

IN DEFENSE OF INTERNATIONAL LAW?

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Questions about methods hardly featured at PhD defenses in international law at a specific university some twenty years ago. Doctrinal scholarship was the default, and its method was supposed to be so obvious that it did not require elaboration: this was “simply” *the* legal method. Some (usually external) examiners caused a stir—much to the frustration of the candidates’ supervisors, giants in the field of international law—when they insisted on corrections on the ground that the dissertation did not have a “methods section.” The candidate then had to justify—indeed, think about—the method after all the substantive research had been done. Where to start for writing this add-on? Prompted by the words “method” and “international law,” Google and legal databases took the almost-Doctor to an issue of the *American Journal of International Law* (AJIL) that had come out in the late 1990s: *Symposium on Method in International Law*, edited by Steven Ratner and Anne-Marie Slaughter.¹ To the relief of the candidate confronted with the demanding examiner, the list of methods presented in the Symposium—legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics—contained one that most resembled what they had been doing: legal positivism.² So with reference to the Symposium, they then wrote the requested additional section by describing legal positivism, which, according to Symposium contributors Bruno Simma and Andreas Paulus, sees law as “a unified system of rules.”³ Had Martti Koskenniemi been an examiner, he would probably already in those days have taken issue with the candidate’s picking a method off the shelf.⁴ He

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1. See Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291 (1999). Had the candidate done the search today, Anne Orford’s work would probably have featured prominently in the search results considering few international lawyers have been as reflective, and prolific, on questions of method and international law. See, e.g., Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT’L L. 609 (2012); Anne Orford, *On International Legal Method*, 1 LONDON REV. INT’L L. 166 (2013) [hereinafter Orford, *Legal Method*]; Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT’L L. 369 (2014).

2. See Ratner & Slaughter, *supra* note 1, at 293–94.

3. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302, 304 (1999).

4. See Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT’L L. 351, 352 (1999), in which Koskenniemi rightly questions whether the different products sold in this mall were “methods”; he preferred to call them “styles.” “Approaches” to international law could be another contender, the point being that the methods/styles/approaches discussed (legal positivism,

had refused to cover Critical Legal Studies on the terms of the Symposium on the ground that the editors presented methods as products sold in a shopping mall, without problematizing the role of the mall in the first place (for instance, its exclusionary effects: where were naturalism, postcolonialism, or—one might add—was TWAIL⁵ not (yet) for sale?).⁶ His main objection was the Symposium's assumption that "there is some overarching standpoint, some nonmethodological method, a nonpolitical academic standard that allows that method or politics to be discussed from the outside of particular methodological or political controversies."⁷

If Anne Orford were the examiner, she would probably not let candidates get away with treating method as an afterthought either, so we assume on the basis of her forcefully argued most recent book, *International Law and the Politics of History*.⁸ For we take the book's most important message to be: fellow international lawyers, don't think that you can pick up an "objective," politically neutral method, whether in the shopping mall of "legal methods" or of methods associated with other fields. The book makes this point in relation to the method of (contextualist) historians—a method that was not yet on sale in the 1999 AJIL Symposium but has become so fashionable that international law is said to have taken a "historical turn."⁹ We will argue in the first part of this essay that Orford's admonition is generalizable: thinking about the politics of method is important beyond the adoption of contextualist historical methods.

However, in another respect, namely as regards the state of the field of international law, the book is perhaps overly, or generously, general. The book can be read not only as an admonition to international lawyers but also as a defence of international lawyers as methodologists. The book argues that the attack has come from historians and lawyers who subscribe to the contextualist historical method and accuse international lawyers of doing bad history, while arguing that their techniques allow them to produce objective, neutral, and verifiable accounts—or, "simply," to do "proper" history. Taking this attack seriously—and not as unfortunate but common academic posturing of exaggerating the gaps in, and flaws of, the literature in order to aggrandize one's own contribution—Orford defends international law,

feminist jurisprudence, law and economics, etc.) shape not only *how* one answers questions about international law, but also which questions one asks about international law in the first place.

