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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

# The turn to history in international law and the sources doctrine: Critical approaches and methodological imaginaries

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## Abstract

Expanding now familiar debates about the impact of the ‘historical turn’ upon the field of international law, this article considers some of the different ways in which ‘turn to history’ scholars have confronted the methodological and theoretical tensions arising from the central, yet paradoxical, role occupied by the sources doctrine in international law. We suggest that the anxiety over the sources of international law as the basic methodological precepts of the discipline has been a catalyzing element for a radical reengagement with the canon of international law, one with a significant impact on the field’s existing parameters and doctrinal limits. Within the three streams of scholarship we explore here, history has become a site of creative engagement for scholars in opening up the discipline to diverse ends, one in which a new doctrinal universe can be created, and new issues, sources, subjects, and approaches can be explored. Yet, by opening up international law’s sources doctrine, reactionary causes and unjust ends may equally well be the result. This account is an attempt at diversifying the narrative surrounding the causal relationship between history and the ongoing changes to the field of international law, along with the differential practices, techniques and epistemological foundations behind the history of international law as an evolving discipline, and of the different scholarly motivations of its specialists.

**Keywords:** crisis; democratization; historiography; sources doctrine; ‘turn to history’ in international law

## 1. Introduction

The emergence of a new historical consciousness in the field of international law has had powerful theoretical and methodological implications. Questions regarding the purposes, limits, and meanings of history and its relationship with international law have raised intractable problems of historiography, which continue to generate controversy amongst scholars. One key consequence of this historical turn<sup>1</sup> has been to dislodge many of the long-standing disciplinary

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<sup>1</sup>The expression ‘historical turn in international law’ has become the popular moniker to denote the growing body of literature in the field of international legal history. See G. R. B. Galindo, ‘Martti Koskenniemi and the Historiographical Turn in International Law’, (2005) 16 EJIL 539, at 541; M. Koskenniemi, ‘Why History of International Law Today?’, (2004) 4 *Rechtsgeschichte* 61; R. C. H. Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’, in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2006), 27. See also T. Skouteris, ‘Engaging History in International Law’, in D. Kennedy and J. M. Beneyto (eds.), *New Approaches to International Law: The European and American Experiences* (2012), 99; M. Clark, ‘Ambivalence, anxieties / adaptations, advances: conceptual history and international law’, (2018) 31 LJIL 747; J. d’Aspremont, ‘Critical histories of international law and the repression of

divisions of labour between history and law, prompting legal scholars to open up their canons and methods to sources beyond the customs, doctrines, treaties, and so forth that have traditionally formed the boundaries of international law. Efforts to reframe the history of international law have been met with both ambivalence and controversy. Charges of anachronism, presentism, and instrumentalism levelled by both historians and some international legal scholars, underline the disruptive effects, perceived or otherwise, upon the field.<sup>2</sup>

Taking these anxieties as a generative moment for reflection, this article explores the impact of the historical turn in international law through the lens of its relationship with the sources of international law. Specifically, drawing on the work of Rose Parfitt,<sup>3</sup> this article considers some of the different ways in which ‘turn to history’ scholars have confronted the methodological and theoretical tensions arising from the central, yet paradoxical, role occupied by the sources doctrine in international law.<sup>4</sup> As several scholars have underlined, international law’s authoritative reliance on the sources doctrine has important implications for the writing of international legal history, particularly as regards framing the object and method of study.<sup>5</sup> This central paradox raises the question, captured aptly by Parfitt: ‘is it actually possible to liberate the historiography of international law from the constraints of sources doctrine without transforming it into a historiography of something else?’<sup>6</sup> We suggest that the anxiety over sources as the basic methodological precepts of the discipline has been a catalyzing element for a radical re-engagement with the canon of international law, one with a significant impact on the field’s existing parameters and doctrinal limits. Within the three streams of critical legal scholarship we explore here, history has become a site of creative engagement for scholars in opening up the discipline to diverse ends, one in which a new doctrinal universe can be created and new issues, sources, subjects, and approaches explored. In this way, the emergence of a new historical consciousness and new historical modes of engagement with the past forms part of broader efforts to reshape and reconceptualize the field of international law for disruptive and democratic ends, as our analysis will show. Yet, the methodological move to open the sources doctrine – in particular in regards to international law’s histories – may also become a distressing site of the opposite.<sup>7</sup> An important

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disciplinary imagination’, (2019) 7 *London Review of International Law* 89; V. Vadi, ‘International Law and Its Histories: Methodological Risks and Opportunities’, (2018) 58 *Harvard International Law Journal* 311; V. Vadi, ‘Perspective and Scale in the Architecture of International Legal History’, (2019) 30 *EJIL* 53.

