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AMBIVALENCE, ANXIETIES / ADAPTATIONS, ADVANCES: CONCEPTUAL HISTORY AND INTERNATIONAL LAW

MARTIN CLARK*

Scholars of the history of international law have recently begun to wonder whether their work is predominantly about law or history. The questions we ask — about materials, contexts and movements — all raise intractable problems of historiography. And yet despite this extensive and appropriate questioning within the field, and its general inclination towards theory and theorising, few scholars have turned to the vast expanses of historical theory to try to think through how we might go about addressing them.

This article works towards remedying that gap by exploring why and how we might engage with historiography more deeply.

Part One shows how the last three decades of the ‘turn to history’ can be usefully read as a move from ambivalence to anxiety. The major works of the 2000s thoroughly removed the pre-1990s ambivalence to history in general, with brief considerations about method. Efforts in the last decade to build on those works have led to the present era of anxiety about both history and method, raising questions around materials, contexts and movements. And yet far from a negative state, this moment of anxiety is both appropriate and potentially creative: it prompts us to rethink our mode of engaging with historiography.

Part Two explores how this mode of engagement might proceed. It reconstructs the principles and debates within conceptual history around the anxieties of materials, contexts and movements. It then explores how these might be adapted to histories of international law, both generally and within one concrete project: a conceptual history of recognition in the writings of British jurists. Part Three concludes by considering the advances achieved by this kind of engagement, and reflects on new directions for international law and its histories.

Keywords: *international legal history, historiography, interdisciplinary engagements, method, Reinhart Koselleck*

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- [1] Scholars of the history of international law have recently begun to wonder whether our work is predominantly about law or history, and, if we must make a choice, which discipline ought to be the main guide to our methods.¹ We hold contradictory feelings about the purposes, limits, and meanings of history, the ways it can be written, and how it relates to and uses legal thought and practice.² We are firmly and inescapably ensconced in a variety of important questions about method and methodology. How should we write our histories? How should we deal with texts, archives, context, biography, disciplines, regions, geographies, periods, structures, systems, causation and change? Who should do the re-thinking and re-writing? And what have we missed so far, and how can we retrieve it?
- [2] These questions all raise intractable problems of historiography. They must be asked, answered, re-asked, re-answered. They will always remain ultimately unanswerable and unsettled. And yet despite this extensive and appropriate questioning within the field, and its general inclination towards theory and theorising, few scholars have turned to historical theory—the field that considers the methods and purposes of history and its writing, and philosophical questions about the nature of historical truth, causation, and memory, for example—to try to think through how we might go about addressing them. This article works towards remedying that gap by exploring why and how we might engage with historiography more deeply.
- [3] Part One addresses the ‘why’ and sets up the ‘how’. I suggest that the last three decades of the ‘turn to history’ can be usefully read as a move from ambivalence to anxiety. The major works of the 2000s ‘turn to history’ thoroughly removed the pre-1990s ambivalence towards histories of international law, but contained at most brief reflections on their historiographical commitments. More recent efforts to build on their legacies — both by exploring their methodological choices and in writing new histories — have moved us to anxieties around history and method in at least three areas: over materials, contexts, and movements. Yet far from a negative state, this moment of anxiety is an appropriate reaction to the complexity of doing good historical work. It is also a potentially creative moment. These anxieties can prompt and guide us in thinking about how we might engage with historical theory.
- [4] Part Two explores how this engagement might proceed. Historiography should not be approached as a procrustean bed of historians’ methods and criteria. Nor should the various schools of historical theory be treated as singular or static: they are internally diverse and open to debate and disagreement. Instead, scholars of international law ought to approach historical theory as one set of

¹ See, eg. A. Orford, ‘International Law and the Limits of History’, in W. Werner, A. Galan and M. de Hoon (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017), 297.

² Two recent symposia, among other works, nod in this direction: see C. Tomlins, ‘Foreword: “Law As...” II, History As Interface for the Interdisciplinary Study of Law’, (2014) 4 *UC Irvine Law Review* 1; A. L. Brophy and S. Vogenauer, ‘Introducing the Future of Legal History: On Re-Launching the *American Journal of Legal History*’, (2016) 56 *American Journal of Legal History* 1.

materials for thinking more deeply about method. While engagement should take many forms and explore a range of approaches, to demonstrate how and why to do this, I focus on one here — conceptual history — and the ways in which it might be adapted to projects in international legal history. In Part Two then, I first explore the frames, methods and approaches of conceptual history. I then turn to where and how these inquiries might be adapted to histories of international legal concepts. I then illustrate the promise of this framing by considering the methodological issues raised by one project; a conceptual history of recognition in the writings of British jurists.

- [5] Part Three concludes by considering the advances achieved by this kind of engagement, and reflecting on new directions for international law and its histories.

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- [6] The usual story about the ‘turn to history’ in international law holds that with the end of the Cold War came a revived interest in critically re-evaluating the ideas, figures, structures and theories embedded in the origins of international law.³ The arrival of a supposed consensus about liberal democratic political and economic systems, new international unrest and interventions, and a seeming return to multilateralism long prevented by superpower struggles, all offered new vistas for international law — and with them a renewed interest in the histories of international law. The milestone works of this period of international lawyers turning to history are well known — David Kennedy, Martti Koskenniemi, Gerry Simpson and Antony Anghie.⁴ These texts largely appeared in the 2000s, but they attempted to make sense of both the supposed ‘new horizons’ of the 1990s and the longer histories and structures of the discipline. These works also laid the ground for contemporary debates about historiography. Here, I read them as markers of a declining ambivalence not just towards history itself, but also towards questions of historical method.
- [7] The first historiographically-sensitive works started with texts and lives as their principal archives.
- [8] Kennedy sought to contextualise early canonical works — Vitoria, Suarez, Gentili and Grotius — by asking, simply, ‘what would one have to think to write this?’ and trying to find historical alternatives to traditional legal problems that

³ See, eg, M. Koskenniemi, ‘Why History of International Law Today’, (2004) 4 *Rechtsgeschichte* 61; M. Craven, ‘Theorising the Turn to History in International Law’, in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), 23.

⁴ D. Kennedy, ‘Primitive Legal Scholarship’, (1986) 27 *Harvard International Law Journal* 1; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

have neither been solved nor abandoned.⁵ Rather than charting the development of doctrine, trying to find continuities or differences with today's writings, constructing a social history of these writers, or even trying to show that they actually held some set of views or other, Kennedy's goal there was simply the 'description of texts'.⁶ What results is a detailed reconstruction of the works of four major jurists that Kennedy argues reveals their coherence and difference from twentieth century international law (contra the readings of those twentieth century 'modern' international lawyers). We might see Kennedy's work now as itself a 'modern' form of chronicling, reliant on another (literary) methodology to cast new light on old materials by asking carefully how they speak to us today. Kennedy's other works took up origin stories — of the League of Nations and later of the imagined nineteenth century — using the ideas of break, movement and repetition to make sense of how those stories spoke to the discipline in the 1990s.⁷

- [9] Koskenniemi's *Gentle Civilizer* significantly advanced this way of approaching texts and lives, based on a more direct engagement with historiography. While Koskenniemi recognised the importance of historiography, he remained cautious about not treating it as rigid or settled, but just as 'riddled with methodological controversy' as sociology, philosophy or law.⁸ This grounded some suggestive historiographical commitments that are not articulated in full at the outset. Koskenniemi offered small-scale social, intellectual or cultural inquiries, or a 'great man' theory writ relatively small, confined to the circle of international lawyers of the late nineteenth and early twentieth centuries. To avoid suggesting that these 'great minds' of the era were the only important factors, Koskenniemi matched them with contextual and epochal elements to produce a narrative history of international lawyering and its ideas, which he dubbed an 'experimental ... non-rigorous' approach to history.⁹ This method aimed to 'bring international law down' from precisely those 'epochal or conceptual abstractions' present in the earlier chronicles and hagiographies, and looked to varied, developing practices of international law to avoid singular views about the shape of the era. These practitioner-subjects were described 'as actors in particular social dramas' that played out on the 'terrain of fear and ambition, fantasy and desire, conflict and utopia' that was international law; where they expressed 'occasionally brilliant insights and (perhaps more frequently) astonishing blindness, the paradoxes of their thought, their intellectual and

⁵ Kennedy, 'Primitive Legal Scholarship', *supra* note 4, at 11–13. And see D. Kennedy, 'A New Stream of International Law Scholarship', (1988) 7 *Wisconsin International Law Journal* 1, at 12ff (examining international law's 'history and historiography' at a general, epochal level).

⁶ Kennedy, 'Primitive Legal Scholarship', *supra* note 4, at 12.

⁷ D. Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841; D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1997) *Quinnipac Law Review* 99.

⁸ Koskenniemi, *Gentle Civilizer*, *supra* note 4, at 6.