5. Third World Approaches to International Law (best known by its acronym, TWAIL) emerged in the late 1990s. For an introduction to TWAIL, see Luis Eslava, *TWAIL Coordinates*, CRITICAL LEGAL THINKING (April 2, 2019), <https://criticallegalthinking.com/2019/04/02/twail-coordinates/> (describing TWAIL as a movement, a network, and a sensibility).

6. A few years later, the editors of the Symposium did invite Antony Anghie and B.S. Chimni to write the relevant TWAIL chapter for the book project, which was also published as Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003) (describing and applying TWAIL as a "method," by which they mean a way of "thinking about what international law is and should be.").

7. Koskenniemi, *supra* note 4, at 352–53.

8. See ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* 7–12 (2021).

9. The claim is now ubiquitous, but one of the earliest references to this "turn" was made by George Rodrigo Bandeira Galindo. See George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT'L L. 539, 539 (2005).

arguing that it is not the case that international lawyers are not aware of their own political usage of history. Her point is that international lawyers are fully aware and that assembling arguments for specific causes is exactly what they have been trained to do. As we will elaborate in the second part of this essay, it is in this respect that Orford's defense of international law may be generously general: she is generous to the field of international law by generalizing her positive appraisal of methodological awareness and sophistication to the field as a whole, whereas we recognize it only in certain subfields and certain places. Put differently, whilst it is the case that there is more attention to method than at the defenses described above, there still seems to be a lot of "picking a method off the shelf," especially of legal positivism. Similarly, whilst the statement "international law is political" may no longer cause great shock,¹⁰ that does not necessarily translate into a noticeable awareness of the politics of international legal methods or practices. There thus remains a place not only for contextualist historians (and critical international lawyers for that matter) to continue doing their work but also for exposing the politics that the works of international lawyers—diverse as they are—underwrite or enact. This state of the field makes Orford's call for awareness among international lawyers of the politics and instrumentalization of methods all the more important.

I. A GENERALIZABLE CALL FOR AWARENESS OF THE POLITICS OF METHODS

Orford argues that some international lawyers look to the field of history for a certainty of methods that they miss in international law ever since the realists successfully challenged formalism. According to Maria Aristodemou, international lawyers—and international law as a discipline—look more generally to other disciplines, whether religion, economics, history, politics, literature, or indeed, in Aristodemou's case, psychoanalysis, "to help define its identity."¹¹ For her, the cause of international lawyers' and international law's anxiety is not the realists' challenge to formalism, but the "death of God": with the demise of natural law, the lack that exists at the centre of every subject, including international law, has become more apparent. In response, "the subject goes on endlessly looking to recover the missing bit, deluding herself that if only she had that bit she would be 'whole.'"¹² A less jurisprudential or psychoanalytic explanation for the turn to history and other disciplines could be that law schools have become more open-minded about what they consider "legal research." As legal research counts no longer only answering the question "what is (the) law" but also "what are its origins" and "what are its effects." These questions naturally direct one to other disciplines, with their own methods. One step further goes Roberto Mangabeira Unger's argument that law as a field of study has been "emptied of any distinctive content" now that "the old doctrinal practice . . . is no longer credited with any intellectual force."¹³ Whatever

10. ORFORD, *supra* note 8, at 292–93.

11. Maria Aristodemou, *A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours*, 25 EUR. J. INT'L L. 35, 38 (2014).

12. *Id.* at 38.

13. Roberto Mangabeira Unger, *Legal Thought Now: Lecture 3*, [YOUTUBE](https://www.youtube.com/watch?v=wwxRLRnlPrw) (Feb. 8, 2016), <https://www.youtube.com/watch?v=wwxRLRnlPrw>. For Unger's critique of dominant approaches to legal thought, see also his preface to the new edition of ROBERTO MANGABEIRA UNGER, *THE*

the cause(s), the fact is that international law has been turning to other disciplines and their methods, as illustrated by conference titles such as “International law and . . .”¹⁴ and the pervasive references to turns—“historiographical turn,”¹⁵ “historical turn,”¹⁶ “empirical turn,”¹⁷ “political economy turn,”¹⁸ “computational turn.”¹⁹ If anything, international lawyers have turned to . . . turning.