<sup>2</sup>For a recent discussion on these criticisms see L. Benton, ‘Beyond Anachronism: Histories of International Law and Global Legal Politics’, (2019) 21 *Journal of the History of International Law* 7.

<sup>3</sup>R. Parfitt, ‘The Spectre of Sources’, (2014) 25 *EJIL* 297.

<sup>4</sup>See D. Kennedy, ‘The Sources of International Law’, (1987) 2 *American University International Law Review* 1; T. Skouteris, ‘The Sources of International Law: Tales of Progress’, (2000) 13 *Hague Yearbook of International Law* 11.

<sup>5</sup>M. Craven, ‘Introduction: International Law and its Histories’, in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2006), 1, at 8; S. Moyn, ‘Legal History as a Source of International Law: The Politics of Knowledge’, in S. Besson and J. d’Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (2017), 301.

<sup>6</sup>See Parfitt, *supra* note 3, at 302.

<sup>7</sup>Reactionary and counter-revolutionary interventions are, thus, equally part of the ‘turn to history’; this can be illustrated by the invocation of American Civil War historical sources by the US in the ‘war on terror’, in particular the Lieber Code and associated case law: M. Arvidsson, *The Subject in International Law* (2017); Y. Ronen, ‘The DoD Conception of the Law of Occupation’, in M. Newton (ed.), *The United States Department of Defense Law of War Manual: Commentary and Critique* (2019), 298. A wholly different example, seen as simply ‘bad history’ by some of its critics, is the publication in the *Journal of the History of International Law*, in 2017, of John Bennett’s article ‘The Forgotten Genocide in Colonial America: Reexamining the 1622 Jamestown Massacre within the Framework of the UN Genocide Convention’. A significant number of scholars in the ‘turn to history’ saw the piece as displaying deeply disturbing nationalist overtones, ‘pseudo-scientific and very thinly veiled racist propaganda’: An open letter to the editors of the journal published on the *Opinio Juris* blog, signed by the above-mentioned scholars, available at [opiniojuris.org/2017/09/06/letter-to-the-editors-of-the-journal-of-the-history-of-international-law/](http://opiniojuris.org/2017/09/06/letter-to-the-editors-of-the-journal-of-the-history-of-international-law/), resulted in an apology from the editors and an updated review policy ([opiniojuris.org/2017/09/06/response-from-the-editors-of-the-journal-of-the-history-of-international-law/](http://opiniojuris.org/2017/09/06/response-from-the-editors-of-the-journal-of-the-history-of-international-law/)). Yet, the journal has refused to take down the piece or revoke its publication. Critical scholarly responses have also appeared on the *Critical Legal Thinking* blog: A. O’Donoghue and H. Jones, ‘The Jamestown Massacre: Rigour & International Legal History’, 24 August 2017, available at [criticallegalthinking.com/2017/08/24/jamestown-massacre-rigour-international-legal-history/](http://criticallegalthinking.com/2017/08/24/jamestown-massacre-rigour-international-legal-history/). Although the latter example

take-away from our analysis is that a ‘turn to history’ carries with it critical potentialities for international law and scholarship but it remains an essential task of such scholarship to identify, examine, and offer critique in relation to the aims pursued and ends met by the many turns to history.