⁹ *Ibid* 5–8.

emotional courage, [and] betrayals and self-betrayals'.¹⁰ The history was drama, specifically tragedy, which we knew was filled with noble yet doomed aspirations. For most readers, this mix of doctrine and drama did not lead to hagiographies and panegyrics, despite the obvious risks.

- [10] The second pair of milestones engaged with historiographical questions of structure, perspective, and wider contexts.
- [11] Anghie's work can be read as revitalising the non-European histories of the 1960s and 1970s, though in a much more powerful, direct way that explored colonialism and imperialism as structural themes intertwined with the histories of international law and offered more than just different or non-European narratives.¹¹ Anghie's historiographical sensitivities are refracted through the works of postcolonial scholars — Edward Said, Gayatri Spivak, Homi Bhabha, David Scott and Dipesh Chakrabarty — whose influence he explicitly acknowledges.¹² Building from their pivotal contributions that challenged Eurocentrism among historians,¹³ Anghie urged us to look to histories that were 'alternative' to the narratives, concepts and 'controlling structures' of conventional histories: histories of resistance that take up the perspective of the peoples subjected to international law, and which are 'sensitive' to the tendency to assimilate those stories into conventional ones.¹⁴
- [12] Simpson described his approach to exploring unequal sovereigns and international 'outlawry' as 'theoretical intellectual history with a point'.¹⁵ This was an episodic history of the roles played by the idea of sovereign equality in organising the global legal order that drew heavily on European diplomatic history. The episodic approach allowed Simpson to outline the occurrence and recurrence of legalised hegemony at different places and times, each providing a new angle on the enduring theme of hierarchies of states.¹⁶ Simpson and Anghie linked their episodes through large organising themes, charting the gaps and elisions in place of a continuous narrative. Like the first strain, they began with the writings and actions of international lawyers. But they also sought to ultimately address and reveal just as much about the wider contexts, institutions and structures beyond the discipline that also shaped history and law.

¹⁰ Ibid 7.

¹¹ See Anghie, *Imperialism*, *supra* note 4, at 7–9. See also A Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', (2006) 27 *Third World Quarterly* 739; A Anghie, 'Vattel and Colonialism: Some Preliminary Observations', in V. Chetail and P. Hagenmacher (eds.), *Vattel's International Law from a XXIst Century Perspective* (2011), 237.

¹² Anghie, *Imperialism*, *supra* note 4, at 9 note 14.

¹³ See, eg, D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000); P. Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial History* (1993); J. L. Abu-Lughod, *Before European Hegemony: The World System AD 1250–1350* (1991).

¹⁴ Anghie, *Imperialism*, *supra* note 4, at 8.

¹⁵ Simpson, *Great Powers*, *supra* note 4, at 11.

¹⁶ See further Simpson's reflections in G. Simpson, 'Great Powers and Outlaw States *Redux*', (2012) 43 *Netherlands Yearbook of International Law* 83.

- [13] About a decade ago, Matthew Craven wrote that for Simpson international legal history is ‘understood primarily as a rhetoric’ about various figures — Great Powers, outlaw states, colonisers, pirates — not merely as background to today’s doctrinal questions ‘but rather a past marked by ambiguity and ambivalence, rhetorical excess and definitional undecidability, that finds continuing expression in contemporary legal and political discourse’.¹⁷ I take up this characterisation as a reflection of the decline in ambivalence in the way that I have used it so far: that by 2007, at the latest, history and historiography were a thoroughly important and inescapable part of understanding international law; that this past was now radically open for exploration; and that equally our methods for exploring it could and must be more creative. International legal historiography now embraced ambiguity, taking doctrine not as science but as rhetoric against the background of the indeterminacy of legal ideas, and sought the traces of the past in today’s arguments.
- [14] None of the works discussed above is ambivalent about historiography. Each author recognised a need to raise and address these questions, and to articulate and defend some theory and method, even if it is modestly generic (Kennedy), ‘non-rigorous’ (Koskenniemi), aiming to have ‘a point’ (Simpson), or broadly reliant on and generally inspired by a large tradition that is noted but lies beneath the work (Anghie). With them we encounter fractured timelines, murky and contested narratives, figures and projects with multiple and unclear roles, intentions, and culpabilities, ideas in flux, diverse conditions and structures, and a variety of questions, sources and methods.
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- [15] With this came anxiety. Around and after these works coalesced a large body of new histories examining the full gambit of events, people, and ideas, written by international lawyers, historians, political and international relations theorists,

¹⁷ M. Craven, ‘Introduction: International Law and Its Histories’ in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2007), 1, at 12. See also G. Simpson, ‘Piracy and the Origins of Enmity’ in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2007), 219.

among many others.¹⁸ The milestones became millstones; the sources against which the work of extending, critiquing, responding, narrowing or expanding our ways of doing history were processed. Looking to the immediate past decade, I identify three major anxieties: materials, contexts and movements — or, what the archive contains, how it should be placed, and how we read and construct its changes. Doubtless others could be described, but these are the strongest trends.

- [16] A first group of anxieties revolves around materials. What should we look at? Which texts and contexts, and how to read the archives we construct? The most recent work exploring these questions and exemplifying attempts to rethink them is the ‘History, Anthropology and the Archive of International Law’ project. This project grew out of collaborative conversations that turned to ‘heated debates’ about history, anthropology and law and resulted in ‘a whole series of questions [being] opened up, particularly regarding methodology’.¹⁹ Instead of turning to scholarly work on method, the authors ‘decided to try an experiment instead’: turning to artefacts — a letter, a graphic novel, a suit, a poster, and a memorial.²⁰

¹⁸ Of the many works across these disciplines that could be included here, a basic list in approximate chronological order of subject might be: D. J. Bederman, *International Law in Antiquity* (2001); B. Kingsbury and B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (2010); L. A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); A. Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (2014); B. Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (2003); R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999); E. Keene, *Beyond the Anarchical Society Grotius, Colonialism and Order in World Politics* (2002); L. Hunt, *Inventing Human Rights: A History* (2008); E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (2012); L. A. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016); A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014); N. Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (2012); F. A. Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898–1921* (1999); I. V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014); M. Garcia-Salmones Rovira, *The Project of Positivism in International Law* (2013); U. Özsü, *Formalizing Displacement: International Law and Population Transfers* (2015); J. E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004); S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015); Y. Otomo, *Unconditional Life: The Postwar International Law Settlement* (2016); K. Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (2013); A. Orford, *International Authority and the Responsibility to Protect* (2011); S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011); S. Moyn, *The Last Utopia: Human Rights in History* (2012). *Longue durée* monographs and thematic collections include, eg, H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010); B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012); D. Armitage, *Civil Wars: A History in Ideas* (2017); S. Kadelbach, T. Kleinlein and D. Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (2017); M. Koskenniemi, W. Rech and M. Jimenez Fonseca (eds.), *International Law and Empire: Historical Explorations* (2017).

¹⁹ M. Chiam et al, ‘The History, Anthropology and the Archive of International Law Project’, (2017) 5 *London Review of International Law* 1.

²⁰ *Ibid.*

This project, then, seemed to take up a double rejection of both law and writing generally (with the possible exception of the letter),²¹ as well as writings on historical and anthropological method. This is part of a general trend in recent years to take up objects, commodities, literature, daily practices and lived experience as places where we might begin histories of international law.²² All of these moves are familiar to historians and general legal historians alike. But I suggest that they signal a dissatisfaction or anxiety about staying too reliant on texts and individuals alone, which is a natural attraction for lawyers (as they were for historians prior to the 1960s) and the basis of earlier doctrinal histories. The anxiety here is that text and interpretation — especially when narrowed to legal texts written and read by lawyers and jurists — will not uncover what is *really* going on, or will simply replicate and reinforce a preference for what is written, and written by lawyers.²³

- [17] A second collection of anxieties respond to context, structure and perspective. Where and whose context is relevant for understanding legal changes? What kinds of structural questions — of race, gender, empire, nation — should be asked? Most recently, these have coalesced around the deep problem of Eurocentrism in international law's history. This was most clearly illustrated in the critical engagements with the *Oxford Handbook on the History of International Law*'s attempts to 'globalise' international legal history by opening up new contexts, engaging with structural questions, and making perspective and positionality central. Criticisms of the *Handbook*'s aims focused largely on methodology and execution. Martineau, for example, contended that to achieve the editors' aims of overcoming Eurocentrism, nothing less than a radical shift of vocabulary would be needed: the kind of method and approach that revealed what was hidden, instead of just presenting different stories side by side.²⁴ Despite its aims, the *Handbook* still told resoundingly European histories. In response, the editors suggested they never attempted to organise 'the' global history of international law, but rather that global historical approaches should be taken 'seriously' as inspirations for the authors.²⁵ What the editors called a

²¹ See further G. R. Painter, 'A Letter from the Haudenosaunee Confederacy to King George V: Writing and Reading Jurisdictions in International Legal History', (2017) 5 *London Review of International Law* 7.