If the turn to another discipline and their methods is inspired by anxiety, it also causes new anxieties. In law and society research—a field of law that made the empirical turn before international law did—this has been labelled “MAS,” or Methodological Anxiety Syndrome, consisting of “a pervasive and sometimes debilitating doubt about whether one has the necessary methodological skills to embark on empirical sociolegal work in the first place.”²⁰ The fact that the PhD candidates introduced above were not disturbed by questions about methods until after the dissertation had been written²¹ may thus have been to their benefit—method is one of those topics where one has the sense that the more one knows the less one knows, and this can have a paralysing effect.

From this perspective, Orford’s intervention can be read as a liberation. One of Orford’s stated motivations is to fight against forces that grant access to the field of international legal history only if one subscribes to one specific method.²² Orford wants to protect openness and diversity, and calls for creativity: “I . . . want to encourage scholars of international law to evaluate, choose among, or create methods based not on whether they are ‘correct’ but on what they help to make visible or possible.”²³ And in comparing “legal” and “historical” methods, she shows that purportedly “objective” historical methods come with their own political choices and whatever research is produced through them will become part of political struggles.²⁴ Aristodemou, although arguing on different grounds, also notes

CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 3–45 (2015).

14. See *10th Anniversary Conference “International Law and . . .”*, EUR. SOC’Y INT’L L. (Sept. 14, 2014), <https://esil2014.univie.ac.at/>.

15. Galindo, *supra* note 9.

16. Matt Craven, *Introduction: International Law and Its Histories*, in *TIME, HISTORY AND INTERNATIONAL LAW* 1, 4 (Matthew Craven et al. eds., 2007).

17. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 1 (2012).

18. John Haskell & Akbar Rasulov, *International Law and the Turn to Political Economy*, 31 LEIDEN J. INT’L L. 243, 243 (2018).

19. *The Future of Empirical Research in International Law*, GRADUATE INST. OF GENEVA (Oct. 30, 2020), <https://www.graduateinstitute.ch/communications/news/future-empirical-research-international-law>.

20. Patrick Schmidt & Simon Halliday, *Introduction: Beyond Methods – Law and Society in Action*, in *CONDUCTING LAW AND SOCIETY RESEARCH* 1, 2–3 (2009).

21. See the first page of this article for said introduction.

22. See ORFORD, *supra* note 8, at 10.

23. *Id.* at 11–12.

24. See *id.* at 16 (“Any study that is described as offering a history of something called ‘international law’ . . . makes choices about what international law is, where its precursors are to be found, who or what counts as a subject of international law, what past practice is relevant to the field of international law, which figures, texts, or events are central to understanding how the field developed, how the technical details of legal practice relate to ideological claims about what the

that the grass is not greener in other disciplines: “[t]he problem with this quest [for what is lacking in oneself] is that the people or disciplines we look for to complete us are just as lacking as we are.”²⁵

The liberation is only temporary, however: the identification of similar problems in other disciplines requires the scholar to reflect upon and be ready to defend their methodological choices. Orford’s message is that “legal scholars need to think hard about the historical baggage, the time-bound assumptions, the working premises, the institutional conditions, the visions of politics, the possibilities, and the inevitable limitations that are part of any method we borrow or take up.”²⁶ Also writing about the law-history methodological encounter, Gerry Simpson concludes his almost simultaneously published book similarly: “we might want to understand ‘method’, less as a tranche of prohibitions or list of dispensations, and more as an invitation to think about, defend and elaborate a distinctive method of one’s own.”²⁷ Having noted that due to the methodological law-history debates—in which Orford has been a key protagonist—the time of “methodological innocence” is over, he is optimistic about the next phase: “we might experience . . . a greater awareness of the choices open to us along with an awareness that these are choices, and a sense that these choices are both methodological and political: decisions we make rather than decisions that are made for us (by context, by choice of field, by disciplinary tradition).”²⁸ Simpson’s vision is one of Orford’s call having been heeded.