Our article is structured as follows: We begin by briefly setting out the relationship between history, international law and the classic approach to sources. We then consider how the ‘turn to history’ has prompted a major re-evaluation of the methods and purposes of international legal history and its writing, and philosophical questions about the nature of historical truth, causation, and memory. We then move to consider three groups of scholars who by their creative approach to sources in the writing of critical international legal history have sought to use the past as a tactical space in which a new doctrinal universe can be created. While the various schools of historical theory should not be treated as singular or static, they are blurred, internally diverse, and open to debate and disagreement, we have grouped the many forms into three, not altogether distinct, categories: (i) one in which scholars have reached beyond the doctrinally sanctioned sources of international law for their historical source material, removing the disciplinary divisions between international law and intellectual history (the ‘anti-internalist’ turn); (ii) another in which scholars have reframed the temporal hierarchies erected by the sources doctrine, to use international law’s own sources, as critical resources in their own right (the ‘past for the present’ turn); and finally, (iii) a group of scholars who undertake a more radical pluralization of sources aiming to turn its orthodoxy into a heterodoxy for global, legal and political justice purposes (the ‘radical enterprises’ turn). In concluding the article, we suggest that these scholars make radically different uses of history in the current turn to history in international law; that although all three groups of critical scholarship in their own respective ways disrupt and democratize – and thus open up – international law and its conventional sources doctrine distressing examples of similar methodological moves can be seen in reactionary and far-from-critical ‘turns to history’ in contemporary international legal scholarship and practice; and that an important task for critical international legal scholarship thus becomes to critically examine the methodological employment of sources – in particular international law’s histories – in scholarship and practice.

Ours is an account which seeks to diversify the narrative surrounding the causal relationship between history and the ongoing changes to the field of international law, along with the differential practices, techniques, and epistemological foundations behind the history of international law as a discipline, and of the different scholarly motivations of its specialists.<sup>8</sup> The significance played by, and played on, the conventional sources doctrine in international law for the different ‘turners’ has, we find, hitherto been underestimated in scholarship commenting on the ‘turn to history’. Indeed, while the ‘turn’ has been largely understood as a way to rethink and resituate international law’s histories, or as a way to recalibrate the relationship between law and history, our approach wants to move the take-aways further: by focusing on the methodological aspect of how ‘turners’ have employed the sources doctrine, we argue that the potential creative and reigniting force within ‘the turn’ can be better understood and even, as we suggest, adopted in broader international legal scholarship.

## 2. The ‘spectre of sources’ in international law and history

History has long formed the cornerstone of international law, pervading, as Thomas Skouteris argues, legal writing ‘so seamlessly that it almost passes unnoticed.’<sup>9</sup> Yet, as recent academic efforts have underlined, while history has been a crucial buttress to the field of international law, it is also

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is significantly different in substance, scope and (perhaps) aims in comparison to the excessive use of American Civil War law and history as part of contemporary US practices of war and law, the intensification of reactionary history as part of the ‘turn to history’ should neither be ignored, nor brushed off as an irrelevant or insignificant effect of ‘the turn’.

<sup>8</sup>See, e.g., d’Aspremont, *supra* note 1; Clark, *supra* note 1; Vadi (2018), *supra* note 1.

<sup>9</sup>Skouteris, *supra* note 1, at 99.

an unstable one. That history forms a focal point in international law can be seen to rest upon two interrelated functions. Matthew Craven has identified the former as history *of* international law, and the latter as history *in* international law.<sup>10</sup> In a normative sense, international law seeks to establish and reinforce its status as a discipline in its central historical narrative, which moors both, past and future developments in a historical lineage. This is motivated by a perceived and actual belief in international law's unstable claims to legal authority and legitimacy. The other function is a substantive one. Both in practice and in scholarship, history has been instrumental in creating the body of norms and principles of international law, most notably through the formalization of the sources doctrine. The classic doctrine of sources, as it was developed in the nineteenth century, and later codified in Article 38(1) of the ICJ Statute, entrenches international legal discourse and argumentation in the historical and contemporary behaviour, will and interests of states.<sup>11</sup> The consecration of the sources doctrine during this time was in many ways an exercise in cherry-picking historical source material in the pursuit of new doctrinal boundaries and hierarchies. The doctrine's inbuilt reliance upon the writings of authoritative publicists or judicial opinion, the precedential value of judicial decisions, the use of past texts and concepts, and a clear preference for describing specific rules and their applications in a genealogical manner, continues to ensure that history remains tightly woven into its fabric and that international legal practitioners are necessarily engaged with the process of historical discourse.