²² J. Hohmann and D. Joyce (eds.), *International Law's Objects* (forthcoming 2018); M. Fakhri, *Sugar and the Making of International Trade Law* (2014); C. N. Warren, *Literature and the Law of Nations, 1580–1680* (2015); L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015); Otomo, *supra* note 15.

²³ See especially Benton and Ford, *supra* note 15, at 20–21, which looks away from jurists and lawyers alone towards 'middling' colonial bureaucrats, rebels, merchants and imperial commissions as central actors in processes of (international) legal, as well as imperial change.

²⁴ A.-C. Martineau, 'Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law', (2014) 25 *EJIL* 329, at 330, and see at 332ff. See also R. Parfitt, 'The Spectre of Sources', (2014) 25 *EJIL* 297 (who also urges a radical rethinking of vocabulary).

²⁵ A. Peters and B. Fassbender, 'Prospects and Limits of a Global History of International Law: A Brief Rejoinder', (2014) 25 *EJIL* 337, 339.

sceptical reaction to global history was mostly rooted in current (that is, post-2008 global financial crisis) critiques of globalisation²⁶ — hinting, then, that the reaction was motivated by present framings and concerns, and hence veering close to one of history's apparent sins: 'presentism'. But the risks of flippant 'globality', well known to historians, had already been identified by critical international lawyers. BS Chimni predicted these kinds of anxieties in 2007 when he identified two tracks for globalised histories of international law: either a hegemonic project of promoting and normalising global capitalism through common understandings of the past, or an emancipatory project that looks to global capital's everyday effects and resist stories of coordination, cooperation and rationality.²⁷ To avoid the pernicious risk that in failing to deal well with structure and positionality we not only misread the past but further entrench and repeat these failures, a number of scholars have opted to radically displace European perspectives by erasing them (almost) entirely.²⁸

- [18] A third set of anxieties revolves around movement. The central question here — 'how do ideas move through time?' — perhaps encapsulates the last decade of work. From it arose the wide problem of the movement between disciplines: how should the methods of law and history relate, and is the historian's caution about anachronism and presentism one that should be shared by lawyers doing historical work? During the milestone period, basic forms of practical genealogy were readily and effectively adopted.²⁹ Following the publication of Anne Orford's *International Authority and the Responsibility to Protect*, which tracked changing ways of thinking about the idea of 'international authority' plotted through episodes in papal, interwar and decolonisation histories, debates over contextualism, genealogy, and anachronism — the movement of international legal ideas in time and space — flourished. Early critiques of that work suggested that explicit reflections on historical and sociological methods were problematically absent,³⁰ and later engagements — primarily with Ian Hunter —

²⁶ Ibid 340–1.

²⁷ B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 8 *Melbourne Journal of International Law* 499, 511–12. This latter strain is pursued in, eg, Eslava, *supra* note 18.

²⁸ Becker Lorca, *supra* note 15; L. Eslava, M. Fakhri and V. Nesiah (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017); J. P. Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (2017); A. Weststeijn, 'Provincializing Grotius: International Law and Empire in a Seventeenth-Century Malay Mirror' in Koskenniemi, Rech and Jimenez Fonseca (2017), 21.

²⁹ Most notably in N. Berman, 'In the Wake of Empire', (1998) 14 *American University International Law Review* 1521.

³⁰ See C. Peevers, 'Conducting International Authority: Hammarskjöld, the Great Powers and the Suez Crisis', (2013) 1 *London Review of International Law* 131; J. Mowbray, 'International Authority, the Responsibility to Protect and the Culture of the International Executive', (2013) 1 *London Review of International Law* 148; A. Orford, 'On International Legal Method', (2013) 1 *London Review of International Law* 166. And see an endorsement of Orford's approach in M. Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', (2013) 27 *Temple International and Comparative Law Journal* 215, 226ff.

focused on the need to cleave to (or resist) historiographical frames.³¹ This led to a wider debate around the themes, methods, and usefulness of the Cambridge contextualist school of intellectual history, most often and (over)broadly associated with Quentin Skinner.³² Orford is not the first international lawyer to look or respond to contextualism.³³ Others have made contextualist-style critiques of genealogising.³⁴ But this debate focused directly on the insights and methods of both law and history to consider how history might interact with and differ from the study of legal ideas. For Orford, whereas questions of context and movements in meaning are ‘of interest’ for contextualist historians, they are ‘unavoidable’ for lawyers: ‘contextualist historians ... think about concepts in their proper time and place — the task of international lawyers is to think about how concepts move across time and space.’³⁵ That task should focus on movements and changes in ‘juridical thinking’, which recognises that international law is always inescapably linking past to present: claims about the meanings of concepts, language and norms hold their political or legal force precisely by moving across space and time, to link the past with the present, the specific with the universal, and so on.³⁶ Orford also rejected taking method as a cumbersome frame of theoretical demands or injunctions required for ‘real’ and ‘proper’ history.³⁷ She instead approaches it as a wider set of theoretical reflections to which history, among other disciplines and perspectives, might usefully contribute.³⁸

[19] These anxieties persist. I want to be careful about what I do and do not mean in using the word ‘anxiety’. I do not use it to emphasise the critical or negative

³¹ See I. Hunter, ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’, in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010), 11; I. Hunter, ‘The Figure of Man and the Territorialisation of Justice in “Enlightenment” Natural Law: Pufendorf and Vattel’, (2013) 23 *Intellectual History Review* 289; A. Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, in M. Toufayan, E. Tourme-Jouannet and H Ruiz Fabri (eds.), *Droit international et nouvelles approches sur le tiers-monde: entre repetition et renouveau* (2013), 97; A. Orford, ‘On International Legal Method’, (2013) 1 *London Review of International Law* 166; Orford, ‘International Law and the Limits of History’, *supra* note 1.

³² That approach seeks to establish what an idea meant at a time and place to particular people, focusing on the meaning of terms at that point, and discouraging attempts to try ‘track’ changes in an idea over long spans of time. See especially Q. Skinner, ‘Meaning and Understanding in the History of Ideas’, (1969) 8 *History and Theory* 3. For context, see, eg, M. Bevir, ‘Mind and Method in the History of Ideas’, (1997) 36 *History and Theory* 167; K. Palonen, *Quentin Skinner: History, Politics, Rhetoric* (Polity Press, 2003).

³³ Nijman, *supra* note 15, at 7–27.

³⁴ See R. Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’, in Craven, Fitzmaurice and Vogiatzi, *supra* note 14, at 27, 34.

³⁵ Orford, ‘The Past as Law or History?’, *supra* note 27, at 98.

³⁶ See Orford, ‘On International Legal Method’, *supra* note 27, at 171, 175.

³⁷ See especially Orford, ‘International Law and the Limits of History’, *supra* note 1.

³⁸ *Ibid.*

connotations of its everyday meanings of fear, aversion, unease. Rather, I want to emphasise its more technical meaning of heightened stimulation and a concomitant lack of working through or dealing with that stimulation. We have now a great number of projects stimulated by questions of historical method in part or in full. Yet only a handful consider or make clear the working through of their methods. This is the lack of working through: most considerations of mainstream historiography and its application to guide, structure or inform international legal histories are brief³⁹ or refracted,⁴⁰ and the bulk of international legal history does not engage with historical theory at all. Even the engagement with the Cambridge School — by far the most thoroughgoing to date — has arguably not really begun in earnest, in that there are many finer points and other thinkers to explore beyond the broad version of Skinner and Hunter's criticisms that formed the specific engagement with Orford's work.

- [20] The more existentialist connotations of anxiety are also appropriate: the fear provoked by realising the freedom we have, and not knowing how to evaluate or choose between the many ways that we might go about delving into the pasts of international law. Another side of that freedom is a feeling of responsibility for getting it right, or, at the least, doing it well. That sort of responsibility forms a longstanding part of the role and office of international lawyer: the long felt need to care for and be responsible for the practice, content, projects and damages of international law.⁴¹ In looking to history, this moves us towards grappling with responsibility for international law's roles in those histories: knowing that this work has all too often obscured, legitimated or argued for power and its abuse,

³⁹ This includes historical studies which explicitly address their historiographical commitments: see, eg, Nijman, *supra* note 29; Becker Lorca, *supra* note 29; T. Skouteris, *The Notion of Progress in International Law Discourse* (2010) (using Jacques Derrida and Hayden White). Theory papers considering historiography's application to international law can also contain examples of brevity in dealing with historical theory directly: see, eg, P. Allott, 'International Law and the Idea of History', (1999) 1 *Journal of the History of International Law* 1; I. J. Hueck, 'The Discipline of the History of International Law: New Trends and Methods on the History of International Law', (2001) 3 *Journal of the History of International Law* 194; A. Kemmerer, 'The Turning Aside: On International Law and Its History', in R. A. Miller and R. M. Bratspies (eds.), *Progress in International Law* (2008), 71; G. R. B. Galindo, 'Force Field: On History and Theory of International Law', (2012) 20 *Rechtsgeschichte* 86; T. Skouteris, 'Engaging History in International Law', in J. M. Beneyto and D. Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (2012), 99.

