specific interpretive framework is needed.”).

<sup>81</sup> Dyson, *If the Present were the Past*, at 50.

<sup>82</sup> See generally del Mar and Lobban (eds.), *LAW IN THEORY AND HISTORY*.

<sup>83</sup> Dyson, *If the Present were the Past*, at 52.

<sup>84</sup> Roman J. Hoyos, *Legal History as Political Thought*, *AMERICAN J. OF LEGAL HISTORY* 56 (2016) 76–83 (considering legal history as something more than a discipline and a type of political thought), at 79.

<sup>85</sup> Thomas Skouteris, *Engaging History in International Law*, José María Beneyto and David Kennedy (eds.) *NEW APPROACHES TO INTERNATIONAL LAW* (2012) 99, 99 (stressing the linkage between international law and history).

<sup>86</sup> Ginzburg, *Checking the Evidence: The Judge and the Historian*, 84–85 (highlighting that “the tasks of both the historian and the judge imply the ability to demonstrate, according to specific rules, that x did y, where x can designate the main actor, albeit unnamed, of a historical or of a legal act, and y designates any sort of action”).

<sup>87</sup> Brook Thomas, *Reflections on the Law and Literature Revival*, 17 *CRITICAL INQUIRY* (1991) 510, 533.

<sup>88</sup> See e.g. Vincenzo Ferrone, *The Rights of History: Enlightenment and Human Rights*, 39 *HUMAN RIGHTS QUARTERLY*, (2017) 130 (investigating the genealogy of human rights and tracing them back to the Enlightenment).

<sup>89</sup> Bob Jessop and Ngai-Ling Sum, *Pre-disciplinary and Post-disciplinary Perspectives*, *NEW POLITICAL ECONOMY* 6 (2001), 89–101, 89 (“refusing disciplinary boundaries[,] decentering some of their effects ... [and] commit[ting] to transcending these boundaries”).

<sup>90</sup> Kalman, *Border Patrol*, at 114.

the interest of both historians and international law scholars.<sup>91</sup> Historians and international lawyers should “ris[e] above their traditional antagonism”<sup>92</sup> and write international legal history that is of relevance to both international lawyers and legal historians alike.<sup>93</sup>

In order to transcend the borders of pure international law or legal history analysis, one needs to be aware of the four dimensions of international legal historiography: 1) local/global; 2) internal/external; 3) diachronic/synchronic; and 4) micro/macro.

First, international legal history can be ‘local,’ focusing on domestic and/or regional trajectories of international legal history, or ‘global,’ that is ‘a de-centered ... perspective, detached as far as possible, from the concrete circumstances and the national identity of the observer’.<sup>94</sup> Although international legal history by definition focuses on international legal facts, for a long time it adopted a Eurocentric focus.<sup>95</sup> To counter this hegemonic discourse, local and global approaches to international legal history aim to overcome the traditional Eurocentrism of the history of international law.<sup>96</sup> Only recently have scholars approached the history of international law illustrating the contribution of other regions to its making.<sup>97</sup> Among these approaches, global history promotes ‘a de-centered’ perspective focusing on the interactions between peoples rather than states.<sup>98</sup> Global/local legal histories do not necessarily replace the traditional dichotomy between national and

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<sup>91</sup> *Id.* at 116 (“hoping for more scholarship that is both “valid” for historians, in the sense that it represents a provocative interpretation of history, and “valid” for law professors, in the sense that it provides useful data from the past”).

<sup>92</sup> *Id.* at 118.

<sup>93</sup> *Id.* at 116 (arguing that legal historians and international lawyers should “produce work which is at once both good lawyers’ legal history and good historians’ legal history”).

<sup>94</sup> Bardo Fassbender and Anne Peters, *Introduction: Towards a Global History of International Law*, in Bardo Fassbender and Anne Peters (eds) *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* (2012) 1, 9 [internal references omitted] (adopting a global history approach); Galindo, *Force Field: On History and Theory of International Law*, 93 (highlighting that in international legal history, those preferring local approaches “reject ... a singular and unified narrative of the development of international law and instead focus on how such development happened in different ways, at different speeds, and from different perspectives.”)

<sup>95</sup> See Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, *RECHTSGESCHICHTE* 19 (2011), 152–76, 158 (noting that “Europe served as the origin, engine and telos of historical knowledge.”) and 155 (highlighting that “European stories, myths and metaphors continue to set the conditions for understanding international law’s past”). See also Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, in Bardo Fassbender and Anne Peters (eds.), *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* (2012) 1034–57 1034 (noting that “[t]raditionally, the history of international law has been deeply Eurocentric”, and arguing, at 1035 that the Eurocentric historical narrative can “perform an ideological function—universalizing and legitimizing the particular Western standpoint” and calling for the production of “divergent narrative[s]”).

<sup>96</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, 9 (noting that one of the various objectives of global history is “to overcome the (primarily European) heritage of national history”); Galindo, *Force Field: On History and Theory of International Law*, 93 (pinpointing that “studies on the way international law was thought of and practiced in the ‘periphery’ of the world [are] becoming important”)

<sup>97</sup> See, e.g., ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY (1850–1950)* (2012) 10 (suggesting that international law is not purely of European making; arguing that extra-European countries did not passively receive a ‘European international law’ but re-shaped such rules and contributed to the making of international law; and offering “a global and intellectual history of a mestizo international law”). See generally TASLIM OLAWALE ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1988) (illustrating the importance of Africa in the history of international law); Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 *HARVARD INTERNATIONAL LAW JOURNAL* (2006) 283, 283 (examining international law’s trajectories in Latin America); Liliana Obregón, *Regionalism Constructed: A Short History of Latin American International Law* in Mariano J. Aznar and Mary E. Footer (eds.) *SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW* (2012) (examining the history of Latin American international law); DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* (1990) (tracing the role of international law in American foreign policy from the founding of the Republic through the beginning of the Bush administration).

<sup>98</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, at 9.

international legal histories. While domestic history of law is a matter for legal historians; international legal histories can also present a national component. National histories of international law are international legal histories narrated from the perspective of the nation's foreign policy, including "the domestic laws and treaty-arrangements that regulate the conduct of external relations."<sup>99</sup>

Such trends toward local/global histories have both promises and pitfalls. On the one hand, they can map the histories of international law in a pluralistic way.<sup>100</sup> Moreover, they open the door to analysis as to the role played by non-state actors in the history of international law.<sup>101</sup> On the other hand, how to relate the local and the global and how to overcome epistemic biases remain significant challenges.<sup>102</sup>

Second, international legal history can be 'internal' or 'external.' While 'internal' international legal history "stays as much as possible within the box of distinctive-appearing legal things," relying on legal sources and depicting legal matters, external international legal history relies on interdisciplinary approaches, for instance focusing on the interplay between legal matters and "the social context of law and its social effects."<sup>103</sup> So far internal legal history has predominated.<sup>104</sup> In the sixties, the Italian historiographer, Arnaldo Momigliano, famously contended that legal historians should not write solely from an internal perspective. Rather, he argued that since law is a social phenomenon, its history should investigate the interplay between law and its context.<sup>105</sup>

Nowadays both international lawyers and legal historians seem to regard 'self-contained legal history' as outdated.<sup>106</sup> There is an emerging "recognition that meaningful legal history must be more than ... internal history."<sup>107</sup> If law is a 'mirror of society', legal history cannot be separated from law's context.<sup>108</sup> However, some eclecticism is possible and even desirable.<sup>109</sup> For instance, "[o]ne need not choose between ... internal and external legal histories."<sup>110</sup> Rather, "[t]he conventional sources of legal history—judicial opinions, statutes,

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<sup>99</sup> Koskenniemi, *Histories of International Law*, 237.

<sup>100</sup> *Id.* at 10 (highlighting that global histories enable 'a multipolar perspective').

<sup>101</sup> Galindo, *Force Field: On History and Theory of International Law*, 93 (highlighting that "there are possibly 'local' histories on amore reduced scale"); Fassbender and Peters, *Introduction: Towards a Global History of International Law*, 9 (noting that global historians *inter alia* focus on grassroot movements, business and non-state actors).

<sup>102</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, at 10 (mentioning the struggle of international lawyers to overcome 'the epistemic nationalism of their discipline', and for some, the 'traditional epistemic Eurocentrism'); Galindo, *Force Field*, 93 (mentioning the challenge of inquiring into the mutual existence of local and global dimensions of international legal history).

<sup>103</sup> Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, *LAW & SOCIETY REVIEW* 10 (1975) 9, 11 (arguing that whereas American legal history tended to be 'internal', it gradually became more 'external' since the publication of the work of J. Willard Hurst).

<sup>104</sup> Jacob Katz Cogan, book review of *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW*. Edited by Bardo Fassbender and Anne Peters (2012), 108 *AM. J. INT'L L.* (2014) 371, 375 (pinpointing that "Much of [international legal] history is intensely internalist (histories by lawyers seeking the antecedents of contemporary law and the profession, using the methods and materials that lawyers typically employ).")

<sup>105</sup> Arnaldo Momigliano, *The Consequences of New Trends in the History of Ancient Law*, in ARNALDO MOMIGLIANO, *STUDIES IN HISTORIOGRAPHY* (1966) 239–256, at 240–1 (contending that "It is inherent in the general recognition that law, as a systematization of social relations at a given level, cannot be understood without an analysis of the sexual orientations, the moral and religious beliefs, the economic production and the military forces that characterize a given society at a given moment.") *See also* Ginzburg, *Checking the Evidence: The Judge and the Historian*, 84 (suggesting that "No text can be understood without a reference to extratextual realities").

<sup>106</sup> Wise, *Legal History*, 551 (noting that "there is unease on all sides when problems of legal history are treated in traditional lawyers' terms."); Galindo, *Force Field: On History and Theory of International Law*, 97 (criticising "exclusive reliance on canonical authors and the mandarins of the discipline.")