What we also wish to highlight is the relevance of this call and vision for international lawyers who use methods from fields other than history—a relevance that Orford and Simpson, too, suggest. For if, in Aristodemou’s words, the cause of the anxiety is internal, it does not matter to which discipline one flees. Explaining why historians cannot escape the politics of methods when they write about international law, Orford argues:

Writing a history of international law involves writing a history of something for which there is no stable referent or fixed object . . . there is no neutral story to be told about something called “international law”. There is no impartial and agreed account of what “international law” is, the methods by which texts should be interpreted, whose interpretation of a text or concept is authoritative, who counts as a “subject” of international law, what counts as a “source” of international law, the sites in which international law is made, and thus what kinds of archives offer what kinds of “evidence” about what international law really meant at any given moment of where it really originated.²⁹

To the outsider, there may seem to be such a “thing” as “international law.” But the more one gets to the inside, and the more aware of the disputes about the most existential and definitional features of the discipline one is, the harder it becomes to fix the meaning of “international law.” (When asked for a definition of international

law is for, and why any of this might matter.”).

25. Aristodemou, *supra* note 11, at 38.

26. ORFORD, *supra* note 8, at 17.

27. GERRY SIMPSON, *THE SENTIMENTAL LIFE OF INTERNATIONAL LAW* 143 (2021).

28. *Id.* at 136.

29. ORFORD, *supra* note 8, at 256.

law, final-year PhD candidates are often more hesitant than undergraduates.) This problem persists no matter how “hard” the methods with which one approaches this malleable “thing.” Orford uses “treaties” as an example: to the outsider, a treaty may be a treaty like a table is a table, but the international lawyer knows that entire legal disputes revolve around the question whether something is a treaty.³⁰ “International agreements” are an even more slippery category. Quantitative empirical research that is based on counting treaties or international agreements is therefore by definition based on qualitative assessments as to what counts as such—and such qualitative assessments bring us back to the methodological questions *within* international law. Similarly, effectiveness studies, for instance of courts or international organizations, require interpretations of the goals of these courts and organizations in the first place—questions that are often disputed among lawyers, and are inherently political.³¹ Empirical studies into the relationship between international law and other big concepts, for instance, democracy or the rule of law, require proxies for both otherwise intangible concepts. International law easily becomes equated with treaties, leaving out customary rules and principles, as well as a whole set of practices, and indeed, methods. Democracy and the rule of law for their part are identified on the basis of their own less or more demanding indicators, resulting in thinner or thicker concepts. None of this is to argue against empirical research—just like Orford does not argue against contextualist historical research—but to be aware of the inevitability of political choices. The call for reflexivity on such methods is as relevant with respect to empirical research as it is for historical approaches to international law.³²

II. A (PERHAPS TOO) GENEROUS DEFENSE OF INTERNATIONAL LAW

International Law and the Politics of History is also a generous defense of international law. Citing the critiques that subscribers to the contextualist historical school have made against allegedly methodologically deviant international lawyers, Orford argues that these critics have misunderstood or misconstrued the practice of international law.³³ Certain historians, Orford shows, remain attached to stereotypical characterisations of international lawyers as either apologists of authority grounded on tradition or moralizing judges of the past who appeal to the transcendent origins of present norms.³⁴ In this view, international lawyers reject canonical historical methods in favor of empirically wrong and intellectually

30. *Id.* at 226–35.

31. On this and other related challenges to empirical research on international law, see Michael A. Becker & Sarah M. H. Nouwen, *International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach*, 30 EUR. J. INT'L L. 819, 820–831 (2019).

32. For further elaboration, see generally, Sarah M. H. Nouwen, ‘As You Set out for Ithaka’: *Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict*, 27 LEIDEN J. INT'L L. 227, 230 (2014) (addressing practical, epistemological, ethical, and existential questions about socio-legal empirical research in conflict, building on the author’s experience conducting such research for a book related to international criminal law).

33. ORFORD, *supra* note 8, at 105–77.

34. *Id.*

unsophisticated approaches that allow them to advance political or instrumental readings of the past under the pretext of interpreting the law.