⁴⁰ By 'refracted' I mean they engage with other theoretical traditions tied closely to questions of historical method: in addition to Anghie/postcolonialism noted above is Marxist historical theory refracted in the work of Susan Marks and the early works of B. S. Chimni, to name but two: see, eg, S. Marks, 'False Contingency', (2009) 62 *Current Legal Problems* 1; B. S. Chimni, *International Law and World Order* (1993), 245–56 (on historical phases of bourgeois international law).

⁴¹ See, eg, J. Westlake, *International Law: An Introductory Lecture* (1888), 14–15 (one early account of personal responsibility and civilising missions); P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', (1997) 3 *EJIL* 435 (on the relations with power); A. Orford, 'Embodying Internationalism: The Making of International Lawyers', (2001) 19 *Australian Yearbook of International Law* 1 (on office); H. Charlesworth, 'Saddam Hussein: My Part in His Downfall', (2005) 23 *Wisconsin International Law Journal* 127 (using the language of anxiety).

and that whatever achievements we can point to so far, it has not calmed the tumult of history as it seems it always promised to do. We want to condemn the failures, culpability and injustices wrought by people and ideas, while also trying to understand and explain these things in their contexts, and, on top of that, trying to discern new horizons and re-imaginings of how the world and its laws might turn out.⁴² We want to take up responsibility for telling international law's pasts truthfully; a reckoning that seems a pre-requisite for any improvement in its futures.

- [21] Ultimately, what anxiety captures is a new self-awareness and self-reflexivity about the difficulties of history. I want to think of this as a positive and productive spur to action. It is good and fitting to worry about good historical method. It is usually easier to express qualms about how to go about historical work than it is to offer clear and convincing (or indeed, any) reflections on how to address them. It is understandable in the face of so much history, so many potential sources, figures, events and arguments, where the central questions of what to ask, how to understand something, and what the answers seem to be, are all radically open. Taken together, the three sets of anxieties above illustrate the questions we now ask about our identity when doing things with history and law, about defending or rejecting claims to police our methodological choices, and about trying to mark and preserve an area of study in which we feel comfortable, qualified and able to pursue our scholarly projects.
- [22] What we anxiously ponder are the perennial questions of historiography. And yet we remain rarely and often superficially engaged with the ways in which these questions have been asked, answered, rejected, critiqued, re-asked, and re-answered by historical theorists of all stripes. This is arguably neither particularly surprising nor limited to scholars working on the history of international law, and indeed of law in general. Similarly, plenty of historians are thoroughly unexcited by and uninterested in questions raised by historical theory, preferring a more 'practical' conception of their work.
- [23] Yet in the case of histories of international law today it still seems a curious absence. The theory and practice of international law is thoroughly intertwined with the world of ideas and ideas about the world.⁴³ Histories of international law usually contain substantial questions or explorations of theories and theorising. Moreover, today's scholars of international law seem especially inclined towards and adept at bringing interdisciplinary insights from a range of fields and theoretical frames — international relations, linguistics, anthropology, social and political theory, the full spectrum of critical theories — to bear on questions of international law. Why, then, amidst the turn to history, are historical theorists so often absent? Why do we so often look to Walter Benjamin, Carl Schmitt, Hannah Arendt, Paul Ricoeur or Jacques Derrida — theorists of general importance and power — for understanding historical-

⁴² See, eg, the Allotian strain of this approach to history: P. Allott, *Eutopia: New Philosophy and New Law for a Troubled World* (2016).

⁴³ See, eg, M. Koskeniemi, 'International Law in the World of Ideas' in J. Crawford and M. Koskeniemi (eds), *Cambridge Companion to International Law* (2012), 47.

theoretical aspects of international law — without (also) poring over Fernand Braudel, Marc Bloch, Lucien Febvre, Hayden White, Dominick LaCapra, Immanuel Wallerstein, or Reinhart Koselleck?; to raise a standard, unimaginative starting point and progression confined to Western, white male historians and historical theorists, missing the wealth beyond those narrowing confines. Despite the obviousness of this kind of engagement, most contemporary work rarely moves far beyond brief gestures to select major figures — chiefly Skinner and Michel Foucault — or broad catch-all labels — mostly contextualism (sometimes with the still too-broad descriptor ‘Cambridge’) and global history. There have been good exceptions to this general trend. But the trend and the curiousness remain.

- [24] And yet, following Orford’s concerns about policing disciplines, we ought to be careful about how we think of disengagement as a problem, and engagement as a solution. I do not suggest that recent work that does not engage directly with historical theory is deficient, ‘unhistorical’ or shows that the history of international law ought to be left to ‘trained’ historians.⁴⁴ While debates over frames, methods, archives, interpretation, purposes and perspectives in historical work are conducted mainly by historians, they are not the only scholars with a stake in or insight into them. This is why it is useful to read our current discussions as expressions of anxiety, rather than as problems or failures: that we are anxious to do good historical work, that we worry about problems that have clear analogues in historical theory, and that while historical theory should not be approached as corrective, ready-made cure for our anxieties, it is a store of ideas, methods, questions, interpretive tools, principles — and the disagreements and debates about each of these things — all of which can help us to deepen our own thinking. Moving beyond brief or selective delving into these works and towards thorough engagement — adaptation — is one way forward.

II ADAPTATIONS⁴⁵

- [25] Adaptation usually connotes practicality, purposive adoption and shedding what is not useful for a task at hand. This kind of basic, pragmatic engagement is not the kind I suggest here. Rather, adaptation should be a form of deep engagement. That depth comes from two steps. First, outlining the broad tenets of a historiographical school and considering how they might be adapted to the history of international law. Secondly, delving into debates, disagreements and later applications that have developed and finessed that approach to history, which helps us to clarify how a range of methodological choices might be made in the context of a concrete project. This view of adaptation aims, above all, to resist any singular, procrustean approach to historiography and its schools. It prevents these internally diverse schools from becoming rigid structures against

⁴⁴ See instead Lesaffer, *supra* note 30. See also A. Kemmerer, “‘We Do Not Need to Always Look to Westphalia ...’: A Conversation with Martti Koskenniemi and Anne Orford”, (2015) 17 *Journal of the History of International Law* 1.

⁴⁵ Some of the arguments in this section are explored, albeit in an earlier, briefer form and with a different framing, in M. Clark, ‘A Conceptual History of Recognition in British International Legal Thought’ [2018] *British Yearbook of International Law* (forthcoming).

which we measure our work. Not only would a singular statement distort any approach to history, it would also be unhelpful for trying to identify and alleviate the difficulties raised by international legal history in general and the methodological challenges raised in specific projects.

- [26] Deep engagement need not necessarily involve lengthy, explicit adoption of some historiographical framework or other, or a set of rigid conditions that outline why a study is a ‘genuine’ example of that approach to historical work. In a minimal form, it might simply involve reflections, explorations or defences of the choices about archives, periods, interpretations, context, or framing, as a kind of drawing on, gesturing to, or fitting in with one or more schools of historiography. Certainly, historians do not tend to outline their historiographical commitments explicitly and exhaustively in a section entitled ‘methodology’. Equally, lawyers rarely exhaustively set out the approach to legal interpretation, or a rigid concept of law, at the outset of a study. Some works or arguments may warrant or require it; but even then, it often proceeds as a description of a milieu or mood — of more or less fitting into an approach or school of thought — rather than a set of strictures. That is often what historians also do: articulate methods, theory framings or school alignments in an introduction, defend those choices for the particular study, and highlight how they might differ from and build on previous works or other historiographical approaches already taken in the field.⁴⁶ Both fields certainly have their share of scholars who are firmly uninterested in questions of theory and method, preferring instead the craft or practice metaphors as definitions of their endeavours. But in both cases, even this ‘minimal’ theorising belies a close appreciation of the tools, frames and methods of doing that work, even if it is left unsaid. For lawyers taking up historical questions without that training or practice, minimal description may be enough, but it may be more useful to err on the side of detailed exploration.

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- [27] How can we begin adapting conceptual history to international law? One starting point is with the already close affinity of law, history and theory, and the importance of concepts in writing our current histories. Many histories of international law could be read or redescribed as conceptual histories,⁴⁷ as could those works more specifically dubbed as ‘genealogies’ or sitting within the wider

⁴⁶ See, eg, Benton and Ford, *supra* note 15, ch 1.