<sup>107</sup> Wise, *Legal History*, 551.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (arguing that "legal historians should not be afraid to adopt a multitude of approaches and experiment in finding different ways to ascertain the truth of the legal past").

<sup>110</sup> Fisk and Gordon, "Law As . . .": *Theory and Method in Legal History*, at 526.



treatises, ... pleadings and ... court records ... —” can appear “alongside conventional sources of intellectual and social history—.”<sup>111</sup>

Third, international legal history can be synchronic or diachronic. Legal history is ‘synchronic’ when it investigates legal issues as they exist at one point in time without reference to their evolution. Legal history is ‘diachronic’ when it studies legal phenomena as they change in the long term, the *long durée*.<sup>112</sup> Most historians, except for intellectual historians studying the history of ideas and looking at the development of concepts,<sup>113</sup> generally adopt a synchronic approach, stressing that “the past is ... different from the present.”<sup>114</sup> For historians, “the past is a foreign country; they do things differently there.”<sup>115</sup>

By contrast, international lawyers prefer a diachronic approach, considering law and history as necessarily entangled. They focus on a given legal concept and study its evolution. The language of international law has “a strong genealogical or ancestral component,” “in the sense that one generation has provided the foundation or the impetus for the emergence and shaping of the next generation’s usage.”<sup>116</sup> International lawyers look for continuity with the past. One of the sources of international law—customary law—is based on state practice and thus requires international lawyers to look at past conduct. Although there is no binding precedent in international law, international law courts and tribunals do refer to past cases.

While a diachronic approach characterises the toolkit of international lawyers when they deal with international law, questions arise as to whether such approach remains sound when dealing with the *history* of international law. International law scholars and practitioners have started questioning the sacrality of diachronic approaches within the history of international law.<sup>117</sup> Such diachronic approaches may foreclose in depth understanding of the meaning of given events or legal texts.<sup>118</sup> However, questions arise as to the possibility of a purely synchronic study of international legal history. In fact, as Koskenniemi points out, “a clear separation between the object of historical research and the researcher’s own context cannot be sustained; ... the study of history is unavoidably—and fruitfully—conditioned by the historian’s ... pre-understandings, conceptual frames and interest[s].”<sup>119</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> Fernand Braudel, *History and the Social Sciences*, in FERNAND BRAUDEL, ON HISTORY (1980) 25, 27 (highlighting the ‘multiplicity of time’ and the value of ‘the long time span’).

<sup>113</sup> Like law scholars, also intellectual historians (those studying the history of ideas) look at the development of concepts, studying the status quo, the status quo ante, how the status quo came into being, and then finally how developed in the future.

<sup>114</sup> Kalman, *Border Patrol*, at 121.

<sup>115</sup> DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY (2015) 3 (quoting L.P. HARTLEY, THE GO-BETWEEN (1962) 17).

<sup>116</sup> Alston, *Does the Past Matter?* at 2052.

<sup>117</sup> Galindo, *Force Field: On History and Theory of International Law*, 93 (cautioning that “What is necessary, however, is that any international lawyer – practitioner or theorist alike – approach history more carefully, avoiding seeing in the past what is not there at all: the present”); Kemmerer, *Völkerrechtsgeschichten – Histories of International Law* (noting that “reconstruction of context is a deliberate decision on the part of the (international law) historian.”)

<sup>118</sup> See e.g. Koskenniemi’s reflection on anachronism and the legacy of Francisco de Vitoria, one of the founders of international law. Koskenniemi, *Histories of International Law*, 226 (asking: “What might Vitoria, ... professor of theology at Salamanca, have thought if he had learned that he would be downgraded as a “jurist” or addressed as a “human rights scholar” in a world where the expression “human rights” made no sense ... and ideas that we associate with freedom in a secular community were frankly heretical? Vitoria, after all, was in favor of burning heretics! ... Surely, anachronism shuts our ears to what Vitoria was actually trying to convey to his Salamanca audience.”)

<sup>119</sup> *Id.* 230 (also suggesting that “complete freedom from anachronism is impossible”).

Fourth, international legal history can be micro or macro. Micro-history typically involves “a reduction of scale” and focuses on given events or anecdotes or individuals rather than epochal events.<sup>120</sup> Far from constituting mere case studies, micro-histories aim to ask big questions in small places. Despite their small scale, such stories allegedly epitomize the behaviors, logics, and motives characterizing a given society.<sup>121</sup> These anecdotes “typically bridge the worlds of literature and history.”<sup>122</sup> Albeit to a limited extent, international legal historians have mined small episodes, often discovered serendipitously, for insights into major themes of international legal history.<sup>123</sup> While the move to investigate micro-histories is only recent, its potential is only gradually unfolding.<sup>124</sup> Not only is there a growing interest in international law scholars and practitioners, whose biographies make great subject of micro-histories, but there is a growing interest in linking institutions, concepts and international legal scholars to their milieu. The small-scale enables researchers to look at given topics from new underresearched angles and provide in depth analysis even of the historical smaller details (*minutiae*).<sup>125</sup> However, such an approach has also some pitfalls, including the difficulty of selecting a subject suitable matter for inquiry, dealing with scarce evidence and gaps in the data, and remaining relevant to a broad audience.

In turn, macro-history seeks out large, long-term trends in international legal history, looking at multiple events and concepts over the course of centuries.<sup>126</sup> It studies the past on large scales. Most international legal histories have focused on large historical events and their legal outputs.<sup>127</sup> But the fact that macro-historical approaches have predominated in the field of international legal history does not mean that it should necessarily be the case in the future. This approach often loses sight of local and individual contributions to international legal history.

Therefore, macro-histories and micro-histories are complementary.<sup>128</sup> Their complementarity is highlighted by what historians call the ‘issue of framing’: “In writing, as in an art gallery, frames determine what we see and how we see it. By telling us what is inside and what is outside they suggest what is and what is not important. So frames can hide at least as much as they reveal.”<sup>129</sup> Therefore, investigating international legal history through both micro and macrohistorical frames “ought to offer a richer, fuller and more

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<sup>120</sup> On microhistory, see Carlo Ginzburg, *Some Queries Addressed to Myself*, CYBER REV. OF MODERN HISTORIOGRAPHY 18 (2013) 90, 93 (also arguing that “the reduction of scale in observation (not the object of investigation ...) is a precious cognitive tool [a]s ... one intensely studied case can be the starting point for a generalization[.]...above all if it is an anomalous case, because anomaly implies the norm”); Carlo Ginzburg, *Microhistory: Two or Three Things that I Know about it*, CRITICAL INQUIRY 20 (1993), 10–35;

<sup>121</sup> William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, STANFORD L. REV. 49 (1996–1997) 1065, 1071.

<sup>122</sup> *Id.*

<sup>123</sup> See e.g. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) 10 (discussing some historical background).

<sup>124</sup> Galindo, *Force Field: On History and Theory of International Law*, 98 (noting that “International lawyers have rarely if ever embarked upon full-length, small-scale histories. Some commendable efforts excavated the doctrine of forgotten authors, but they are generally unconcerned with a movement that starting in the 1970s shook the field of historical studies under the label of micro-history.”)

<sup>125</sup> See e.g. PHILIPPE SANDS, EAST WEST STREET (2016) xxviii–xxix (connecting the Nuremberg trials to the histories of Hersch Lauterpacht, Rafael Lemkin, and the history of Sand’s own family.)

<sup>126</sup> See e.g. GREWE, THE EPOCHS OF INTERNATIONAL LAW 1 (discussing the history of modern international law and proposing a “periodization” of the same).

<sup>127</sup> Koskenniemi, *International Legal Histories*, 235 (noting that “[h]istories of international law have tended to encompass large, even global, wholes that are supposed to determine the substance of the international laws of a period, such as the ‘Spanish’, ‘French’, or ‘British’ ‘epochs’ discussed by Grewe.”)

<sup>128</sup> David Christian, *The Play of Scales*, 4 SOCIAL EVOLUTION & HISTORY (2005) 22, 28.

<sup>129</sup> *Id.* 26 (referring to the traditional neglect of Aboriginal perspectives into historical narratives of domestic history).

coherent understanding of the past in general”.<sup>130</sup> Moreover, international legal historians may well need to “mov[e] back and forth between a wider and a narrower scale in order to gradually come to a clearer view of [their] object.”<sup>131</sup>

Are there discernible trends of international legal history across these various dimensions? For decades, if not for centuries, the history of international law has been Eurocentric. Since the decolonization process took off, this assumption has given way to more comprehensive and inclusive histories of international law.<sup>132</sup> In the late 19th and early 20th centuries, legal history—both national and international—used to be largely ‘internal.’<sup>133</sup> More recently, however, eminent scholars have stressed the need to broaden the types of sources and to adopt a more interdisciplinary stance in order to locate given historical events within a broader context.<sup>134</sup>

Until recently, while legal historians privileged a synchronic approach to the history of international law, international law scholars privileged a diachronic approach to the same, focusing on the genealogy of given legal concepts and assuming continuity between legal scholarship of earlier periods and contemporary international law.<sup>135</sup> International law scholars argued for the specificity of law; law is a peculiar “discipline in which judges, advocates, scholars and students all look to past texts precisely to discover the nature of present obligations.”<sup>136</sup> However, legal historians have criticized the genealogical approach for leading to anachronistic results, for not taking into account historical complexity and “the basic rules of historical methodology.”<sup>137</sup> If the diachronic approach works well for the study of international law, this does not necessarily mean that it works well for making the history of international law. While “lawyers ... are trained in the art of making meaning move across time,”<sup>138</sup> doubts remain as to whether anachronism should/can have any role in the making of international legal history. The diachronic/synchronic conundrum can be solved by carefully selecting an appropriate historiographical method.