But that understanding of the field of international law is wrong, argues Orford. She paints international law as a complex anti-formalist field that has been informed by “humanist historicizing and anti-metaphysical” orientations for at least a century.³⁵ Contrary to the assumptions of those advocating the adoption of “objective” historical methods, Orford emphasizes, for international lawyers, the political character of their discipline has become a truism. As highlighted above, Orford explains to historians—and reminds lawyers—that ambiguity over the meaning of treaties, decisions, and other instruments is central to the practice of international law. International lawyers know that law is made, not found. Indeed, she explains, international lawyers employ the past as part of an argumentative practice that aims at settling the meaning of international law in specific disputes, with distributive effects.³⁶ To master different ways of engaging the past in international legal argumentation is a mark of proficiency in international law—both for practitioners and, given the fluidity between the worlds of international legal practice and academia, scholars.³⁷

Having portrayed law in all its post-realist complexity, Orford exhibits the analytical and political limits of resorting to contextualist historiography as a new, neo-formalist basis “for grounding our arguments about the real history of a regime, the origins of international law, or the meaning of a past text.”³⁸ Analytically, she notes how the insistence on the significance of “context” and the focus on origins and individuals might sit in tension with the defining aspect of legal knowledge production; namely, “the practice of repetition through which legal concepts, principles, and fictions are handed on.”³⁹ Criticizing Quinn Slobodian’s intellectual history of neoliberal globalism, Orford argues that “focusing on a small number of European men” over “the routine operation and technical detail of legal practice of institutions” fails to elucidate how international economic law actually operates, thus hindering political action.⁴⁰ In turn, Orford explains, given the permanent contestation of matters as elementary as what counts as a “source” or who counts as “subject” of international law, any historical study of international law will necessarily make several presentist choices at the outset.⁴¹ In this account, contextualist histories of international law emerge not only as analytically limited but also as political as any historical account produced by lawyers.

But in its generosity to the field of international law, Orford’s defense risks attenuating her most important message, as elaborated above: a call for awareness of the politics of methods. For, after Orford has highlighted some of the best that the

35. *Id.* at 178–252.

36. *Id.*

37. *Id.* at 185–94.

38. *Id.* at 7.

39. *Id.* at 244.

40. *Id.* at 280; see QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018) (tracing an intellectual history of neoliberal globalism).

41. ORFORD, *supra* note 8, at 256–57.

field has to offer, one might get the impression that such a call is no longer necessary: international lawyers are fully aware that international law and methods are politics all the way down—indeed, that we are “all realists now.”⁴² We argue that such a general reading of the defense would be more generous than the field deserves—and more generous than her own arguments require. And that is because, in our view, Orford’s painting of the field represents an aspect of the field—and a beautiful one at that—but does not characterize the field as a whole, as we see it from our (obviously also limited) vantage points.

First, formalist thinking, writing, and teaching in international law is alive and kicking—and not just as a consciously chosen tactic. Orford concedes that “it might be going too far to say” that the anti-formalist critique has “won close to universal acceptance”⁴³ and also acknowledges that there are “legal scholars who make legal arguments that continue to rely upon metaphysical claims or adopt formalist methods.”⁴⁴ But through statements such as “most international legal scholars and practitioners would barely raise an eyebrow at the claim that international law is political,” the book gives in various places the impression that international lawyers have effectively dealt with the limits of formalism.⁴⁵ Consider, in contrast, Andrea Bianchi’s assessment of “traditional approaches” in his study of international law theories.⁴⁶ For Bianchi, “the idea that international law is a system of objective principles and neutral rules” may still be considered “mainstream.”⁴⁷ Umut Özsu argues, in turn, that “[f]or all intents and purposes, public international law remains a discipline wedded to a default formalism – a formalism to which most international lawyers continue to have recourse without bothering to acknowledge the formalist tradition (and its countless critiques) as such.”⁴⁸ The outbreak of the COVID-19 pandemic illustrated the resilience of a particular kind of formalist writing and its depoliticizing effects—international law blogs and journals soon appeared with contributions on discrete questions of state responsibility, focusing on China, much more than addressing the role of international law in facilitating the conditions that led to the pandemic and shaping its development.⁴⁹

Similarly, Orford’s depiction of international legal teaching is, from our

42. *Id.* at 217.

43. ORFORD, *supra* note 8, at 216.

44. *Id.* at 182.