⁴⁷ Some examples, from the 1930s to today, include E. D. Dickinson, ‘Changing Concepts and the Doctrine of Incorporation’, (1932) 26 *AJIL* 239; C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (2003); C. Ku, ‘The Concept of *Res Communis* in International Law’, (1990) 12 *History of European Ideas* 459; A. Carty, ‘Myths of International Legal Order: Past and Present’, (1997) 10 *Cambridge Review of International Affairs* 3 (using concepts of ‘myth’, ‘frontier’ and ‘territory’); E. Benvenisti, ‘The Origins of the Concept of Belligerent Occupation’, (2008) 26 *Law and History Review* 621. Schmitt’s *Nomos* is perhaps the clearest example, and Schmitt’s influence on Koselleck forms an important basis for Koselleck’s vision of politics (and history) as a field of combat between groups over and through ideas: see N. Olsen, ‘Carl Schmitt, Reinhart Koselleck and the Foundations of History and Politics’, (2011) 37 *History of European Ideas* 197.

turn to the ‘international’ in intellectual history.⁴⁸ Despite this connection, this ease of redescription, and the general aversion to historiography explored above, it is still surprising that one major trend in twentieth century historiography — ‘conceptual history’, treated almost synonymously with one of its major primogenitors, Reinhart Koselleck⁴⁹ — has received at best fleeting notice as a possible pathway for international legal historiography. In 2012, Koskenniemi provided a short and enticing exploration of those possibilities, seeing Koselleck’s work as a way of highlighting the polemical sides of the vocabulary of international legal argument, which could frame connections between doctrinal arguments and their political, confrontational projects, and ultimately ground new histories of international law that narrate the clash of legal views as ‘an aspect of political struggle’.⁵⁰ More recently, Craven used Koselleck’s explanations of the origins of historiography and the emergence of historical time as a frame for the development of international legal history.⁵¹ Other works have used the language of ‘polemic’ or ‘combat’ concepts⁵² — very Koselleckian terms — or embrace the breadth of conceptual history, often with

⁴⁸ Examples of the former include, eg, Berman, ‘In the Wake of Empire’, *supra* note 25; R. G. Teitel, ‘Transitional Justice Genealogy’, (2003) 16 *Harvard Human Rights Journal* 69; A. Rasulov, ‘New Approaches to International Law: Images of a Genealogy’, in Beneyto and Kennedy (2012), 151. For the intellectual history turn to the international, see, eg, D. Armitage, ‘The International Turn in Intellectual History’, in D. M. McMahon and S. Moyn (eds.), *Rethinking Modern European Intellectual History* (2014), 232. Indeed, Armitage himself provides strong examples of recent major conceptual histories grounded in law and the international: see, eg, Armitage, *Civil Wars*, *supra* note 15.

⁴⁹ The major essay collections translated into English are R. Koselleck, *Futures Past: On the Semantics of Historical Time* (1985); R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (2002). On the development of conceptual history, see, eg, M. Richter, ‘Conceptual History (*Begriffsgeschichte*) and Political Theory’, (1986) 14 *Political Theory* 604; M Richter, ‘*Begriffsgeschichte* and the History of Ideas’, (1987) 48 *Journal of the History of Ideas* 247. The major, multi-volume ‘encyclopedia’ of conceptual histories is O. Brunner, W. Conze and R. Koselleck (eds.), *Geschichtliche Grundbegriffe: Historisches Lexikon Zur Politisch-Sozialen Sprache in Deutschland* (1972–97). Two entries translated into English are: F.-L. Kne Meyer, ‘Polizei’, (1980) 9 *Economy and Society* 172; R. Walther, ‘Economic Liberalism’, (1984) 13 *Economy and Society* 178. On Koselleck’s life and work, see, eg, N. Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (2012); M. Richter, *The History of Political and Social Concepts: A Critical Introduction* (1995).

⁵⁰ M. Koskenniemi, ‘A History of International Law Histories’, in Fassbender and Peters, *supra* note 15, 943, at 968–9.

⁵¹ M. Craven, ‘Theorising the Turn to History in International Law’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016), 21.

⁵² See T. Hippler and M. Vec, ‘Peace as a Polemic Concept: Writing the History of Peace in Nineteenth Century Europe’, in T. Hippler and M. Vec (eds.), *Paradoxes of Peace in Nineteenth Century Europe* (2015), 1; I. Hunter, ‘About the Dialectical Historiography of International Law’, (2016) 1 *Global Intellectual History* 1. While Hunter does not explicitly cite Koselleck here, his earlier works were strongly influenced by Koselleck as well as Schmitt: see I. Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Europe* (2006), 11–12.

scattered references to Koselleck's works.⁵³ One project promises an encyclopedia of fundamental international legal concepts, many of which are explained largely through their history, and which may prove to mimic the foundational multi-volume collection of conceptual histories, the *Geschichtliche Grundbegriffe*.⁵⁴

- [28] These are all useful provocations moving in the right direction. But they are not examples of deep engagement with the methods and frames of conceptual history. This part explores the tenets, debates and possibilities of conceptual history in more depth, to think on how they might be adapted. It outlines conceptual history under the rubric of the main anxieties outlined above — materials, context and movements — presenting its main tenets as contained in the works of Koselleck, as well as a handful of contemporary extensions, debates and applications. It then synthesises this account into general insights for conceptual histories of international law. Finally, it outlines one set of methodological choices made in a concrete project on the history of the concept of recognition.

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- [29] First, how does conceptual history approach and order its sources? The principal sources are the works of 'representative authors'. This begins with 'classical' thinkers — philosophers, theologians, poets, economists, legal and political theorists — who considered, debated or introduced new versions of ideas, proposed visions of the world, and promoted or critiqued ideologies. Examining these texts establishes the 'semantic fields' of a period: the conditions of possibility about what can be said, argued, understood and done at a particular time. We then turn to wider sources that might contain social and political debates using the concept examined: newspapers, periodicals, pamphlets, parliamentary debates, government sources, diaries, letters, and, to some extent, dictionaries and encyclopedias.⁵⁵ Understanding a concept's impact in the world and its formation and change is largely gleaned from comparing and contrasting uses between and within these categories of sources.⁵⁶ In Koselleck's original approach, these sources and examinations must be confined to singular national-linguistic traditions and political communities. That is because although conceptual history looks to a wide range of actors and forms of communications, the terms used — and hence their past uses — must be largely similar and shared. Apparently similar translated terms (for example, state, *état*, *Rechtstaat*) hold vastly different meanings, connotations and uses, rooted in their varied

⁵³ D. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (2015) (discussing Koselleck briefly at 104).

⁵⁴ J. D'Aspremont and S. Singh (eds.), *Fundamental Concepts for International Law: Construction of a Discipline* (forthcoming 2018).

⁵⁵ On sources, see R. Koselleck, 'Introduction and Prefaces to the *Geschichtliche Grundbegriffe*', (2011) 6(1) *Contributions to the History of Concepts* 1, at 22–3.

⁵⁶ *Ibid.* 22. See also R. Koselleck, 'Begriffsgeschichte and Social History', (1982) 11 *Economy and Society* 409, at 415.

histories within national-linguistic communities.⁵⁷ Recent works have sought to expand this national-linguistic-centred approach, thinking through the translation of concepts across languages⁵⁸ and the comparative, transnational and global dimensions of language.⁵⁹

- [30] Secondly, what broad contexts are relevant? Conceptual histories are sometimes dubbed ‘pragmatic’ in their linking of language, ideas and the context of a period, specifically its intellectual and social history.⁶⁰ While changes in political and social situations are often presented in relatively general terms, changes in language, arguments and ideas should be situated within these broader transformations. Context is not just a background to concepts. It can also condition their possible meanings, and — most importantly — the kinds of political projects or views of the world that a concept can be used to describe or advocate for at a given point in time.⁶¹ Koselleck’s approach involved several stringent principles about where and how the engagement with context should take place. Conceptual history should neither try to draw conclusions about historical facts directly from linguistic sources, nor focus only on ‘intellectual expressions’ of earlier thinkers.⁶² Rather, it seeks to understand how concepts were ‘used in the past to order experience’.⁶³ Those ordering concepts can then form the basis for theorising the world or society, eventually becoming central parts of political or ideological arguments, which can then be examined thematically for changes in them over time.⁶⁴ The concrete ‘facts’ of history and the language of the times play important roles, and their relevance is prompted when a concept uses, shapes or is shaped by them, illustrated by changes to its content.⁶⁵ A distinction between historical facts and language use must be maintained to ensure that the inquiry does not lead to only factual history, or simply a catalogue of a language’s use of political and social terms.⁶⁶ Contemporary works have sought, in various ways, to globalise both language and context, to move beyond the nation-state and largely European focus of

⁵⁷ On this point, illustrated with reference to French, British and German understandings of voting rights since the French Revolution, see R. Koselleck, ‘Linguistic Change and the History of Events’, (1989) 61 *Journal of Modern History* 649, at 657–61.

⁵⁸ See, eg, M. J. Burke and M. Richter (eds.), *Why Concepts Matter: Translating Social and Political Thought* (2012).

⁵⁹ See, eg, P. den Boer, ‘Towards a Comparative History of Concepts: Civilisation and “Beschaving”’, (2007) 3 *Contributions to the History of Concepts* 207.