#### 4. Historiographical Methods

Methodology—the analysis of the methods applied to a field of study—“involve[s] key decisions about what and how we read, the nature of the material with which we engage, [and] how we conduct our research.”<sup>139</sup> Why should one bother about the method(s) of international legal history? One could contend that any historiographical debate “not only

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<sup>130</sup> *Id.* 27–8 (noting that “[b]y looking at the very small you can sometimes glimpse the very large. But the opposite is also true; by trying to grasp very large themes, you can sometimes find to your surprise that you are closing in on the intimate and the personal”).

<sup>131</sup> Koskeniemi, *Histories of International Law*, 236.

<sup>132</sup> See, e.g., O. Yasuaki, *When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective*, 2 *JOURNAL OF THE HISTORY OF INT’L L.* (2000) 1, 1 (aiming at overcoming Eurocentrism); DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000) 27, 43 and 45 (pinpointing that history remains largely Eurocentric and aiming at provincialising it that is “aim[ing] to displace Europe from the centre”).

<sup>133</sup> Kunal M. Parker, *Writing Legal History Then and Now: A Brief Reflection*, *AMERICAN J. LEGAL HISTORY* 56 (2016), 168–178, at 168.

<sup>134</sup> Alston, *Does the Past Matter?* at 2048.

<sup>135</sup> Orford, *On International Legal Method*, 172.

<sup>136</sup> *Id.* at 171.

<sup>137</sup> Lesaffer, *International Law and Its History*, 33. (criticising the genealogical approach for “describ[ing] history in terms of similarities with or differences from the present, and not in terms of what it was” and for “try[ing] to understand the past for what it brought about and not for what it meant to the people living in it”).

<sup>138</sup> Orford, *On International Legal Method*, 172.

<sup>139</sup> *Id.* at 167.

fails to enhance, but actively threatens the practice of history.”<sup>140</sup> Accordingly, to do history, one “should forget theory and get on with the business of doing history.”<sup>141</sup> Following this line of argument, if any guidance was needed for determining how to write international legal history, one could look at the work of peers.<sup>142</sup> In a nutshell, trying too hard to understand the history of international law would prevent one from appreciating just how interesting the history of international law really is.<sup>143</sup>

The problem with this apparently liberal approach is that if one adopts it, she will be left in a muddy zone of uncertainty and confusion as to the best way(s) to proceed. Reference to the works of peers can be illuminating, but the current literature is rather fragmented, given the extraordinary expansion of international law to cover fields as diverse as international criminal law, international economic law, the law of the sea, and others. Scholars often fail to explicitly acknowledge the method they adopt. This is not to say that method is irrelevant to their work, just that often they take it for granted. Moreover, recent methodological debates, as illustrated in section 2, can make it difficult to draw sound conclusions about the lessons to be learned from the debate.

Therefore, mapping and critically assessing the available methods of international legal historiography is a useful, timely, and crucial endeavor. Not only can it clarify the range of available options, but it also enables the researcher to identify the best method(s) for pursuing her research objectives. A scrutiny of the available methods does not replace creative effort with a pre-determined path; rather, it aims to contribute to the understanding of the field and empower the international legal historian to devise an appropriate method to address given research questions. It is like providing a map: not only is one free to select possible destinations, but she is also free to choose possible routes. No single paradigm dominates the historiography of international law. Rather, there is an array of methods by which international legal historians can do their work. While this Article may not provide the ultimate map, and other maps are possible, it certainly constitutes an original contribution to the emerging field of the history of international law, which may facilitate further research in the field and/or open fruitful debates.

While this section offers a significant sample of historiographical methods, it does not purport to be exhaustive. In particular, it does not aim to map all of the available methods of international law or the methods of legal history. Rather, it identifies a selected range of methods that can and have been used for writing the history of international law.<sup>144</sup> While this section examines the defining characteristics of these methods, it acknowledges that “each is a living method, employed by a diverse community of scholars,” and that therefore, only a snapshot of them can be provided with perhaps some sense of their past and future trajectories.<sup>145</sup>

This Article identifies seven major methods and/or approaches to international legal historiography: 1) Structuralism; 2) Post-structuralism; 3) Contextualism; 4) Textualism; 5)

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<sup>140</sup> Fisher, *Texts and Contexts*, 1087 (reporting an analogous criticism with regard to the methods of American legal history).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1086.

<sup>144</sup> For a similar approach, albeit related to American legal history rather than international legal history, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, STAN. L. REV. 49 (1996–1997) 1065 (referring to four schools of thought in intellectual history that have been used by law historians: structuralism, contextualism, textualism and new historicism).

<sup>145</sup> For a similar approach, albeit related to the identification of methods of international law rather than methods of international legal history, see Steven R. Ratner and Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. (1999), 291, 295 (highlighting the fact that methods evolve, and “present[ing] only a snapshot” of methodological approaches).

Critical Legal Studies; 6) Third World Approaches to International Law; and 7) Law and Society approaches. The first four groups or schools of thought—Structuralism, Post-structuralism, Contextualism, and Textualism—derive from intellectual history; the remaining three groups or schools of thought—Critical Legal Studies, Third World Approaches to International Law, and Law and Society approaches—derive from international and domestic law.

Structuralism assumes that the historian's job is to map "universally transcendent [legal] structures ... without paying any attention at all to social context."<sup>146</sup> Focusing on doctrinal dogmas, it produces a type of history that is not really history at all.<sup>147</sup> It investigates "the evolution of legal rules, paying attention to how those rules have changed over time."<sup>148</sup> According to the structuralists, law can be understood as a 'timeless and universal'<sup>149</sup> "language-system ... governed by a deep grammar."<sup>150</sup> Accordingly, they focus on the 'deep grammar' of international law.<sup>151</sup> Whereas structuralism "had only a modest following among intellectual historians in general," it "profoundly influenced the scholarship of a substantial group of legal historians."<sup>152</sup> Nonetheless structuralist legal history has been increasingly criticized and "sidelined in the last decades of the 20th century," for its ahistoricism and rigidity.<sup>153</sup>

Post-structuralism advocates critical ways of thinking. The contextualists, the Gramscians, the feminists, and the Frankfurt School could be included in this large group. Such movements share, for example, the perception that the historical and cultural context should be investigated, as well as a common approach of constant re-assessment of facts, events and theories. In other words, post-structuralism transforms historiography into a critical project.<sup>154</sup>

Contextualism, the mainstream historiographical current, highlights the need to relate texts to their context and to constant re-assess facts, events and theories. It constitutes a reaction to structuralism. Contextualists highlights that the meaning of a text depends upon its historical context, and that, therefore, "the central job of the ... historian is to reconstruct that context and then to interpret the text in light of it."<sup>155</sup> According to Quentin Skinner, the founder of the Cambridge school of intellectual history,<sup>156</sup> legal texts "should not be read as sources of timeless truths," rather they should be seen as "political interventions in particular social contexts and political power struggles."<sup>157</sup> Therefore,

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<sup>146</sup> Desautels-Stein, *A Context for Legal History*, at 35.

<sup>147</sup> *Id.* (criticising structuralist legal history as "an embarrassing kind of history").

<sup>148</sup> *Id.* at 36.

<sup>149</sup> Fisk and Gordon, "Law As . . .": *Theory and Method in Legal History*, at 530.

<sup>150</sup> Justin Desautels-Stein, *Structuralist Legal Histories*, LAW AND CONTEMPORARY PROBLEMS 78 (2015) 37 at 45.

<sup>151</sup> CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS—A MARXIST THEORY OF INTERNATIONAL LAW (2005) 3; Martti Koskeniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW (2016) 727, 727 (defining 'structuralism as a "form of analysis that separates phenomena of social life that are immediately visible from others that are usually 'hidden' but in some way contribute to producing the former so that once the operation of that 'hidden' background is revealed we feel we 'understand' the more familiar phenomena better").

<sup>152</sup> Fisher, *Texts and Contexts*, 1073.

<sup>153</sup> Alston, *Does the Past Matter?*, at 2080; Desautels-Stein, *A Context for Legal History*, at 37.

<sup>155</sup> Fisher, *Texts and Contexts*, 1068.

<sup>156</sup> The Cambridge School of Intellectual History was a historiographical movement traditionally associated with the University of Cambridge including a number of intellectual historians who aimed at "reconstruct[ing] an intellectual context within which major works of philosophy could be studied, as opposed to the traditional way of studying philosophy, where great texts tended to be examined for their internal coherence and for the truth status of the claims that they made." [http://www.history.ac.uk/makinghistory/themes/cambridge\\_school\\_of\\_intellectual\\_history.html](http://www.history.ac.uk/makinghistory/themes/cambridge_school_of_intellectual_history.html)

<sup>157</sup> Orford, *On International Legal Method*, 170 (referring to Skinner, *Meaning and Understanding in the History of Ideas*, 3).

international legal historians should approach past texts studying what their authors intended to do in their own historical context, rather than studying them anachronistically in light of current debates. For the contextualists, it is necessary to study both the text and its context to understand a given text.<sup>158</sup> In fact, not only can the context —meant as the social, cultural and political background of a given text—“help in the understanding of a text”, but it also constitutes a sort of ‘shibboleth’, the master key to its proper meaning(s).<sup>159</sup> In turn, “the understanding of texts ... presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken.”<sup>160</sup> Several international law scholars have expressed some sympathy for this approach,<sup>161</sup> but also cautioned that the choice of the relevant contexts is a subjective endeavour which is unavoidably influenced by the (current) concerns of the researcher.<sup>162</sup>

Textualism suggests that “each document produces ... a multiplicity of meanings.”<sup>163</sup> Textualists argue that “it is futile to try to give meaning to an ambiguous text by looking to its context since the context is equally dependent on interpretation [of texts] for its meaning.”<sup>164</sup> Moreover, treating a text as a mere “respons[e] to the ideas of [its] author[’s] contemporaries” seems rather determinist and neglects the “transcendent potential” of a given text.<sup>165</sup> Rather, textualists suggest the existence of a continuous dialogue between a text and its readers and favor anachronism.<sup>166</sup> For them there is a living bond between past and present. Textualist analyses “oscillat[e] between explications of texts themselves and reflections upon how those texts illuminate and are illuminated by . . . present-day legal thought and practice.”<sup>167</sup> Some international lawyers have adopted some of the textualist methodological tenets, albeit implicitly.<sup>168</sup> Legal historians, such as Quentin Skinner, have

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<sup>158</sup> Skinner, *Meaning and Understanding in the History of Ideas*, 40 (noting that the method of contextual reading “provide[s] the appropriate methodology for the history of ideas,” “paying due regard to the historical conditions which produced the texts themselves”); Lesaffer, *International Law and Its History*, 38–40 (proposing ‘a two phased methodology’. For Lesaffer, first international legal historians “should try to read [texts] as the contemporaries of the author would [a]nd should relate them to the contexts and concerns of the authors”. Second, they could “construct an evolutionary theory that truly moves from past to present.”)