45. *Id.* at 293.

46. See ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 21–43 (2016) (exploring traditional approach(es) to international law, exposing the hidden presuppositions in mainstream international legal discourse, and reflecting critically on its claims, including impartiality, neutrality, and objectivity).

47. *Id.* at 21.

48. Umut Özsu, *Legal form*, in CONCEPTS FOR INTERNATIONAL LAW 624, 629 (Jean d’Aspremont & Sahib Singh eds., 2019).

49. See Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AM. J. INT. LAW 687, 687–97 (2020) (analyzing two sets of international legal responses to the COVID-19 pandemic, criticizing both as concealing the role of international law in the production of the conditions that led to the pandemic and its unequal impact, and calling for a more explicit political engagement in and through international law).

viewpoints, most inspiring, but not representative of legal education across the field. Orford portrays teaching as dynamic, antiformal, structured around argumentative exercises, and designed to prepare “law students for the expectation that they will be able to move between the general and the particular or the present and the past, creating plausible patterns or analogies by assembling material from disparate sources.”⁵⁰ She beautifully illustrates how seemingly “messy” casebooks can be used to that effect.⁵¹ But the fact that they can be used to that effect does not mean that they always are: the international legal materials on the reading list can also be studied as examples confirming the law as described in the assigned textbook. In other words, in many universities across the world, international legal education looks very different than how Orford envisages it: it is still very formalist. Our opening reflection, which stems from experience at an Anglophone university, illustrates that this post-realist versus formalist divide does not run along the boundary of common law / civil law⁵²: in both systems, there are still many students who are taught law—or, only pick up on law—as inculcated objectivity and reason over indeterminacy and (political) choice.⁵³ This situation then also points to the importance of good contextualist histories and genealogies of international law. For some of these students—and the lawyers they will become—such studies can make a huge difference, not so much because they offer a neoformalist grounding for their post-realist field, but because they destabilize some of the conservative and teleological aspects of the traditions they were introduced to—or incorporated into.

A second reason to question the ‘we are all realists now’ assessment of the state of the field is that it is possible to appreciate continuities between formalism and contemporary dominant approaches to international legal thought. In the discredited—and somewhat mythical—European formalist tradition of scientifically deduced rules, law is an indivisible system, with an inherent substance and logic rather than a series of impositions and compromises often in tension with each other. Though presenting themselves as a post-realist repudiation of formalism, some contemporary dominant approaches to (international) legal thought share some of these features. For instance, law and economics, liberal theories of rights, and even global administrative law present purposive, systematizing, and idealizing visions of

50. ORFORD, *supra* note 8, at 192.

51. *Id.*

52. Nor is there necessarily a casebook/textbook divide along the civil law / common law boundary: in many civil law countries, “international legal materials” feature on reading lists alongside textbooks, whilst universities in common law countries often set textbooks in addition to the casebooks. The real difference is made by how those books are used, but that differs not so much from country to country but from professor to professor.

53. A number of scholars involved in a collective project to rethink international legal education in Latin America explain that in the region “international law is usually taught as though it is detached from the context of severe inequality,” with course syllabi exhibiting “a tendency to reproduce knowledge rather than comprehend its origins and question its consequences.” Paola Andrea Acosta Alvarado et al., *Rethinking International Legal Education in Latin America: Reflections Toward a Global Dialogue*, THIRD WORLD APPROACHES TO INT’L. L. REV.: REFLECTIONS (Aug. 30, 2019), <https://twailr.com/rethinking-international-legal-education-in-latin-america-reflections-toward-a-global-dialogue/>.

the law.⁵⁴ In portraying international law as a system serving specific goals, these approaches obscure the tensions, contradictions, and ambiguities that, as Orford lucidly shows, are central to the operation of law. Much like formalism then, they portray international institutions, structures, norms, and their dominant interpretations as arrangements that one can make normative sense of, and in doing so, they render them harder to change. Indeed, Orford acknowledges the influence of such idealizing and systematizing approaches to law when she criticizes contextualist historians for embracing specific approaches to international law—global administrative law, law as nongovernmental networks—without acknowledging that these approaches are at least as contested as the formalist.⁵⁵ But such influence then also vindicates the relevance of certain de-idealizing historiographical interventions, for instance, through genealogy: Samuel Moyn's de-idealization of human rights in *The Last Utopia* or Marcos Zunino's de-idealization of transitional justice in *Justice Framed*.⁵⁶