⁶⁰ J.-W. Müller, ‘On Conceptual History’, in D. M. McMahon and S. Moyn (eds.), *Rethinking Modern European Intellectual History* (2014), 74, at 74 (and noting that this pragmatism is reflected in the ‘somewhat paradoxical’ lack of any ‘real theory’ of Koselleck’s approach itself).

⁶¹ Koselleck, ‘*Begriffsgeschichte* and Social History’, *supra* note 52, at 419.

⁶² Koselleck, ‘Introduction and Prefaces’, *supra* note 51, at 21.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* 28.

⁶⁶ *Ibid.* 29.

Koselleckian conceptual histories.⁶⁷ Even where Europe remains the focus, recent work shows careful appreciation of the importance of non-European contexts and influences for understanding conceptual change taking place in European discourses.⁶⁸

- [31] Third, how do concepts move in conceptual history? Koselleckian conceptual history fixes on a concept, charting its emergence as a ‘basic concept’ over time.⁶⁹ ‘Basicness’ is a complicated idea, but includes those ideas that are essential and contested: ideas that are ever-present, invoked by all political actors, indispensable for furthering political projects, and used so often that they crystallise into single words or terms: ‘state’, ‘human right’, ‘democracy’.⁷⁰ A conceptual history framework plots the transition to this ‘basicness’ by charting where, when, how and why different associations, connotations and strands of meaning are added to, endure in, or are discarded from a concept.⁷¹ Addressing the accumulated criticisms of the *Geschichtliche Grundbegriffe*, Koselleck clarified that when a concept is placed in historical context, it can be called ‘basic’ ‘if and when all contesting strata and parties find it indispensable to expressing their distinctive experiences, interests, and party-political programs’.⁷² This moment of transition is indicated by a concept coming to ‘dominate usage’, a starting point of ‘minimum commonalities’ in meanings of a concept that are necessary for it convey and contest social and political experiences and programs; more simply, the commonality of language needed for political discourse — and hence action — at all.⁷³ Movement in conceptual history takes place within a particular conception of time. A first step is uncovering the possibilities of what can be thought, said, and done, at various points in time.⁷⁴ The transition from tradition to modernity — a movement to basicness — is not a simple ‘before’ and ‘after’ teleology. Instead, it is a gradual shift where a concept takes on a temporal aspect, where it can be used to describe

⁶⁷ See, eg, A. Lianeri, ‘A Regime of Untranslatables: Temporalities of Translation and Conceptual History’, (2014) 53 *History and Theory* 473; S. Moyn and A. Sartori (eds.), *Global Intellectual History* (2014); H. Schulz-Forberg, ‘The Spatial and Temporal Layers of Global History A Reflection on Global Conceptual History through Expanding Reinhart Koselleck’s *Zeitschichten* into Global Spaces’, (2013) 38(3) *Historical Social Research/Historische Sozialforschung* 40.

⁶⁸ See further W. Steinmetz, M. Freeden and J. Fernández Sebastián (eds.), *Conceptual History in the European Space* (2017).

⁶⁹ R. Koselleck, ‘A Response to Comments on the *Geschichtliche Grundbegriffe*’, in H. Lehmann and M. Richter (eds.), *The Meaning of Historical Terms and Concepts: New Studies on Begriffsgeschichte* (1996), 59, at 64. See also E. J. Palti, ‘Reinhart Koselleck: His Concept of the Concept and Neo-Kantianism’, (2011) 6(2) *Contributions to the History of Concepts* 1.

⁷⁰ Müller, *supra* note 56, at 84.

⁷¹ Koselleck, ‘A Response’, *supra* note 65, at 68.

⁷² Koselleck, ‘Introduction and Prefaces’, *supra* note 51, at 32.

⁷³ *Ibid.*

⁷⁴ See J. Rayner, ‘On *Begriffsgeschichte* Again’, (1990) 18 *Political Theory* 305, at 306.

possible futures, and advocate for one or another of those futures.⁷⁵ In Koselleck's work, this transition period — the *Sattelzeit* or 'saddle time' — is the period during which most concepts underwent this change. For Koselleck, it is posited as approximately 1750–1850, but other projects have stretched further backwards and forwards in their periodizations,⁷⁶ and later commentators have seen the *Sattelzeit* as any transition period that stretches continuities and discontinuities to the present.⁷⁷ Within this transition, concepts become 'essentially utopian': they could do more than just describe the conditions of the world; they begin to identify conditions that should change and prescribe action to achieve those changes. Somewhat paradoxically, during this transition, interlocutors are forever trying to fix an exclusive, singular meaning to a concept; to present it as a universal, atemporal, coherent, and univocal idea. But because the meanings and uses of concepts are constantly in flux, responding to and shaping societies, and finding different uses in political arguments, these concepts — even, or especially, when presented as definite — remain always contested, ambiguous and controversial.⁷⁸ Their continuities and ruptures within these arguments indicate their changes and movements.

- [32] Perhaps the best shorthand description of conceptual movement is into four 'hypotheses'. Prompted by critical discussions over the lack of clarity in Koselleck's work, these hypotheses neatly distil conceptual historical investigation itself.⁷⁹ In their hypothesis form, they are built from the general trends seen in specific conceptual histories in the *GG*. But for the purpose of adaptation, they can be easily repurposed into hypothetical questions. The first is temporalisation: when is a concept placed into a longer horizon of a particular philosophical or historical development, or into a teleology of stages of development? The second is democratisation: when is a concept's audiences expanded beyond small elite political strata to the larger body politic? The third is ideologization: when does a concept gain the ability to be incorporated into ideologies; when is it picked up by various social strata and moved into 'isms' and singular nouns ('liberalism', 'liberty') for use in politics? The fourth is politicisation: when does a concept begin to be used by antagonistic political

⁷⁵ On which, see Koselleck, *The Practice of Conceptual History*, *supra* note 45, chs 7 ('Concepts of Historical Time and Social History') and 10 ('The Eighteenth Century as the Beginning of Modernity').

⁷⁶ See, eg, the wide range of periods explored in the essays in P. Ihalainen, C. Ilie and K. Palonen (eds.), *Parliaments and Parliamentarism: A Comparative History of a European Concept* (2016).

⁷⁷ See further G. Motzkin, 'On the Notion of Historical (Dis)Continuity: Koselleck's Construction of the *Sattelzeit*', (2005) 1(2) *Contributions to the History of Concepts* 145.

⁷⁸ See K. Palonen, 'An Application of Conceptual History to Itself: From Method to Theory in Reinhart Koselleck's *Begriffsgeschichte*', (1997) 1 *Redescriptions* 39, at 41–2 and 65.

⁷⁹ These distillations can be seen in, eg, M. Richter, 'Appreciating a Contemporary Classic: The *Geschichtliche Grundbegriffe* and Future Scholarship', (1997) 1 *Finnish Yearbook of Political Thought* 25, at 28–30; P. den Boer, 'The Historiography of German *Begriffsgeschichte* and the Dutch Project of Conceptual History' in I. Hampsher-Monk, K. Tilmans and F. van Vree (eds.), *History of Concepts: Comparative Perspectives* (1998), 13, at 15.

actors to advance their projects during rearrangements of social, regional and national connections driven by revolutions, wars and economic changes. These questions are phrased as ‘when’ inquiries; after that answer comes the questions of who, how, why, and with what effects?

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- [33] These hypothetical questions can be usefully adapted to guide histories of international legal concepts. We might ask instead: when might an international legal concept be placed into wider philosophical, historical or teleological narratives? When might it gain wider speakers and audiences beyond just the elite strata of jurists and state leaders? When might it be generalised or abstracted and then fitted into ideologies espoused by particular states or groups? And when might it become practical or usable for states or groups in articulating and pursuing political projects amidst the torrents of world history? Again, after identifying the when, we may move to the who, how, why, and with what effect. We may also see fit to build in new hypotheses specific to international law. One important example might be universalisation or internationalisation: when and how does a concept begin to be used to make demands across borders, or posed as asking or attaining the assent of all nations or peoples?⁸⁰ Another could be legalisation or juridification: where and how do ordinarily or formerly ‘political’ concepts become juridified; that is, described and defended as matters of law and not politics, and with what effects?
- [34] Consistent with conceptual history’s focus, histories of international legal concepts should look to identify the emergence of ‘basic concepts’ in international legal thought and practice. Basic concepts in international law, like basic concepts in general, would be those terms that are essentially contested and controversial but are simultaneously central to articulating arguments, positions or projects in international law.⁸¹ A starting list could be generated from the headings of any major textbook — ‘sources’, ‘sovereignty’, ‘treaty’, ‘international court’, ‘general principles’, ‘human rights’ — to which could be added major themes and contested ideas: ‘civilisation’, ‘progress’, ‘empire’, ‘authority’, ‘protection’, ‘jurisdiction’, ‘comity’, ‘community’, ‘war’, ‘peace’. Technical concepts or major doctrinal debates could also, potentially, achieve the level of basicness: ‘competence’, ‘*non-refoulement*’, ‘monism’.
- [35] During the general period of transition from traditional to modern concepts, international lawyers were engaged in forging a professional identity with its own scientific, technical and expert vocabulary. The ‘representative authors’ may include writers from philosophers to theologians, but jurists and juristic works that describe, theorise, debate and apply concepts in international law are likely to contain the bulk of conceptual discussion and change. The limits of this professional vocabulary and its comparatively few interlocutors pose problems for source selection; namely, where to widen out the texts and debates that reflect conceptual changes in the world? One avenue is expanding the field of

⁸⁰ As applied to global intellectual history, see further C. L. Hill, ‘Conceptual Universalization in the Transnational Nineteenth Century’ in Moyn and Sartori (eds), *supra* note 63, 134.