<sup>159</sup> Skinner, *Meaning and Understanding in the History of Ideas*, at 40, 43 (emphasis and internal quotes omitted).

<sup>160</sup> *Id.* at 48.

<sup>161</sup> Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentricity*, RECHTSGESCHICHTE 19 (2011) 152 (arguing against the sin of anachronism); Martti Koskenniemi, *Why History of International Law Today?*, RECHTSGESCHICHTE 4 (2004) 61, at 64–65 (pointing to the Cambridge School as a model for work in the history of ideas); Nathaniel Berman, *But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 HARVARD L. REV. (1993) 1792, 1795 (arguing that understanding “the transformation of international law in the period between the First and Second World War requires explicating its underlying framework of assumptions”); JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* (2004) 3 (investigating the concept of international legal personality, “how it is used in international legal thinking ... from a historical-theoretical perspective”).

<sup>162</sup> Koskenniemi, *International Law Histories*, 232 (also noting, at 239, that “[t]he reduction of a historical narrative to its context is relative to the way the historian frames the context, decides its scope, and chooses its scale.”)

<sup>163</sup> Fisher, *Texts and Contexts*, 1069.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1070 (noting that the textualists “ask of old texts frankly anachronistic questions”).

<sup>167</sup> Fisher, *Texts and Contexts*, 1081.

<sup>168</sup> See, e.g., Anne Orford, *International Law and the Limits of History*, in Wouter Werner, A. Galán and M. de Hoon (eds.) *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI* (2015) 1, 6 (clarifying that “[her] interest is in the stakes of the methodological encounter between intellectual historians and international lawyers for critical work in international law” and arguing that “to mandate historical methods as the only means for engaging with past texts makes it impossible to undertake a study of how legal concepts, ideas, or principles are transformed in relation to changes in the social world over time, and thus to grasp the present function of legal concepts adequately”).

criticized the textualist method in the history of ideas, for its contemporary outlook, and what he perceived as debilitating anachronism and presentism.<sup>169</sup>

Since the 1970s, Critical Legal Studies (CLS) have contributed to the history of international law.<sup>170</sup> CLS have “no definitive methodological approach”; rather, their proponents use a variety of methods “to address separate, but interrelated, failings perceived in the international legal project” including but not limited to poverty, cultural imperialisms and violence.<sup>171</sup> They seem committed to “reappraising basic approaches to legal scholarship”<sup>172</sup> and stimulating disciplinary controversies with a deconstructionist approach. In post-structuralist way, they transform historiography into a critical project, criticizing the perceived failings of international law. They call for “any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives . . . ; anything that advances rival perspectives (such as those of the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present—in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.”<sup>173</sup> In sum, critical legal scholars “have sought to move beyond what constitutes law . . . to focus on the contradictions, hypocrisies and failings of international legal discourse”<sup>174</sup> and “to create a more humane, egalitarian, and democratic society.”<sup>175</sup> Koskenniemi’s *From Apology to Utopia* is often considered a “manifestation of ‘postmodernism’ or ‘critical legal studies’ in international legal thinking.”<sup>176</sup>

Third World Approaches to International Law (TWAAIL),<sup>177</sup> the academic movement that aims at putting the colonial encounter at the center of (the history of) international law,<sup>178</sup> is not a ‘method’ in a classical sense, but it constitutes a distinctive approach that questions the foundations, operations and methodological premises of international law.<sup>179</sup> While

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<sup>169</sup> Quentin Skinner, *Meaning and Understanding in the History of Ideas*, HISTORY AND THEORY 8 (1969), 3, 48 (arguing that “The understanding of texts . . . presupposes the grasp both of what they were intended to mean, and how this meaning was intended to be taken” and, at 49, that “[t]he ‘context’ . . . needs . . . to be treated as an ultimate framework for helping to decide what conventionally recognizable meanings, in a society of that kind, it might in principle have been possible for someone to have intended to communicate.”)

<sup>170</sup> Robert W. Gordon, *Critical Legal Histories*, STANFORD L. REV. 36 (1984) 57, 59; Jason Beckett, *Critical International Legal Theory*, OXFORD BIBLIOGRAPHIES (2012) (noting that “Although most writings on public international law (PIL) possess an *esprit critique*, what distinguishes critical international legal theory (CILT) is a sense that the failings in the project are not marginal or exceptional, but endemic, consistent, and structural.”) \*\*\* this entry is available online \*\*\*

<sup>171</sup> See generally Beckett, *Critical International Legal Theory*.

<sup>172</sup> David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, NEW ENGLAND L. REV. 21 (1985–1986) 209.

<sup>173</sup> Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STANFORD L. REV. (1997) 1023, 1024.

<sup>174</sup> Ratner and Slaughter, *Appraising the Methods of International Law*, 291.

<sup>175</sup> Duncan Kennedy and Karl E. Klare, *A Bibliography of Critical Legal Studies*, YALE L. J. 94 (1984) 461, 461.

<sup>176</sup> Jean D’Aspremont, *Martti Koskenniemi, the Mainstream, and Self-Reflectivity*, LEIDEN J. INT’L L. 29 (2016) 625, 629 (noting that Koskenniemi’s *FROM APOLOGY TO UTOPIA* “reject[s] reasoned narrative, [acknowledges] the instability of knowledge, [and] move[s] away from universal grand theories” but adding that such book has also been associated with structuralism).

<sup>177</sup> See generally James Thuo Gathii, *TWAAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography*, 3 TRADE, LAW AND DEVELOPMENT (2011) 26, 26 (“trac[ing] the contemporary origins of Third World Approaches to International Law (TWAAIL) in the late 1990’s” and “argu[ing] that since then, TWAAILers . . . have generated . . . debate around questions of colonial history, power, identity and difference, and what these mean for international law”); Makau Mutua, *What is TWAAIL?*, 94 ASIL PROCEEDINGS (2000) 31, 32 (“identifying] the historical bases for the TWAAIL movement and discussing the basic philosophical and political interests of the movement.”)

<sup>178</sup> Michael Fakhri, *Introduction - Questioning TWAAIL’s Agenda*, 4 OREGON REV. INT’L L. (2012), 1, 6 (noting that “TWAAIL literature has focused on how international law is driven and shaped by the encounter between colonizer and colonized.”)

<sup>179</sup> Antony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 CHINESE J INT’L L (2003) 77, 77 (highlighting that TWAAIL constitutes “a distinctive wa[y] of thinking about what international law is and should be”).

TWAIL does not merely focus on the history of international law, it appears that its historical reading of the colonial encounter influences its approaches to a range of international law issues.<sup>180</sup> TWAIL scholars focus on the “history of the peoples of the Third World,”<sup>181</sup> suggesting “continuous complicities between international law and violence”<sup>182</sup> and “seek[ing] to transform international law from being a language of oppression to a language of emancipation.”<sup>183</sup> In other words, they explore the colonial legacies of international law and engage in decolonizing efforts. TWAIL scholars have contributed several works to international legal history.<sup>184</sup>

Law and Society (L&S) approaches set the history of international law “in its proper social context,”<sup>185</sup> considering law as a social product<sup>186</sup> and society as a product of law.<sup>187</sup> Law is “so tightly woven into the texture of social life, that it is hard to draw sharp lines between legal and extra-legal or ‘social reality.’”<sup>188</sup> L&S scholars consider “law, society, culture and economy” to be “part of a larger common complex.”<sup>189</sup> However, ‘a turn to social history’ which “has sometimes been advocated for international relations” has yet to enter into international law.<sup>190</sup> In fact, international legal history has traditionally adopted state-centric lenses,<sup>191</sup> focusing on diplomatic or doctrinal histories rather than micro-histories of individuals, societies, or sectors of the same. In other words, “international lawyers have been interested in the vicissitudes of sovereignty” rather than that of

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<sup>180</sup> *Id.* at 102 (arguing that “Approaches to international law that fail to take into account its violent origins might preclude an understanding of the continuing complicity between international law and violence and in this way, simply perpetuate a violence that thinks of itself as kindness”). See also B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT’L L. (2007) 499, 511 (arguing that “the future of international law will be determined by how its constantly expanding past is interpreted.”).

<sup>181</sup> Anghie and Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, at 78; Fakhri, *Introduction*, 11 (noting that TWAIL scholars “construct histories of international law that resonate with peoples of the Third World?”).

<sup>182</sup> Anghie and Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, at 102.

<sup>183</sup> *Id.* at 79.

<sup>184</sup> See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005) 3 (arguing that colonialism was central to the constitution of international law); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 NYU J. INT’L L. & POL. 513 (2002) 514 (examining the relationship between the transformation of former colonies into independent sovereign states and the Mandate System of the League of Nations); KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW* (2013) 2 (suggesting that “the origins of international investment law ... are deeply embedded within the global expansion of European trading and investment activities that occurred during the seventeenth to early twentieth centuries”); MICHAEL FAKHRI, *SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW* (2014) 8 (investigating the historical development of sugar regulation at the international trade level, suggesting that “Sugar may very well have been central to the history of modern trade law because the nature of sugar production lends itself to competing transnational interests” and arguing, at 5, that “International law was one of the many new modes of governance forged out of empire”).