This slightly different assessment of the state of the field of international law—in our view, and for better or for worse, formalism and approaches with similar features are still pretty mainstream in a large part of the world—might also lead to a slightly different, or at least additional, conclusion. Orford concludes her book with a compelling exhortation (and given her pathbreaking role in the field, we can trust that many will follow). For several years, she tells us, too much critical work on international law, including certain strands of contextualist historiography, has focused on challenging international legal liberalism—with great success. While crucial in their time, she argues, these interventions have now rendered critical moves rather rigid and predictable. In her words, “[i]n the face of the looming climate change- and resource-related catastrophes, mass displacement, a new generation of authoritarian leaders, and a decline in US power, attacking liberal histories of progress no longer seems quite the challenge it once was.”⁵⁷ New critical approaches, she acutely argues, are needed “even to identify the questions that now need to be posed about the role of international law in the current situation.”⁵⁸ We

54. See generally, UNGER, *supra* note 13, at 7–13 (arguing that the “purposive, policy-oriented, and principle-based style of legal reasoning” which encompasses dominant approaches to legal thought including law and economics and a liberal theory of rights is a continuation, rather than a repudiation, of the “doctrinal formalism” of the nineteenth-century).

55. *Id.* at 257–62.

56. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010) (arguing that the rise of human rights was a recent and contingent development and criticizing celebratory narratives of centuries-long progress); MARCOS ZUNINO, *JUSTICE FRAMED: A GENEALOGY OF TRANSITIONAL JUSTICE* (2019) (questioning the established history of the discourse of transitional justice, and situating the origins of the field in the near past).

57. ORFORD, *supra* note 8, at 318.

58. Orford adds: “[I]t may turn out that an effective legal intervention will require abandoning the axioms of contextualist historiography and instead championing teleological accounts, producing universal histories, creating connections or exploring constellations between present and past, arguing that contingency is overrated, reclaiming the *longue durée* perspective, embracing the use of history as a morality tale, thinking of human beings as collective (political or geological) agents rather than innovating individuals, or abandoning a relentlessly negative form of critique.” *Id.* at 318–19.

want to take up her call and suggest one avenue to explore. Maybe, scholars in the field of international law should adopt a certain distance from the professionally-oriented approach that Orford rightly describes as central to the discipline. International legal thinkers might want to position themselves less in the standpoint of the professional interpreter, applier, or elaborator of law in adjudicative or quasi-adjudicative settings.⁵⁹ Perhaps, following Unger, they (we) could seize their (our) knowledge about the structures of global governance, often expressed in the details of the law, to inform public conversations about alternative institutional futures, including those already existing as contradictions and deviations, or in tension, to dominant arrangements.⁶⁰

III. CONCLUSION

After endorsing Orford's call for reflexivity on the politics of methods, we should be open about our own politics in reading this book. Readers always pick up some aspects and ignore others, and that selectivity is usually more a reflection of their own preoccupations than the author's intentions—poor author. We have chosen to read this book more as a call on international lawyers than as an attack on historians. Of course, we have not missed Orford's very explicit criticism of specific (lawyer-)historians. Some of this criticism we valued—not only because of its analytical sharpness, but also because of our appreciation of the ground-breaking scholarship that had provoked a specific historian's methodological rage, which Orford has now taken apart.⁶¹ Some of the criticism on other (lawyer-)historians we found harder to place. That is because we had not interpreted the specific historian's work as criticism of the methods of critical international lawyers, but as criticism of scholars who subscribe to, and re-inscribe, teleological narratives of international law.⁶² But that we would not have been provoked by exactly the same “irritants” does not matter for the book that Orford's irritants led her to write:⁶³ an inspired and

59. See Fuad Zarbiyev, *On the Judge Centredness of the International Legal Self*, 20 EUR. J. INT'L L. 1, 1–4 (2021) (critically analyzing the centrality of the judicial representation of international law in international legal discourse, identifying its possible explanations, and examining its epistemic and distributional consequences).