⁸¹ Koselleck, ‘Introduction and Prefaces’, *supra* note 51, at 3.

interlocutors from jurists, judges and practitioners to also encompass those reading, acting and relying on legal advice in public discussions — state leaders, government officials, international bureaucrats, leaders of social movements — as well as thinkers in other disciplines who are taken up by or come to influence jurists. The latter group may be a source of wider conceptual changes in social and political concepts that come to be incorporated, reflected (or rejected) in changes in law and legal theory. More generally, engaging with the histories of a wide variety of closely linked political, social and economic concepts to understand the boundaries of what is thinkable and expressible in legal argument is likely to be just as important as exploring the internal limits of legal discourse. Finally, and most closely aligned with general conceptual history, the moments when international legal concepts gain popular understandings and political deployments in wider civil society discussions — consider the popular discourse on the use of force and the Iraq War,⁸² or everyday discussions of the work of the International Criminal Court in African nations⁸³ — may prove to be the most important sites for shifts in meaning.

- [36] A second source problem is translation and nationality. Translation and comparison of similar concepts across jurisdictions and legal languages seem almost a necessity for histories of international legal concepts. Cross-national and cross-regional conversations are common and important for the development of international law, and are the site for the furthering of political projects. It is important, however, not to dispose of the national-linguistic focus of Koselleckian conceptual history too hastily. While the texts and projects of international lawyers are designed to have effects across borders, into the states and societies of other polities or towards and international community in general, they are often rooted in national legal languages and cultures and support national foreign policies. Situating international legal arguments in their national traditions may clarify points of transnational contention and disagreement, but they may also highlight more local shifts in the meaning of concepts. Many central building blocks of legal thought hold meanings and connotations specific to various legal cultures: consider the widely different meanings of terms for law, right, justice, adjudication, constitution, state, international law, even within European traditions.⁸⁴ How and where these different conceptions encounter each other, beyond the confines of the nation, cannot be ignored, as they largely can in nation-focused conceptual history. Certainly, the dissemination, incorporation or resistance to ‘foreign’ legal ideas will be one site of this engagement. Juristic texts themselves have different forms, levels of authority, audiences and impact on practice depending on the culture. Finally, whereas groups seeking to use concepts for (domestic) political ends are a major focus for general conceptual history, the relevant political projects here are likely to be

⁸² See, eg, C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (2013).

⁸³ See, eg, S. M. H. Nouwen, “‘As You Set out for Ithaka’: Practical, Epistemological, Ethical and Existential Questions about Socio-Legal Empirical Research in Conflict”, (2014) 27 *LJIL* 227.

⁸⁴ See further A. Roberts, *Is International Law International?* (2017).

primarily those tied to visions of international — rather than domestic — society: debates over interventions, legal systems, the appraisal or criticism of particular forms of government, the projects of colonial expansion and control, and the role of Great Powers and international coordination in furthering or curtailing these kinds of projects are the sorts of political agendas that are relevant here. And yet ‘domestic’ forms of political concepts and ideologies as developed in different nations will, however, remain important, as they so often form the models to be projected and imposed on to international society, as was the idea of Europe.

- [37] Because international law holds relevance in so many historical events and so many forms of life and action, the array of factual contexts that might seem necessary or at least useful for understanding its concepts is immense. One mode of narrowing down that breadth is to begin with unpacking the contexts that an author has selected or lived through, to ask which events or trends are invoked, to what end (as historical illustration; as a current dilemma; as an analogy or distinguishable case?), and which are ignored? Which contemporary problems is the text aimed at addressing, illuminating, or criticising? The contexts for placing these texts are those of their authors (personal, intellectual, political), the projects and visions of international law and society these texts describe or promote, and the concrete factual events that they are shaped by or seek to interpret or influence: diplomatic interactions, disputes, wars, treaties, trade, congresses, imperialism, colonialism, and so on. As with general conceptual history, paying attention to the way formulations of concepts might press on interpreting the facts of the world is vital: concepts affect the portrayal of context just as much as language and that world may shape concepts themselves.
- [38] Finally, examining movement in international legal concepts means paying close attention to juristic texts as the main sites of likely conceptual change, but to be read and contextualised in their wider worlds. As with general conceptual history, the movements we should look for are stability in meanings and connotations over time, changes recognisable at specific times, and the accretion and discarding of meaning likely seen in doctrinal endorsements, modifications, disagreements or criticisms. These movements may be divided into sub-periods which might emphasise the rise or fall of particular understandings or applications of a concept, or shifts in their use in political projects. These various trends may well overlap substantially. The central question remains what kinds of meanings and projects were — or seemed — thinkable and realisable within the boundaries of law and legal ideas at the time, and how did these texts expand those meanings or further those projects.

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- [39] A recently published conceptual history of recognition provides a concrete example of how these historiographical considerations might play out.⁸⁵ ‘Recognition’ is, today, perhaps the clearest example of a basic concept in international law. Academically, it is usually explained as a diametric opposition of constitutivist and declarativist theories. Politically, it almost always forms a

⁸⁵ This section recapitulates and reflects on the methodological choices and the arguments made in detail in Clark, *supra* note 46.

moment and space of wide, contentious and acrimonious argument that deploy competing factual, political and ideological claims which are quickly cloaked in the language of law. For this reason, it is more easily accepted as holding important political dimensions, at least compared to other more traditionally 'legal' concepts in international law.

- [40] The history I told presented one 'British story' of recognition. It examined the juristic works of international lawyers writing in Britain as well as their political and social projects and contexts to show how different meanings of recognition emerged and formed a ground for contestation over law, empire and the shape of the world. In the nineteenth century, recognition began as a descriptive, European-diplomatic concept, before being refashioned as the basis for chauvinist theories of international law, and then more broadly use as a racialized language that furthered colonial and imperial projects. In the twentieth century, jurists began to shed the language of civilisation from the meaning of recognition, which gave way to widely divergent political and utopian projects amidst the new international system of the League of Nations. By the 1950s, recognition had emerged as a basic concept — essentially contested and inescapable — amid the ruins of the British Empire, the establishment of the United Nations, and the turn towards decolonisation and self-determination.
- [41] The materials for this history were a wide range of juristic texts published over two centuries. Its contexts were the political and social projects of these jurists, as well as changes in Britain, its empire, and the world. The movements were those of the concept of recognition, as well as these contexts, which split into several strands that partly overlapped to reflect the concurrence and contestation of these ideas. These choices were made in line with the tenets on adaptation outlined above. They balanced continuity and connection against change and diversity. The continuities and connections lay in the focus on a concept encapsulated in one unchanging word, in similar writing styles, social situations, worldviews, and a geographical and political connection around 'Britain' and its empire. The change and diversity came from the different projects and purposes to which recognition was put, and the changes of contest in Britain, its empire and the world. It picked up a tradition of legal thought and practice that is recognisably 'British' and yet still complex, contested and largely incapable of clear definition. In many senses, this is an immensely conservative frame: around published texts of white male legal scholars, largely upper-class, most holding university chairs, all but one Christian, working in and thinking about one of the world's most powerful, long-lived imperial polities. But in going back to these texts and figures carefully, with the insights of conceptual history in mind, we can see anew just how and where the assumptions about race, power and authority came to be entwined in the idea of recognition. It is not to promote these figures as the only writers worth looking at. But nor does it demand we re-write their works or judge them by today's standards, as some — critical or not — have worried.⁸⁶ Their problematic aspects lie on the surfaces of their writings. Those aspects are not only occasions for judgment, but also guides to why and

⁸⁶ See M. Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law', (2014) 22 *Rechtsgeschichte* 119, 121–23.

how we ended up as we did; how the ideas that we might abhor today were moved into the sediment of international legal thought. We follow the leads to who has been said to have invented these things, invoked them, shaped them, but in doing so we need not necessarily write ‘to’ them,⁸⁷ taking the risk of reinscribing them further.