<sup>185</sup> Justin Desautels-Stein, *A Context for Legal History, or, this is not your Father’s Contextualism*, AMERICAN JOURNAL OF LEGAL HISTORY 56 (2016) 29–40, at 32.

<sup>186</sup> Fisk and Gordon, “*Law As . . .*”: *Theory and Method in Legal History*, at 525.

<sup>187</sup> Linda L. Berger, “*Law &*” Meets “*Law as*”, 13 LEGAL COMMUNICATION & RHETORIC (2016) 221, 223 (pinpointing “the ways in which law and society construct one another”).

<sup>188</sup> Wise, *Legal History*, 551.

<sup>189</sup> David Sugarman, *Writing Law and Society Histories*, 55 MODERN LAW REVIEW (1992) 292, 298 (arguing that “Law, society, culture and economy are not external to each other; they are part of a larger common complex.”).

<sup>190</sup> Martti Koskeniemi, *Expanding Histories of International Law*, AMERICAN J. LEGAL HISTORY 56 (2016) 104–12.

<sup>191</sup> *Id.* at 109 (noting that “while international legal histories have meticulously traced the legal trajectories of the foreign policy of states, they have paid much less attention—virtually no attention—to the private law relations that undergird and support state action that become visible only once analysis penetrates beyond the official statements or formal acts of governments and diplomatic chancelleries).



societies.<sup>192</sup> Few legal histories of international law have a wider focus and L&S approaches remain underused.<sup>193</sup>

What are these methods' contributions to the lawyers' and historians' histories of international law? Structuralism and textualism contribute to the lawyers' histories. Structuralism looks for historical transcendence and hypothesizes that legal concepts have metaphysical, transcendent and eternal qualities. Analogously, textualism emphasizes the transcendence of a given text. By focusing on concepts and texts, structuralism and textualism have contributed to lawyers' histories. Contextualism and L&S approaches mainly contribute to historians' histories. CLS can contribute to bridging the gap between historians' histories and lawyers' histories. By advocating critical ways of thinking, CLS can dispel some of the myths surrounding international legal history, such as the narrative of progress, and the alleged historical neutrality of the field. TWAIL scholars have contributed both to lawyers' histories and historians' histories of international law. While some have privileged an intra-disciplinary approach to the history of international law (mainly relying on legal sources rather than historical sources), others have conducted thorough historical investigations.

From this survey, a number of questions arise. First, which, if any, of the methods reviewed above is most promising? As mentioned earlier, there is no perfect method or one-size-fits-all methodology to write the history of international law. Rather, the international legal historian is free to choose the suitable method to address given research questions. The plurality and rigour of the available methods diversify research types, styles, and outcomes, making international legal history an interesting and fruitful field of study.

Second, is there any method by which the international legal historian can decide which of the seven (or more) methods to use? Can the international legal historian select from each method those elements that sound most appealing? None of the methods seems to predominate in the history of international law, nor is there an easy method for selecting an appropriate method for such investigation. Rather, methods need to be carefully selected on a case-by-case basis, namely on the basis of the given research questions, aims, and objectives. Rational choices among the methods are possible. Combining different methodological approaches is feasible too—for instance combining CLS with TWAIL or contextualism with L&S—as long as the selected approaches are closely related and/or compatible and 'intellectual eclecticism' does not "ea[t] away at the core premises of each method."<sup>194</sup> In other words, the choice of given method(s) requires some commitment to the chosen method(s). Examples of successful eclecticism are not uncommon.<sup>195</sup>

Third, how do the examined methods relate to each other? Are there convergences and/or divergences among them? Three sets of methods seem closely related: CLS, TWAIL, and L&S (with their emphasis on the need to adopt a critical stance to the evolution of international law, criticizing uneven distribution of power and injustice);

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<sup>192</sup> *Id.* at 110.

<sup>193</sup> See generally MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (examining the role of international law in the ending of the transatlantic slave trade); MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* (2012) (capturing the complexity behind many international law projects, and taking stock of most internationalist activism); MARK MAZOWER, *NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS* (2009) 18 (narrating the origins and early development of the United Nations through the clash of various personalities); Lauren Benton and Richard J. Ross (eds.) *LEGAL PLURALISM AND EMPIRES 1500-1850* (2013) 5–6 (focusing on societies, in which two or more legal orders co-exist).

<sup>194</sup> Ratner and Slaughter, *Appraising the Methods of International Law*, 300.

<sup>195</sup> Galindo, *Matti Koskeniemi and the Historiographical Turn in International Law*, 545 (noting that "The methodology adopted by Koskeniemi in the fifth chapter of *THE GENTLE CIVILIZER OF NATIONS* is distinct from that adopted in the preceding chapters. Not only does the focus of the study shift towards the analysis of a single author, but the biographical tone becomes more relevant in the description of this author's work").

contextualism and L&S (with their emphasis on law in context); and textualism and structuralism (with their emphasis on the diachronic dimension of international law). But other linkages can be found. For example, structuralism and contextualism seem to be diametrically opposed methods with different aims and objectives, yet they offer complementary accounts of the history of international law.

Fourth, are there any trends in the development of methods for writing the history of international law? The ongoing trend to move away from a mere structuralist approach to adopt contextualist methods reflects a growing interest for a historical approach to international law as opposed to a purely internal/legal one. The emergence of L&S and TWAIL approaches to the history of international law reflects the increasingly important role played by individuals and peoples in international law and legal history. While states remain the classical subjects of international law, individuals and peoples have started to play a significant role in the evolution of international law. In parallel, legal historians have increasingly focused on micro-histories. While this section has described some significant methods, others exist and may well produce significant scholarship in the future. New methods may emerge as well, in response to emerging research questions. As a matter of fact, the scrutiny of the promises and pitfalls of the principal methods currently employed “may plant the seeds for new methodological projects that can invigorate [the] field.”<sup>196</sup>

Finally, what do the existing methods suggest about the future of the field? Each of these methods (with the exception of TWAIL) originated in an approach to national legal history and or national law. Their conceptual move from the national sphere to the international domain reflects the expansion and pervasiveness of international law in human affairs, and its emergence as a subject worthy of historical investigation.<sup>197</sup> New discussions of domestic historiography can benefit the history of international law. In turn, not only can international legal history contribute to the evolution of international law, but also to the development of legal history providing it new perspectives, new *topoi* and fields for study.

While almost a century ago, Momigliano boldly announced the end of legal history as a discipline,<sup>198</sup> considering it as a mere part of history, the history of international law is alive and kicking. Moreover, one may wonder whether it should be considered a mere appendage of international law or history respectively, or a hybrid mixture of the two, or an emerging field of study.

## 5. Legal Biographies: A Road Worth Taking?

*Stories are told and not lived; life is lived and not told.*<sup>199</sup>

Depending on the selected object of inquiry, three modes of writing history can be identified—the history of events, the history of concepts and the history of individual people.<sup>200</sup> Diplomatic history has traditionally focused on events relevant to international law. The history of international law has traditionally focused on concepts. Legal biography narrates the history of the lives of persons relevant to international law. Biographies do not constitute a special method of investigation; rather they constitute a literary genre, a way of approaching international legal history and a type of micro-history.

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<sup>196</sup> Ratner and Slaughter, *Appraising the Methods of International Law*, 301.

<sup>197</sup> *Id.* (noting that “the movement from the domestic to the international has not followed one trajectory”).

<sup>198</sup> Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *Law & Soc’y Rev.* (1975-1976) 9, 9 (reporting that “In 1963 the Italian historiographer Arnaldo Momigliano told an assembly of legal historians that they were gathered to celebrate “a historical event of some importance, the end of history of law as an autonomous branch of historical research.”)

<sup>199</sup> Paul Ricoeur, *Life: A Story in Search of a Narrator*, in Marinus C. Doeser and John N. Kraay (eds.) *FACTS AND VALUES* (1986), 121.

<sup>200</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, at 11.

Legal biography has not been a very popular literary genre in international law. The history of international law has often obscured the richness of individual stories in favor of an examination of trends, events, or concepts. Not only were international law scholars uninterested in the life of its makers,<sup>201</sup> but there was an anti-biographical tradition in international law. In turn, historians consider biographies as a ‘borderline genre’, “a peripheral, blurry area” between history and literature.<sup>202</sup> This neglect reflected a broader trend in historiography which rarely focused on the individual contribution to the making of history.<sup>203</sup> Legal biographies are a risky business for “a triple obstacle: the irrelevance of the topic ... according to the traditional criteria; the scarcity of evidence; and the absence of stylistic models”.<sup>204</sup>

Let’s examine these three obstacles. First, the life of international lawyers has been perceived to be historically irrelevant. There is a general perception that lawyers are not necessarily interesting and/or historically relevant individuals, and that few international law scholars and practitioners are worthy of a biography. In general terms, lawyers are perceived as “agents, rather than principals,” “engag[ing] in specialized and highly repetitive work that is typically dull in its quotidian routines and difficult to represent in an engaging manner.”<sup>205</sup> Moreover, as a literary category, legal biographies can dissatisfy international law scholars, legal historians, and general readers. International law scholars may want a more in-depth treatment of the work of a given scholar, legal historians may expect the use of appropriate historical methods, and the general public may want a more in-depth treatment of the person behind the work. It may be difficult to satisfy different audiences.

Second, the scarcity of evidence can make the collection of raw materials of a lawyer’s life and their elaboration into a significant whole challenging. This criticism is often overrated; as a matter of fact, international lawyers’ correspondence, personal papers and network can help the researcher to delineate the person in addition to her work. The study of both written and visual evidence can generate significant data.<sup>206</sup>

Third, the absence of stylistic models is due to scarcity of legal biographies in the first place. Legal biographies are perceived to be an ‘epistemological minefield’ and a ‘problematic form’ of both legal and historiographic scholarship.<sup>207</sup> While legal scholars question whether legal biography is really legal scholarship,<sup>208</sup> contending that legal

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<sup>201</sup> Simpson, *The Sentimental Life of International Law*, at 12.