The case of international law history has become so integrated into the discipline through the sources doctrine that to write its history is to define it as an idea. 'To write a history', Craven points out, '(or more emphatically the history) of international law necessarily involves . . . setting out in advance the parameters of the discipline (in terms of its subjects and sources, its actors and modes of engagement)'.<sup>12</sup> This is reflected in the tendency of classical historical accounts to draw primarily on doctrine, judicial decisions, treatises, and the writings of prominent international law practitioners as their historical source material. This 'ready-made methodology' of the sources doctrine, as Parfitt has underlined, has particular implications for the practice of writing international legal history. Feed the past into this 'legal historiographical machine', as she terms it, and consciously or not, a relatively uniform product is bound to emerge – namely a 'history of rules developed in the European state system since the sixteenth century which then spread to . . . the entire globe'.<sup>13</sup> Indeed, it could be argued that international law's use of history in many ways sets up a contradiction with the discipline of history proper. As Koskenniemi has similarly underlined, the classical approach to sources 'produces an identity of the discipline itself . . . held relatively constant and in which varied and opposing voices are, for the purposes of the narrative itself, silenced or pushed to one side'.<sup>14</sup> International law's reliance upon a congratulatory progressive narrative as a source of normative authority, together with its use of concrete readings of doctrines and past state practices as source material, render critical re-engagement with the past problematic and potentially destabilizing. Scholars engaging with the history of the discipline have therefore either shied away from more than perfunctory engagement with the past or tended to close ranks around the patchy retellings of international law, ignoring both the inadequacies and inconsistencies of the mainstream narrative firmly rooted in nineteenth and early twentieth century European history.<sup>15</sup>

<sup>10</sup>Craven, *supra* note 5, at 6.

<sup>11</sup>The four primary sources enumerated in Art. 38(1) – 'international conventions'; 'international custom'; 'the general principles of law recognized by civilized nations'; and 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' – all in different ways point to the past.

<sup>12</sup>Craven, *supra* note 5, at 8.

<sup>13</sup>Parfitt, *supra* note 3, at 299.

<sup>14</sup>As Martti Koskenniemi points out, '[w]hat we study as history of international law depends on what we think "international law" is in the first place', see M. Koskenniemi, 'A History of International Law Histories', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 943, at 970.

<sup>15</sup>See, for example, M. Shaw, *International Law* (2003); I. Brownlie, *Principles of Public International Law* (1990). This applies not only in the sphere of academic scholarship but is also prominent in judicial reasoning. Contrary to this,

This product is therefore not without its criticisms. The most universal criticism is that classical historical accounts of international law are predominantly Eurocentric narratives which tend to ignore the discontinuities in history, adopting a naturalized approach which typically constructs the ‘evolution’ of international law as an enlightenment narrative of progress (or ‘renewal and restatement’ in Berman’s words).<sup>16</sup> The tendency towards a naturalized approach is also reflected in the deeply state-centric approach manifested in most international legal historical narratives, and its narrow set of (European male) authoritative figures – such as Vitoria, Suárez, Gentili, Grotius, Vattel, and Pufendorf, to the exclusion of a range of different actors and voices. In B. S. Chimni’s formulation, ‘[p]olitical and legal formalism join hands to deny the complex linkages which bind the sociological substratum to law’.<sup>17</sup> Failing to acknowledge the embeddedness of law in broader social and political practices inhibits our ability to register fully the conflicts and contestations that have naturally accompanied historical development in international law.<sup>18</sup> Another point of criticism centres on the tendency within mainstream historical retellings to adopt an approach in which theoretical assumptions are generally unacknowledged and implicit. Writers tacitly project a particular vision about the function and nature of international law as an exercise. Consequently, underlying many historical accounts is a particular normative vision of how international law should operate and its role in the international political order. As such, its history remains instrumental in shaping the ‘politics of international law’.<sup>19</sup> The failure to engage in a self-reflexive enterprise veils the implicit assumptions that form the foundations of mainstream analysis of international legal history, meaning that that such analysis cannot fathom its own role in the creation and perpetuation of a certain vision of international law, and the key role legal analysis plays in the discourse. This is, of course, only a brief introduction to the many strands of critique that have been directed towards historical accounts in international law, but it is nevertheless indicative of a general sense of unease with which many scholars have approached the relationship between history and international law.