60. On legal thought as institutional imagination, see ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

61. We think here of Orford's long-standing criticism of the (contextualist) critics of Antony Anghie's seminal work. See, e.g., Anne Orford, *The Past as Law or History?: The Relevance of Imperialism for Modern International Law* (Inst. Int'l L. & Just., Working Paper No. 600, 2012/2) (exploring the role that certain conceptions of the past play in contemporary debates about the relationship between imperialism and modern international law); see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (examining different phases of the colonial encounter, from the sixteenth century to the “war on terror,” and arguing that the colonial confrontation has been central to the formation of international law and, in particular, of the concept of sovereignty).

62. As it happens, some historians' criticism against the adoption of teleological narratives of international law is directed against non-lawyers. See, e.g., Samuel Moyn, *HUMAN RIGHTS AND THE USES OF HISTORY* 145–56 (2d ed., 2017) (reviewing Kathryn Sikkink's “The Justice Cascade” and criticizing it for neglecting the role of power in shaping the ascendance of international criminal justice).

63. See Jan Klabbers, *Whatever Happened to Gramsci?: Some Reflections on New Legal*

inspiring call for reflexivity on the politics of methods. The book has shown how much is at stake.

Whilst the *Methodenstreit*, as Janne Nijman has characterised the heated interdisciplinary debate,⁶⁴ has been so intense precisely because of these stakes, we speculate that two features of (contemporary?) academia have added oil to the fire. Some of that oil seems to have come from (hyperbolic, grandiose) introductory claims that a specific piece of scholarship will be the first to get it right after other scholars, particularly all the scholars in the other discipline (in this case: international lawyers *in general*), got it so wrong.⁶⁵ This may be a symptom of an academic climate in which individual branding seems to be considered increasingly important.⁶⁶ A second source of heat appears to come from a sense of having been ignored: the criticized author does not seem to be aware that the field they criticize has already covered that ground. This could be a symptom of scholars being confronted with more potentially relevant literature than they can ever absorb, combined with a sense of having to write quickly. Even if these features did not play any role in fuelling the book under consideration, they trigger our political interventions, aspiring for a sense of camaraderie in academia and the liberty of slow scholarship.

Realism, 28 LEIDEN J. INT'L L. 469, 474 (2015) (citing GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012)) (discussing need for exposure to external ideas, sensibilities, and “interference” in methodological-political schools of thought in international law).

64. Janne E. Nijman, *An Enlarged Sense of Possibility for International Law: Seeking Change by Doing History*, in CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 92, 96 (Ingo Venke & Kevin Jon Heller eds., 2021).

65. Note how some science journals have since several decades discouraged newness claims. See for instance Physical Review’s “Policy on New/Novel Phrases,” which states: “All material accepted for publication in the Physical Review is expected to contain new results in physics. Phrases such as ‘new,’ ‘for the first time,’ etc., therefore should normally be unnecessary; they are not in keeping with the journal’s scientific style. Furthermore, such phrases could be construed as claims of priority, which the editors cannot assess and hence must rule out.” *Policy on New/Novel Phrases in Physical Review*, PHYSICAL REV. JS. (May 1997), <https://journals.aps.org/authors/new-novel-policy-physical-review>.

66. See also the call made by Nehal Bhuta in his forthcoming exploration of the past and present of the idea of a history of international law. For Bhuta, “[o]ur present problem is not to pitch one against the other as a strategy of subversion against a dominant mode of thought, but to navigate the constant availability of these alternatives in a fragmented present in the hope of picking a winner. The result is not complacency but a constant vigilance; not a certitude of what critical method must be, but a critical and reflexive openness to what can be learned. This, it must be recognized, sits uncomfortably with many of the realities of modern academic production, but is not yet rendered completely impossible by them.” Nehal Bhuta, *A Thousand Flowers Blooming, or the Desert of the Real?: International Law and its Many Problems of History*, CAMBRIDGE HIST. INT'L L. (forthcoming 2022) (manuscript at 28–29) (on file with author).