<sup>202</sup> Ginzburg, *Checking the Evidence: The Judge and the Historian*, 85, 87.

<sup>203</sup> On the general tendency to neglect individual’s contribution to history by historians, see Giovanni Levi, *Les usages de la biographie*, ANNALES. ÉCONOMIES, SOCIÉTÉS, CIVILISATIONS 44 (1989) 1325–33 (identifying pros and cons of biographical research); Jean-Claude Passeron, *Biographies, flux, itinéraires, trajectoires*, REVUE FRANÇAISE DE SOCIOLOGIE 31 (1990) 3–22 (investigating the biographical methodology); SABINA LORIGA, *LE PETIT X: DE LA BIOGRAPHIE À L’HISTOIRE* (2010) (arguing that the X factor, meant as the individual contribution to history, gives the latter its own trajectory); Sabina Loriga, *The Plurality of the Past—Historical Time and the Rediscovery of Biography*, in *THE BIOGRAPHICAL TURN: LIVES IN HISTORY* Hans Renders, Binne de Haan, Jonne Harmsma (eds.) (2016) (noting that while in the past two centuries an impersonal history has prevailed, paying more attention to the “collective dimension of the historical experience,” microhistory and the biographical genre has recently been rediscovered.); *THEORETICAL DISCUSSIONS OF BIOGRAPHY—APPROACHES FROM HISTORY, MICROHISTORY, AND LIFE WRITING* Hans Renders and Binne de Haan (eds.) (2014) (illuminating key challenges and problems in studying individual lives and contributing to the emergence of biographical studies).

<sup>204</sup> SUSAN TRIDGELL, *UNDERSTANDING OURSELVES: THE DANGEROUS ART OF BIOGRAPHY* (2004) 25.

<sup>205</sup> Mark Fenster, *The Folklore of Legal Biography*, MICHIGAN LAW REVIEW 105 (2006–2007) 1265, 1265

<sup>206</sup> Leslie J. Moran, *Judicial Pictures as Legal Life-Writing Data and a Research Method*, JOURNAL OF LAW AND SOCIETY 42 (2015) 74, 96 (proposing the use of judicial pictures as sources of data and a tool of research).

<sup>207</sup> Linda Mulcahy and David Sugarman, *Introduction: Legal Life Writing and Marginalized Subjects and Sources*, J. LAW & SOCIETY 42 (2015) 1, 4.

<sup>208</sup> Parry, R Gwynedd, *Is Legal Biography Really Legal Scholarship?* LEGAL STUDIES 30 (2010) 208, 208 (arguing that “the legal biography has traditionally been treated with suspicion within the English law school due to ideological and methodological concerns about the intellectual validity and robustness of the form, and because of reservations about its true disciplinary province ... More recent biographies, however, have

biographies suffer from ‘methodological individualism,’<sup>209</sup> historians question whether biographies belong to historiography or rather constitute a literary genre (*Bildungsroman*),<sup>210</sup> or a type of ‘hagiography.’<sup>211</sup>

What can legal biographies offer to the study of international legal history? If international law is understood as a pure technical subject, then its operators are of little interest. However, if international law is conceived as an art and a science, then investigating the role its artists and scientists played in its making acquires great relevance. Not only can the biographies of international law scholars constitute a rich and important source of information about the international legal system,<sup>212</sup> but they also contribute to the knowledge of history and constitute a legacy for future generations. They can inspire and teach.<sup>213</sup> Studying the life of predecessors can be empowering, “providing inspiration and encouragement” especially in times of adversity.<sup>214</sup>

As a matter of fact, some international law scholars and practitioners make great biographical subjects, offering appealing narrative arcs, “compelling passages[,] and dramatic moments.”<sup>215</sup> Alberico Gentili (1552–1608), one of the founders of the discipline, became a Professor of law at the University of Oxford after narrowly escaping the Inquisition and becoming a religious refugee.<sup>216</sup> Hugo Grotius (1583–1645), another founder of the discipline, was imprisoned for his involvement in religious disputes of the Dutch Republic, but escaped hidden in a chest of books.<sup>217</sup> But international lawyers have not faced extraordinary challenges only in early modern history. Rather, even more recently they have overcome wars and exiles, persecution and loss.<sup>218</sup> These histories show international lawyers’ resilience in the face of adversity, how they became masters of their own destiny, and contributed to the making of the field.

International lawyers are gradually becoming interested in their predecessors, and a new biographical direction for the field has emerged. The publication of *THE GENTLE CIVILIZER OF NATIONS* by Martti Koskenniemi has been a watershed in the writing of international legal history. The book adopts the biographical method for studying key

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succeeded in ... demonstrating the potential value of legal biography in deepening our understanding of the human context of legal phenomena); Richard A. Posner, *Judicial Biography*, 70 N.Y.U. UN. L. REV. (1995) 502, 515–16.

<sup>209</sup> William Craig Rice, *Who Killed History? An Academic Autopsy*, VIRGINIA QUARTERLY REV. 71 (1995), 601, 610 (reporting that while Ralph Waldo Emerson contended that “there is properly no history: only biography”, for social historians Emerson would be guilty of “methodological individualism”)

<sup>210</sup> Ginzburg, *Checking the Evidence: The Judge and the Historian*, 85 (referring to Momigliano’s Harvard lectures on the Development of Greek Biography, and his emphasis on “the lasting difference between history and biography as a literary genre”).

<sup>211</sup> Patricia Hagler Minter, *Law, Culture, and History: The State of the Field at the Intersections*, AMERICAN J. OF LEGAL HISTORY 56 (2016) 139–149, at 148 (criticising legal biographies for being “places where hagiography overtakes history”).

<sup>212</sup> Hagler Minter, *Law, Culture, and History*, at 148 (explaining that legal biographies can “offer new insights,” and “frame ... well-known subjects in broader contexts”).

<sup>213</sup> Fenster, *The Folklore of Legal Biography*, at 1281.

<sup>214</sup> David Sugarman, *From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-Legal Scholarship*, J. LAW & SOCIETY 42 (2015) 7–33, 8. See also Susan Bartie, *Histories of Legal Scholars: the Power of Possibility*, LEGAL STUDIES 34 (2014) 305 at 317 (noting that studying the life of legal scholars can be empowering).

<sup>215</sup> Fenster, *The Folklore of Legal Biography*, at 1266.

<sup>216</sup> Valentina Vadi, *At the Dawn of International Law: Alberico Gentili*, 40 NORTH CAROLINA J. INT’L L. AND COMMERCIAL REGULATION (2014) 131–164, 139–140.

<sup>217</sup> For a lively account, see the classical Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in Hedley Bull, Adam Roberts, Benedict Kingsbury (eds.) HUGO GROTIUS AND INTERNATIONAL RELATIONS (1992), 65, 68.

<sup>218</sup> See e.g. Giorgio Sacerdoti, *NEL CASO NON CI RIVEDESSIMO: UNA FAMIGLIA TRA DEPORTAZIONE E SALVEZZA 1938–1945* (2013) (narrating how he escaped persecution during World War II, but lost several members of his family).

figures including Hans Kelsen, Hersch Lauterpacht, Carl Schmitt, and Hans Morgenthau. By turning international lawyers into main protagonists, Koskenniemi's history of international law overcomes the "constraints of the structural method" and "infuses the study of international law with a sense of historical motion and political, even personal, struggle. . . ."<sup>219</sup> Other monographs and edited collections have focused on international law scholars and practitioners.<sup>220</sup> International law journals have launched a series of legal biographies.<sup>221</sup> Other articles have appeared in journals of legal history or international law.<sup>222</sup>

While writing legal biographies of international law scholars seems a road worth taking, are there methodological issues characterizing this specific genre? Some guidelines can help biographers to find their voice in narrating the life of others. First, legal biographers should explain why a legal scholar—unlike the vast majority of scholars—deserves biographical treatment. This is not to say that only the great masters should be studied.<sup>223</sup> On the one hand, 'supposedly *lesser* international lawyers' can be even more interesting precisely because they are not well-known.<sup>224</sup> On the other hand, focusing only on the great masters risks transforming legal biographies into hagiographies, as if international law was made only by a handful of individuals, rather than being a truly cosmopolitan and collective endeavor. Rather, explaining why one scholar deserves a biography helps the reader to decide whether the study can be useful and/or interesting.

Second, it is not sufficient to highlight the public achievements of a brilliant career, "as this will miss significant aspects of [an individual's] life."<sup>225</sup> A legal biographer should provide a sense of the subject as a person and of her place within the broader historical context in which she lived.<sup>226</sup> A biographer has to "shape and unify . . . materials within a coherent narrative, and to craft an argument that persuades us as to the . . . meaning of the

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<sup>219</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002) at 2.

<sup>220</sup> See, e.g., GEOFFREY LEWIS, F.A. MANN (2013); ELIHU LAUTERPACHT, *THE LIFE OF HERSCH LAUTERPACHT* (2012); REUT YAEL PAZ, *A GATEWAY BETWEEN A DISTANT GOD AND A CRUEL WORLD. THE CONTRIBUTION OF JEWISH GERMAN SCHOLARS TO INTERNATIONAL LAW* (2012); Bardo Fassbender and Anne Peters (eds.) *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* (2012) (including short biographies of Muhammad al-Shaybani, Francisco de Vitoria, Francisco Suárez, Alberico Gentili, Hugo Grotius, Emer de Vattel, Friedrich Fromhold von Martens, Lassa Oppenheim, Max Huber, Georges Scelle and Hersch Lauterpacht among others); Jack Beatson and Reinhard Zimmermann (eds.) *JURISTS UPROOTED. GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* (2004) (featuring several international law scholars including Ernst J. Cohn; Francis A. Mann; Wolfgang Friedmann; Lassa Oppenheim; Hersch Lauterpacht; and Georg Schwarzenberger). For earlier studies, see e.g. MARY ANN GLENDON, *A WORLD MADE NEW—ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); EMMANUELLE JOUANNET, *EMER DE VATTEL ET L'ÉMERGENCE DOCTRINALE DU DROIT INTERNATIONAL CLASSIQUE* (1998); H. VREELAND, *HUGO GROTIUS* (1986); PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* (1983); C. GELLINEK, *HUGO GROTIUS* (1983).