### 3. Three ‘turns to history’ in international legal scholarship

Attempts at diversifying the relatively static historical engagement with international law have grown considerably in the last two decades. New and varied histories of different and previously uncharted areas of international law have prompted a re-examination of the ideas, figures, structures, and theories embedded in the field of international law, taking into account the broader social, political, and intellectual context of legal ideologies and especially areas such as international relations or political theory and philosophy.<sup>20</sup> While discussions of the catalysts and motivations of scholars in

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see the Separate Opinion of Judge Trindade in the *Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, who cited the critical historical work by L. Eslava, M. Fakhri and V. Nesiha (eds.), *Bandung, Global History, and International Law Critical Past and Pending Futures* (2017).

<sup>16</sup>See N. Berman, ‘In the Wake of Empire’, (1998–99) 14 *American University International Law Review* 1523. For a radical example trying to counterweigh Eurocentrism in the international legal method by pluralizing its sources of custom, see B. S. Chimni, ‘Customary International Law: A Third World Perspective’, (2018) 112 *AJIL* 1. See also V. Nesiha, ‘Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence’, (2018) 112 *AJIL* 313.

<sup>17</sup>B. S. Chimni, *International Law and World Order* (1993), 45.

<sup>18</sup>C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005), 2.

<sup>19</sup>See M. Koskenniemi, ‘The Politics of International Law’, (1990) 1 *EJIL* 4. See also M. Koskenniemi, ‘The Politics of International Law: Twenty Years Later’, (2009) 20 *EJIL* 7; M. Koskenniemi, ‘Imagining the Rule of Law: Rereading the Grotian “Tradition”’, (2019) 30 *EJIL* 17.

<sup>20</sup>Koskenniemi, *supra* note 1. Relevant examples include: G. Simpson, ‘Linear Law: The History of International Criminal Law’, in C. Scwöbel (ed.), *Critical Approaches to International Criminal Law* (2015), 159; E. Haslam, ‘Silences in International Criminal Legal Histories and the Construction of the Victim Subject of International Criminal Law: The Nineteenth Century Slave Trading Trial of Joseph Peters’, in C. Scwöbel (ed.), *Critical Approaches to International Criminal Law* (2015), 180; G. Baars, ‘Making ICL History: On the need to move beyond prefab critiques of ICL’, in C. Scwöbel (ed.), *Critical Approaches to International Criminal Law* (2015), 196. See also G. Baars, ‘From The Dutch East India Company to the Corporate Bill of Rights: Corporations and



re-evaluating the relationship between international law and history pointed to several factors ranging from the increasing proliferation of international law and governance,<sup>21</sup> the current prevalence of the discourse on human rights<sup>22</sup> and the historical revisiting of mass crimes that are prompting keen debates in international law about memory and history,<sup>23</sup> the creation of the ‘End of History’ discourse,<sup>24</sup> to the opening of Cold War era archives and the availability of new historical resources,<sup>25</sup> one of the key driving forces has undoubtedly been critical scholarship. Drawing on broader trends in critical legal scholarship and its engagement with history as a means of unsettling the axiomatic assumptions underpinning the field,<sup>26</sup> the field of critical international legal history gained considerable momentum in the early 2000s, giving rise to a rapidly expanding canon of critical and revisionist historical studies of international law.<sup>27</sup> These texts moved outside the restrictive boundaries of doctrine, chronicling the indeterminacy and politicization of legal ideas. Most notably, the ‘disenchanted mode of analysis’<sup>28</sup> offered by the turn to history was used to reveal international law’s imperial past and trace its continuing effects, challenging the grand progressive, Eurocentric and evolutionist narrative of international law. This reinterpretation of international law as ‘an instrument of (Western) expansion and hegemony’ has been particularly central in challenging classical narratives and the forging of new perspectives and historical insights.<sup>29</sup>