- [42] My choices in this project could have been made differently. Its sources might have placed greater weight on public debates using the language of recognition. Two clear examples were, first, the 1820s campaigns by London merchants for British recognition of the Spanish Republics which led to Sir James Mackintosh’s policy shift and, secondly, letters to newspapers from an enthralled public about recognition and the American Civil War that prompted the publication of Montague Bernard’s letters explaining recognition to readers of *The Times*. These, among many other instances, might have led to a more public discourse focused project. Another approach might have emphasised parliamentary debates and committee reports, or judicial decisions and their wider reception, or shifting concepts deployed within the Foreign Office. A larger temporal frame might have opened up earlier contexts of papal interventions or recognition’s possible proto-concepts, like legitimacy, jurisdiction or authority, which might have been sourced in ancient forbears in Rome or Greece. Within its own timeframe, it could have more keenly explored debates about revolution and recognition in relation to America or France held in more political than legal tones. A more ambitious, transnational frame could have incorporated other Anglophone writers throughout British settler colonies, or looked to French, Spanish, German or Russian writings, or canvassed recognition’s great importance in Central and South America. Beyond Europe, the history might have engaged with recognition’s place — or absence — in Third World legal thought; in the theories and practices of political and social movements throughout the British Empire in the long marches to independence, or the interventions and engagements against the Ottoman, Japanese and Chinese Empires. Looking to the post-war changes in the concept, and the rise of other competing ways of thinking about state legitimacy and subjecthood — self-determination, later democracy — could have allowed the tracing of other legacies in recognition’s possible newer guises and transformations.
- [43] This is part self-criticism and part wishful thinking. The above project was but one starting point. It could not canvass all the possibilities noted above and explore every path that might have been illuminating. It was ‘a’ conceptual history, focused on one small, significant part of a global debate on an issue of old, perennial importance, not ‘the’ definitive account. Consciously noting these other possible methodological choices reinforces that conceptual history offered a powerful scaffold for thinking through why and how the choices in this project were made. It provided a set of tools for deciding on sources and contexts and for

⁸⁷ To use Sara Ahmed’s phrase: Sara Ahmed, ‘Useful’, (Paper presented at ‘Conceptual Itineraries: The Roots and Routes of the Political’, SOAS, University of London, 10 June 2017) <www.feministkilljoys.com/2017/07/07/useful/>: ‘And when I write of [dead white men] in this project I do so because what I am following leads to who, to who has been deemed to come up with something. I do not write to them.’

thinking about conceptual movement. Ultimately, this interrogation shows the promise — and the difficulty and complexity — of constructing conceptual histories, even those confined to a single state and a standard length of about two centuries. It also allows us to begin thinking about what might be gained by looking to other schools of historiography.

III ADVANCES

- [44] The adaptation explored above shows several directions for advances. It provides us with an approach to texts and contexts that can avoid the rigidity of a simplistic focus on doctrine that anxiety around texts seeks to address, and guides us in delving into the detail of ideas and contexts without becoming lost within them. It structures our inquiries into a broad range of thinkers and texts to examine the development of concepts that remains tied to context, national understandings and political projects. It also allows us the creativity to think beyond just attempting to prove specific causal claims about influence, reception and impact by emphasising wider uses of language, general social and political projects, and the ways in which concepts illustrate changes in the world. It helps us avoid the narrowness that contextualism can tend towards. It forces us to think about where particular ideas in international law are situated between their immediate context and the free-floating play of academic ideas, as well as giving us a set of tools to help navigate that placement. It also gives us a means of confining the totality of world events that might have impacted international legal concepts.
- [45] In more practical terms, this kind of engagement can be the basis for institutional, interdisciplinary and collaborative research projects with the many other scholars that form the contemporary renaissance of conceptual historical work. A decade ago, Kari Palonen noted that conceptual history's focus on the politics of questions, rather than those of answers, provides one promise for engagement with public debate and discourse that fits into the contemporary milieu of academic research in the neoliberal university and state.⁸⁸ But it is also one way of pushing back against the problematic aspects of that institutional setting, at this moment of social and political tumult: to chart how questions and debates always held pragmatic relationships to truth, justice, law and power, to show how they deployed concepts and descriptions of the world for combative purposes which continue to shape our present visions. Our wider anxieties and ambivalences — the everyday, social and political ones — have long histories too.

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- [46] History is neither synonymous with the past, nor a singular truth about the past. Instead it involves claims and arguments about how to understand the past that might be more or less convincing but are always open to contestation. Like the study of law, history is an unending examination of questions of authority, legitimacy, truth and meaning. It proceeds by crafting narratives, making claims

⁸⁸ See especially K. Palonen, 'The Politics of Conceptual History', (2005) 1(1) *Contributions to the History of Concepts* 37.

about a general explanation or significance, illustrated and finessed by the consideration of the particular. It improves by re-evaluating those narratives, incorporating new materials, ideas and ways of understanding the world that were previously ignored or hidden. Just as lawyers are frequently and wrongly perceived to have special and exclusive access to the realm of legal arguments, historians are not blessed with special or exclusive access to the past. What is common to both disciplines is the importance of specialised training in kinds of argumentation that, following reflection and exercise of that training, can build understanding and good scholarship. International lawyers are as free as anyone else to understand and interpret the history of their discipline and the world in which it is situated,⁸⁹ and for some topics technical legal training may prove more important than historical training. We ought to be humble about our abilities and attempts in trying to write histories of international law. Historians likewise ought to be humble about their own limits in navigating law and legal argumentation. One of adaptation's most important advances is in its invitation to a productive kind of humility. Doing good interdisciplinary work always involves ambivalence, anxiety, adaptation, as a means to — hopefully — some advancement in understanding and knowledge; and the best scholarship always mixes brashness and humility in appropriate measures. But to clarify where the blind spots lie for both disciplines, and to fix or at least understand them better — to balm our anxieties — we ought to engage with historiography.

- [47] This article has contributed an exploration of one small but important part of the wider historiographical landscape around which engagement might take place. I pursued here the adaptation of only one school of history that focuses on thought over time, and with a relatively narrow focus. Not only do we need to hold on to the plurality internal to that school, but we need to also explore the many historical theories that may lead us towards very different ways of writing the history of international law. Hopefully, ultimately, a more thoroughgoing set of adaptations would map the diversity of that landscape. This is true, firstly, of the many strands of historical work that deal with thought and time in ways other than conceptual history: intellectual history, the history of political thought, genealogy, and older schools of the history of ideas, and so on. It also applies to wider trends in historiography not primarily focused on ideas: more detailed explorations of social, Marxist, feminist, postcolonial, micro- and global historiography, for a start, would add further richness to our methodological palette. And while I urge a thorough engagement with 'mainstream' historiography, it is important not to forget that theorising about legal history — particularly its transnational, comparative and global angles — offers another rich vein of materials for international law that has likewise remained

⁸⁹ A. Carty, 'Visions of the Past of International Society: Law, History or Politics?', (2006) 69 *Modern Law Review* 644, at 656.

untapped.⁹⁰ For those concerned about international legal history's narrow focus on ideas,⁹¹ looking to objects, materiality, social movements, institutions, governance and the everyday life of international law are all exciting avenues that these historiographical schools can help pave. Care about the narrowness of a focus on jurists or ideas is understandable; but one way of avoiding narrowness is to radically widen the ways in which we can think about ideas over time.

- [48] But in building that palette, we ought to recall that adaptation should not take these schools or thinkers as singular or rigid frames. They are encountered as disputed, multifaceted ways of thinking about and doing historical work, that cannot be reified as 'solutions' to our anxieties about method, but as material to understand those questions in more detail to begin finding answers of our own. Adaptation means taking up and thinking with whatever strikes us as illuminating for the project at hand. And it means continuing the very fruitful connections recently forged with historians of a variety of schools around questions of the pasts of international laws and politics.
- [49] This might all sound somewhat exhausting, and in the face of an ambitious agenda we might risk slipping back to ambivalence about historical method. For some, moving away from conversations about method — thinking about what comes after method — is the more productive step.⁹² But before we decide to do so, it is worth attempting a more thoroughgoing engagement with possibilities of historiography. Koselleck and conceptual history offers one new vista. Deepening and expanding that engagement may allow us to realise the usefulness of a wide range of contending approaches to historical theory, ultimately helping us articulate the different frames, accounts and starting points that will allow us to write new and better — and potentially, eventually, radically different — histories of international law.

⁹⁰ This is a long-term concern for the field, with useful examples ranging from F. Pollock, 'The History of Comparative Jurisprudence', (1903) 5 *Journal of the Society of Comparative Legislation* 74, to G. Schwarzenberger, 'Historical Models of International Law: Towards a Comparative History of International Law', (1972) 25 *Current Legal Problems* 219, to C. Tomlins, 'After Critical Legal History: Scope, Scale, Structure', (2012) 8(1) *Annual Review of Law and Social Science* 31, to T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (2014).

⁹¹ See, eg, D. Lustig, 'Governance Histories of International Law', in M. D. Dubber and C. Tomlins (eds.), *Oxford Handbook of Legal History* (forthcoming 2018).

⁹² See G. Simpson, 'After Method: International Law and the Problem of History', (2018) *Leiden Journal of International Law* forthcoming.