<sup>221</sup> For instance, the *EUROPEAN JOURNAL OF INTERNATIONAL LAW* launched the series 'The European Tradition in International Law' featuring Georges Scelle, Dionisio Anzilotti, Alfred Verdross, Hersch Lauterpacht, Hans Kelsen, Charles De Visscher, Alf Ross, Max Huber, Walther Schücking and Lassa Oppenheim. The *LEIDEN JOURNAL OF INTERNATIONAL LAW* launched the series on non-European international law scholars, featuring Alejandro Alvarez and Taslim Olawale Elias.

<sup>222</sup> See, e.g., Nico Schrijver, *A Portrait of Judge P. H. Kooijmans – A Passionate Advocate of the Rule of Law in International Affairs*, *LEIDEN J. INT'L L.* 27 (2014), 839–858; Yolanda Gamarra, *Rafael Altamira y Crevea (1866–1951). The International Judge as "Gentle Civilizer"*, *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 14 (2012) 1–49; C Landauer, J.L. *Brierly and the Modernization of International Law* 25 *VANDERBILT J. TRANSNATIONAL L.* (1992–1993) 881–917.

<sup>223</sup> Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 554 (noting that "One of the problems in studying the history of international law from a biographical point of view is that, in doing so, attention is paid only to what the great masters of the discipline thought and did").

<sup>224</sup> *Id.*

<sup>225</sup> Mulcahy and Sugarman, *Introduction: Legal Life Writing*, 5.

<sup>226</sup> Fenster, *The Folklore of Legal Biography*, at 1267.

subject's life" within a given historical context.<sup>227</sup> 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.

Third, all biographies are 'intersubjective' as "one person's story is always the story of others."<sup>228</sup> Personal relationships with colleagues, mentors and family members can provide a fuller picture of the subject. Not only can network analysis provide additional insights as to the cultural, political and social context in which the author lived and work, but it can also provide additional insights into his or her personality and his or her contribution to the field.<sup>229</sup>

Fourth, in writing legal biographies, international legal historians should not glorify the past; rather, they should conduct rigorous historical legal research. Ideally, legal biographies should be relevant to lawyers and historians as well as a broader audience.

Fifth—the objectivity question—can the international legal historian remain external to the world she aims to know? Are there objective narratives? While international legal historians aim to be objective,<sup>230</sup> "every author writes from an individual perspective."<sup>231</sup> Unavoidably, "the questions that we raise about the past are informed, explicitly or implicitly, by our own personal experiences or the questions raised by our current historical moment."<sup>232</sup> In particular, biographies are often "the product of the biographies of the subject and the biographer."<sup>233</sup> If a subjective perspective is inevitable,<sup>234</sup> greater awareness of the authorial role in all narratives, enhanced reflexivity in research and definition of the relationship between the author and the subject of inquiry become crucial. Some transparency is needed upfront about the expertise of the author, the selected perspective and approach, and the type of sources utilized. Authors should "consciously reflect about the choices they make," and be "explicit and transparent about them."<sup>235</sup> In this manner, the "inevitable distortions are themselves a source of richness for . . . argumentation and thinking rather than an invalidating flaw."<sup>236</sup>

Sixth, to whom should legal historians and international lawyers address their work? There is a fine line between academic and popular literature. So far, international legal historians have maintained an essentially academic approach, avoiding too much narrative, and prioritizing evaluation and historical insight. Their writings are hardly aimed towards the general public. Yet, one may wonder whether international legal scholars "should consider how best to persuade [a] wider audience of the value of [international] legal

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<sup>227</sup> *Id.* at 1269.

<sup>228</sup> David McCoey, *Understanding Ourselves: The Dangerous Art of Biography (Review)*, BIOGRAPHY 28 (2005) 667, at 680.

<sup>229</sup> Pierre Bourdieu, *L'illusion biographique*, ACTES DE LA RECHERCHE EN SCIENCES SOCIALES, 62–63 (1986), 69, 72 (noting that "on ne peut pas comprendre une trajectoire . . . qu'à condition d'avoir préalablement construit . . . l'ensemble de relations objectives qui ont uni l'agent considéré . . . à l'ensemble des autres agents engagés dans le même champ. . ."); "We cannot understand a trajectory . . . unless we previously construct . . . the set of objective relations that united the person in question . . . with all the other people involved in the same field" [translation of the author].

<sup>230</sup> Gordon Wood, *In Defense of Academic History Writing*, 48 PERSPECTIVES ON HISTORY (2010) 19–20 (noting that "most historians . . . yearn to be . . . objective and . . . true to the past").

<sup>231</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, at 15.

<sup>232</sup> Hoyos, *Legal History as Political Thought*, at 78–9.

<sup>233</sup> Sugarman, *From Legal Biography to Legal Life Writing*, 15 (noting that "debate rages as to how much of the relationship between biographer and subject should be in the background. . .").

<sup>234</sup> See Doug Munro, *The "Intrusion" of Personal Feelings: Biographical Dilemmas*, 30 FLINDERS JOURNAL OF HISTORY AND POLITICS (2014) 3, 3 (considering that it would be "unrealistic" "to expect biographers . . . to divest themselves of feelings and values when dealing with the crooked timber of humanity").

<sup>235</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, at 15.

<sup>236</sup> D'Aspremont, *Martti Koskeniemi, the Mainstream, and Self-Reflectivity*, 626–627 (arguing, however, that "It is not possible to unveil such biases.").

history”<sup>237</sup> and whether international historical research should be both understandable and interesting for ‘outsiders.’ Directing academic work towards a large audience would make it impactful beyond the four corners of academia.

Finally, should textual research be coupled with visual and ethnographical research? Should international legal historians visit the places where historical events occurred to connect themselves with characters from the past? The question as to whether international legal history should be ethnographically informed remains open.<sup>238</sup> International legal ethnography is an almost unmapped terrain, despite some recent efforts to fill this gap.<sup>239</sup> Ethnography is a type of research relying on data acquired via slow-paced participant observation. Fieldwork for international legal historians can include: talking with colleagues off the records; watching films or listening to recordings; walking through relevant city streets or visiting other relevant places; conducting interviews with relevant stakeholders.<sup>240</sup> Certainly, there is a new interest in the material and visual culture of international law.<sup>241</sup>

However, while recent international law can be studied through oral exchange, and certain aspects of international law, such as boundary delimitation, can require the study of objects and sites, the classic method of researching international law history is to read texts.<sup>242</sup> In most cases, it is no longer possible to interview the lawyers, judges and academics who contributed to the making of international law. In certain cases, it is no longer possible to see the places where these people lived due to the redevelopment of given zones. These difficulties however, do not affect the potential added value of ethnographical research to the history of international law.

## 6. What are the Promises and Perils of this Turn to History?

There is no single legal method in the historiography of international law. International lawyers and legal historians have approached the history of international law from different perspectives, adopting different historiographical methods. International lawyers are not writing like historians and legal historians are not writing like international lawyers, nor should we expect otherwise.

On the one hand, international law scholars have defended a dogmatic way of doing international law history based on the genealogy of ideas and an alleged “continuity

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<sup>237</sup> Dyson, *If the Present were the Past*, at 48 (making this argument for legal history).

<sup>238</sup> See, e.g., Merry, *Anthropology and International Law*, 99–116, 99 (showing “the value of ethnographic studies of specific sites within the complex array of norms, principles, and institutions that constitute international law and legal regulation”); Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, AMERICAN UNIVERSITY J. INT’L L. & POLICY 10 (1995) 791, 791 (engaging in “the practice of ethnography to cast light upon ... the local life of global forces” and arguing “the representation of law in contexts shaped by global flows of people, capital, information, imagery, and goods demands new forms of scholarly representation”).

<sup>239</sup> LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015) 28 (describing himself as an “international legal ethnographer.”); Miia Halme-Tuomisaari, *Toward a Lasting Anthropology of International Law/Governance*, EUROPEAN J. INT’L L. 27 (2016) 235–243, 235 (conceptualizing international legal anthropology as a dialogue between “(critical) international lawyers and anthropologists”).

<sup>240</sup> See Orford, *On International Legal Method*, 169 (mentioning some of these activities as “fieldwork”).

<sup>241</sup> Alexandra Kemmerer, *On International Law and Its History*, in Russell A. Miller and Rebecca M. Bratspies (eds.) PROGRESS IN INTERNATIONAL LAW (2008) 71, 86–87 (noting “a new interest in places ... in the history of international law” and adding that “there is an inquiry in ... pictures as media of communication.”)

<sup>242</sup> Fisk and Gordon, *“Law As . . .”: Theory and Method in Legal History*, at 527 (making an analogous argument with regard to legal history more generally).

between past and present.”<sup>243</sup> They claim that the history of international law “is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space.”<sup>244</sup> While offering rich conceptual motives, their narrative risks perpetuating myths detached from the historical truth.<sup>245</sup>

Historians, on the other hand, contextualize law “specifying its temporal, spatial, and social context” and challenging its pretended eternity, autonomy, and separateness.<sup>246</sup> According to the historiographical tradition, every historical account is provisional.<sup>247</sup> In fact, “[h]istory is always being rewritten, not only because what interests one age does not necessarily appeal to its successor, but also because a wealth of new material is continually coming to light, or being made much more accessible.”<sup>248</sup> Legal historians look for historical truth, relying on empirical methods and gathering information from the archives.<sup>249</sup> The search for historical truth can be somehow idealistic—it is impossible to reconstruct, for even if we had all the historical sources in the world, we still would not know entirely what happened and how people understood what happened. Yet, today no authoritative historical work can be published without reference to verifiable historical sources.<sup>250</sup> Engagement with primary sources and archives has become *de rigueur*. As the historian Carlo Ginzburg points out, “the greater our distance from the primary evidence is, the greater the risk of being caught out by hypothesis put forward either by intermediaries or by ourselves actually becomes. In other words, we risk finding what we are looking for—and nothing else.”<sup>251</sup> The ‘archive fever,’<sup>252</sup> or ‘*mal de texte*’<sup>253</sup> can greatly contribute to unveiling new facts and data and promoting new interpretations of the past.<sup>254</sup> Archival research can provide a real feel for the ways in which given institutions functioned and individual people lived.<sup>255</sup> Investigating “the available sources first and

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<sup>243</sup> Kalman, *Border Patrol*, 103.