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International Law’, in U. Mattei and J. Haskell (eds.), *Research Handbook on Political Economy and Law* (2015), 260; M. Cohen and Y. Otomo (eds.), *Making Milk: The Past, Present and Future of our Primary Food* (2019); M. Fakhri, *Sugar and the Making of International Trade Law* (2014); G. Gordon, ‘Railway clocks: Temporal bases of transnational law’, in J. Hohmann and D. Joyce (eds.), *International Law’s Objects: Emergence, Encounter and Erasure* (2017); K. Greenman et al. (eds.), *Revolutions in International Law: The Legacies of 1917* (2019); I. Tallgren and T. Skouteris (eds.), *The New Histories of International Criminal Law: Retrials* (2019); M. Liljefors, G. Noll and D. Steuer, *War and Algorithm: Limits of Understanding, Law and Vision* (2019); F. Megret and I. Tallgren (eds.), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (2019); D. Margolies et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (2019); G. Noll, ‘The ICJ and Migration’, in A. Skordas (ed.), *Research Handbook on the International Court of Justice* (forthcoming); S. Pahuja and A. Saunders, ‘Rival Worlds and the place of the Corporation in International Law’, in P. Dann and R. von Bernstoff (eds.), *Decolonialisation and the Battle for International Law* (2018); S. Pahuja and S. Chalmers (eds.), *International Law and the Humanities* (forthcoming); J. Parker, ‘Judging the Rwandan Soundscape’, in R. K. Sherwin and D. Selermajer (eds.), *A Cultural History of Law in the Modern Age* (2019); M. Trabsky, *Law and the Dead: Technology, Relations and Institutions* (2019).

<sup>21</sup>See Vadi (2018), *supra* note 1; S. L. Hoffmann, *Human Rights and History, Past and Present* (2016), at 26.

<sup>22</sup>E. Jouannet and A. Peters, ‘The Journal of the History of International Law: A Forum for New Research’, (2014) 16 *Journal of the History of International Law* 1, at 2.

<sup>23</sup>*Ibid.*

<sup>24</sup>Skouteris, *supra* note 1, at 4.

<sup>25</sup>Lesaffer, *supra* note 1, at 27.

<sup>26</sup>R. Gordon, ‘The Arrival of Critical Historicism’, *Faculty Scholarship Series*, 1 January 1997, 1024, quoted in C. Tomlins, ‘After Critical Legal History: Scope, Scale, Structure’, (2012) 8 *Annual Review of Law and Social Science* 31.

<sup>27</sup>The works here are too numerous to mention but key texts include: M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); L. A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002); 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); A. Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (2014); 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); 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. G. 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); 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); L. Hunt, *Inventing Human Rights: A History* (2008); S. Moyn, *The Last Utopia: Human Rights in History* (2012).

<sup>28</sup>Tomlins, *supra* note 26, at 38.

<sup>29</sup>M. Koskenniemi, ‘Introduction: International Law and Empire—Aspects and Approaches’, in M. Koskenniemi, W. Rech and M. J. Fonseca (eds.), *International Law and Empire—Historical Explorations* (2017), 4.

These endeavours soon gave rise to historiographical debates over method and the appropriate relationship between history and law in international law, as well as vibrant debates over the implications of the historiographical shift. Anxieties inevitably arose, particularly those related to the burning question of methodology, and the related question of how much these histories actually disrupt or displace.<sup>30</sup> One central paradox, which emerged in many of the early attempts to diversify the canon of international legal histories, was the tension posed by the sources doctrine. Despite their best efforts, many of the markers, periodization, and techniques that these histories fell back upon were invariably those of the international lawyer, thus ensuring the scholarship remained bound to the ‘inbuilt historiography’ of the sources doctrine. These limitations were illuminated by the 2012 *Oxford Handbook on the History of International Law* and its efforts to ‘globalize’ international legal history by opening up new contexts. Many reviewers, while lauding the breadth and scope of the *Handbook’s* undertaking, nevertheless underlined that the very structure and design of the *Handbook* – with its Westphalian emphases – meant that it was difficult for contributors to truly displace Europe as the ‘silent referent of historical knowledge’.<sup>31</sup> ‘The problem with such a liberal-pluralist approach’, Anne-Charlotte Martineau expressed, joining Parfitt in her critique of the *Handbook’s* methods, was ‘not only that it flattens differences and reduces political projects to commodities, but also that it makes its own politics invisible’.<sup>32</sup> Achieving the editors’ aims of overcoming Eurocentrism, Martineau contended, would require nothing less than a radical shift in approach: one that needs to reconsider its past *not only* by including ‘more’ voices, but *also* by reflecting on broader questions regarding the production of knowledge within the field.