<sup>244</sup> Orford, *On International Legal Method*, 175.

<sup>245</sup> Skinner, *Meaning and Understanding in the History of Ideas*, at 22–24 (criticising “any teleological form of explanation” according to which “the action has to await the future to await its meaning”).

<sup>246</sup> Kunal M. Parker, *Law “In” and “As” History: The Common Law in the American Polity, 1790–1900*, 1 UC IRVINE L. REV. (2011) 587, at 590 (noting that contextualism disproves “law’s pretended atemporal foundations, its pretended claim to autonomy, its insistence on its imperviousness to its outside”).

<sup>247</sup> Alston, *Does the Past Matter? 2077–2078* (“We should be very wary of any single account that purports to have found the answer to the puzzle and to have invalidated alternative interpretations”).

<sup>248</sup> F. J. WEAVER, *THE MATERIAL OF ENGLISH HISTORY* (1938), 35.

<sup>249</sup> See generally Del Mar and Lobban (eds.) *LAW IN THEORY AND HISTORY—NEW ESSAYS ON A NEGLECTED DIALOGUE* (2016).

<sup>250</sup> PERCY WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* (1925), 18.

<sup>251</sup> Carlo Ginzburg, *Our Words, and Theirs: A Reflection on the Historian’s Craft, Today*, *CYBER REV. OF MODERN HISTORIOGRAPHY* 18 (2013) 97, 108–109 (adding, at 109 that “clues require first-hand reading: the person responsible for the final synthesis cannot delegate this task to others”).

<sup>252</sup> JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION*, Eric Prenowitz trans. (1996) 91 (defining ‘archive fever’ as “It is to burn with a passion. It is never to rest, interminably, from searching for the archive right where it slips away. It is to run after the archive, even if there’s too much of it, right where something in it anarchises itself. It is to have compulsive, repetitive, and nostalgic desire for the archive, an irrepressible desire to return to the origin, homesickness, nostalgia for the return to the most archaic place of absolute commencement.”).

<sup>253</sup> Wilf, *Law/Text/Past*, 549.

<sup>254</sup> Ginzburg, *Our Words, and Theirs* 109 (noting that “a close, analytic reading is compatible with an enormous amount of evidence. Those familiar with archival research know that one can go on leafing through innumerable files and quickly inspecting the contents of countless boxes before coming to a sudden halt, arrested by a document which could be scrutinized for years.”).

<sup>255</sup> Alston, *Does the Past Matter?*, 2047 (praising Martínez for “do[ing] an excellent job of bringing alive the story of the mixed commissions, primarily through archival research that provides a real feel for the ways in which the commissions functioned. She offers fascinating vignettes of the lives of those involved, including the slaves themselves, the ships’ captains and crews, the judicial officers, the slave owners and plantation managers, and the imperial bureaucrats.”).



see[ing] what kind of questions they raise or might answer” can be a fruitful approach.<sup>256</sup> While full access often was impaired by inadequate cataloging, today the indexing and cataloging of archives, as well as the ongoing digitization of data sources, has opened up archives previously thought inaccessible on account of poor cataloging. The cross-fertilization of archival data with that from other sources—including law, literature, and the fine arts—has re-positioned archives as just one among many tools of the scholar’s trade.

Each of the available methods has pros and cons. Both international lawyers’ legal history and historians’ legal history are valuable.<sup>257</sup> The disciplinary background of scientists influences how they perceive the objects of their investigation. However, while an excessive emphasis on the international law component risks obscuring the historical component of international legal history, at the same time, an excessive emphasis on the historical component risks obscuring the international law component of the same. Should international lawyers and legal historians overcome disciplinary parochialism, cross-disciplinary boundaries, and adopt an interdisciplinary approach? Some scholars contend that international law scholars and legal historians should not become ‘too interdisciplinary,’ as “they risk becoming the captive of another discipline.”<sup>258</sup> However, as Lauterpacht put it, once a lawyer, always a lawyer.<sup>259</sup> Arguably the same is valid for legal historians. Therefore, “there is room for association with other disciplines.”<sup>260</sup>

In conclusion, in the words of an early international legal historian, “history may be compared to a vast and diversified country, which gives very different sort of pleasures [and difficulties] to different travellers, or to the same traveller if [she] visits it at different times”.<sup>261</sup> There is no single history, but “many histories of international law.”<sup>262</sup> There is no single way to address the law/history divide. Rather, multiple approaches and methods have been devised to write international legal histories. The origins of international law “are to be found in different and multiple sites, and they cannot usefully be traced back to any single source, or through examining the evolution of a single theme, process, or institution.”<sup>263</sup> While international legal histories differ; the various types of international legal history are equally valid,<sup>264</sup> and “each of the different historiographical approaches has something important to offer.”<sup>265</sup>

At the same time, “we should be more self-conscious about methodology”: “we must be careful with sources, pursue facts diligently, recognize the contributions of others, ... [and make] sense of the political and social culture of a period.”<sup>266</sup> Awareness of the various legal historical approaches can enrich the texture of international legal history. International legal historians can rely on decades of meaningful methodological reflection and bridge the gap between history and law.

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<sup>256</sup> John Baker, *Reflections on “Doing” Legal History*, in Anthony Musson and Chantal Stebbings (eds.), *MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES* (2012) 7–10, at 7.

<sup>257</sup> Kalman, *Border Patrol*, at 124.

<sup>258</sup> Kalman, *Border Patrol*, at 123.

<sup>259</sup> Helio Lauterpacht, *The Place of Policy in International Law*, *GA. J. INT’L L.* 2 (1972) at 27–28 (arguing that “if one is a lawyer ... one is a lawyer first and foremost”).

<sup>260</sup> *Id.* (cautioning that “in [conducting inter-disciplinary work], ... we should at any rate identify ... what the elements are with which we are concerned”).

<sup>261</sup> Matt Craven, *Theorising the Turn to History in International Law*, in Anne Orford and Florian Hoffman (eds.) *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* (2016) 21, 25 (referring to R. Ward, *An Inquiry into the Foundation and History of the Law of Nations* (1795) xx).

<sup>262</sup> Fassbender and Peters, *Introduction: Towards a Global History of International Law*, 3.

<sup>263</sup> Alston, *Does the Past Matter?* 2077–2078.

<sup>264</sup> Kalman, *Border Patrol* at 89.

<sup>265</sup> Alston, *Does the Past Matter?* 2077–2078.

<sup>266</sup> Wilf, *Law/Text/Past*, 563.

## Conclusions

International legal history as a field of study and international legal histories as its outputs have come of age. International legal history does not seem to constitute an autonomous discipline yet; rather, it remains a hybrid field of study at the crossroad between legal history and international law. The history of international law has become a ‘source of tension’ between legal historians and international lawyers.<sup>267</sup> These epistemic communities have different aims, objectives, and approaches. While legal historians aim to discover ‘historical truth,’<sup>268</sup> international lawyers aim to investigate the genealogy of given legal concepts. While legal historians consider law as a historical product and examine its historical context, international lawyers consider law as a timeless, ahistorical, and autonomous object.

There is no single ‘one-size-fits-all methodology’;<sup>269</sup> rather, methods abound, involving multiple aims, objectives and approaches. No particular technique is better than another.<sup>270</sup> Instead, different methods and approaches can co-exist; it is up to the researcher to identify a suitable method for reaching his or her research objectives. The identification and calibration of the research method on the basis of research needs is not a completely subjective endeavor; rather, there is a rich panoply of methods which researchers can use. Analogously, there is no ideal form of research, as histories of concepts, legal biographies and institutional histories all contribute to the complex kaleidoscope composed by the histories of international law.

This Article contends that the battle of ideas about the proper methodology of the history of international law can and has been gradually overcome by a growing awareness of the complementarity of expertise and know-how of the two groups of scholars. Rather than suggesting a consolidated, but passé, intra-disciplinary approach to the history of international law (that is, approaching the history of international law from a purely internal perspective), interdisciplinary, cross-disciplinary, and multidisciplinary approaches should be preferred, given that both legal history and international law are necessary components of the emerging field of the history of international law. The Article suggests that the acknowledgment of a given cultural background and methodological awareness can promote better narrations of the history of international law. International lawyers and legal historians can overcome each other’s weaknesses, reinforce each other’s strengths, and engage in fruitful dialogue. Such engagement can encourage new ways to think about the history of international law. Only through methodological awareness can the history of international law evolve from its status as a ‘subdiscipline’ of both international law and history to an independent mode of analysis. In this manner, “law becomes history, [and] history becomes law.”<sup>271</sup> International legal history has the potential to break down the boundaries between international law and history, as well as those between past and present. It does not aim to explain ‘history for the sake of history’; rather, it aims at “understand[ing] law as history/history as law.”<sup>272</sup>

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<sup>267</sup> Anthony Musson and Chantal Stebbings, *Introduction*, in Anthony Musson and Chantal Stebbings (eds.), *MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES* (2012) at 4.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 6.

<sup>270</sup> *Id.*

<sup>271</sup> Hoyos, *Legal History as Political Thought*, at 80.

<sup>272</sup> *Id.*