The nature of this task is a formidable one, requiring the displacement of vocabularies, techniques, and understandings that are fundamental to the international legal project. It also raises critical questions about the basic parameters of the field. For, as Koskenniemi has shown, the discrediting charge of *apologia* always hovers.<sup>33</sup> Discard the methodology dictated by the classic approach to sources, as Parfitt explains, ‘and the possibility of “challenging Eurocentrism” emerges – but at the risk of dissolving the specifically international legal character of the historical undertaking’.<sup>34</sup> The question of how and to what extent scholars can dispense with Eurocentric markers and periodization of dominant linear disciplinary narratives without ‘throwing the proverbial baby out with the bathwater’ remains a pressing concern.<sup>35</sup> To completely reject these categories and vocabularies of preceding histories would be reductive, argues Koskenniemi, and would deprive lawyers of the ‘shared imagination’ provided by these historical associations.<sup>36</sup> Scholars have therefore sought to navigate this tension in a variety of ways, employing various

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<sup>30</sup>Jean d’Aspremont makes the claim that critical histories that have come to populate the international legal literature over the last decade continue to be organized along the very lines set by the historical narratives which they seek to question and disrupt, and have therefore failed to exploit the critical potential thereof, thereby perpetuating the repression of disciplinary imagination of dominant historical narratives. See d’Aspremont, *supra* note 1.

<sup>31</sup>D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2000), at 28. For reviews see, e.g., Parfitt, *supra* note 3; S. B. Kirnse, ‘Sleepy Side Alleys, Dead Ends, and the Perpetuation of Eurocentrism’, (2014) 25 *EJIL* 307; A.-C. Martineau, ‘Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law’, (2014) 25 *EJIL* 329; A. G. Forji, ‘Book Review: Oxford Handbook of the History of International Law, Bardo Fassbender, Anne Peters, Simone Peter & Daniel Högger (Editors)’, (2014) 16 *Journal of the History of International Law* 90; J. K. Cogan, ‘Book Review: The Oxford Handbook of the History of International Law. Edited by Bardo Fassbender and Anne Peters’, (2014) 108 *AJIL* 371.

<sup>32</sup>Martineau, *ibid.*

<sup>33</sup>See M. Koskenniemi, *From Apology to Utopia* (2006).

<sup>34</sup>Parfitt, *supra* note 3, at 299.

<sup>35</sup>M. Koskenniemi, ‘Histories of International Law: Significance and Problems for a Critical View’, (2013) 27 *Temple International and Comparative Law Journal* 215, at 226.

<sup>36</sup>Koskenniemi, *supra* note 14, at 945.



techniques to expand the methodological and theoretical constraints of the classical relationship between history and international law, while remaining loyal to their understanding of what international law is and the set of ideas, practices, and institutions they deem relevant for its understanding. And this is reflected in many of the strands of scholarship which currently exist in the field of critical international legal history, three of which we have chosen to examine in the following section. In the three ‘turns’ to history we explore, the ‘spectre of sources’ is exorcized in different ways, but with a common goal of deploying the past as a tactical space for critical engagement with the field.<sup>37</sup> While the success of the endeavour is still the subject of debate, we argue that these flourishing contributions have provided regeneration and re-enchantment within the field of international law, expanding its disciplinary imagination.

### 3.1 Expanding the archive: The ‘anti-internalist’ turn

Dominant realist and idealist approaches to writing international legal history had led to the development of a history predominantly instrumentalized by its creators for the purposes of lending legitimacy and normative gravitas to the discipline.<sup>38</sup> Drawing on the sociology of knowledge,<sup>39</sup> scholars have therefore sought to challenge these celebratory histories by providing complex and contextualized histories of the discipline, moving beyond its doctrinal boundaries and hierarchies. Posing the question: where can the international be said to lie? these scholars have sought to integrate structural concerns – of race, gender, empire, and nation – into their accounts, treating existing historical accounts as replications of a closed set of argumentative positions.<sup>40</sup> The central concern of what we term the ‘anti-internalist turn’<sup>41</sup> is to go beyond what Jouannet and Peters call the ‘methodological primacy of technicism (doctrinalism) and pragmatism in international legal scholarship’,<sup>42</sup> in order to extricate the history of the discipline from the discipline itself, treating it as an object of study in its own right. ‘Anti-internalist’ scholars manifest a resistance to the inbuilt historiography and image of international law which the conventional sources doctrine is designed to construct, underlining that the sources doctrine allows the discipline to distort the past in order to shore up a predetermined doctrinal pattern, ultimately centred on providing authoritative statements about the content of international law. Instead, within the ‘anti-internalist turn’ we find trajectories which ‘unsettle the familiar strategies that we use to tame the past in order to normalize the present’.<sup>43</sup> As a bulwark against the tendency towards pragmatism and functionalism the ‘anti-internalists’ appeal to many of the generic conventions of history

<sup>37</sup>In Koskeniemi’s words: ‘the limits of our imagination are product of a history that may have gone another way’, Koskeniemi, *supra* note 1, at 5.

<sup>38</sup>See also M. Koskeniemi, ‘Histories of International Law: Dealing with Eurocentrism’, (2011) 19 *Rechtsgeschichte* 152, at 161. The term ‘idealist or doctrinal histories’ indicates, according to Koskeniemi, histories of international law which ‘focus on lawyers and philosophers and view the past through debates about legal principles or institutions’. By ‘realist’ narratives, reference is made, by contrast, to those histories ‘that concentrate on State power and geopolitics and view international law’s past in terms of the succession of apologies for State behaviour’ and periodize accordingly.

<sup>39</sup>A. Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, (2012) *NYU ILLJ Working Paper* 2, at 10.

<sup>40</sup>The classic example here is the ‘structuralist’ phase of the work of Kennedy and Koskeniemi. See D. Kennedy, ‘Critical theory, structuralism, and contemporary legal scholarship’, (1986) 21 *New England Law Review* 209; D. Kennedy, *International legal structures* (1987); D. Kennedy, ‘A new Stream of International legal scholarship’, (1988) 7 *Wisconsin International Law Journal* 1; Koskeniemi, *supra* note 1.

<sup>41</sup>Here we borrow Jacob Katz Cogan’s description of dominant forms of international legal history as ‘intensely internalist’ naval-gazing: Cogan, *supra* note 31, at 371.

<sup>42</sup>Jouannet and Peters, *supra* note 22, at 2.

<sup>43</sup>Gordon, *supra* note 26.

writing, which they find to be lacking in legal historical narratives generally.<sup>44</sup> The core of criticism is centred on the misuse of the past for the purposes of sustaining an argumentative position.<sup>45</sup>

Refusing to accept smooth or evolutionary histories, ‘anti-internalists’ dwell on ambiguity and ambivalence. This is evident in the work of Nathaniel Berman who has rejected the account of international legal history presented as an ever-advancing dialectic of restatement and renewal.<sup>46</sup> Instead, he advances a vision of international legal history ‘as pockmarked by a series of catastrophes and mutations, as rocked by the countless forms of colonial conquest and anti-colonial resistance’.<sup>47</sup> In place of a narrative of continuity, progress and inclusion, and drawing on international law’s received boundaries, locating the action in the periphery (minorities, the colonies) and ‘outside’, Berman envisages a history marked by change, regress and exclusion. He raises episodes that have been excluded from mainstream accounts (such as the governance architecture of the Saar, Upper Silesia) and examines the work of international lawyers and other political actors who have mostly been hidden from view.<sup>48</sup> Berman engages heterogeneous vignettes of international legal history to construct an internationalist edifice both to ‘legitimize and subvert’ its elements. The vision of international law he advances is one that is ‘normatively impure, culturally heterogeneous, and historically contingent’.<sup>49</sup> This is not, he argues, a matter of anxiety or despair for it is precisely because of ‘international law’s *lack of coherence*’ and ‘the instability of its transitory configurations of rules and players’, that he is able to identify it as ‘a hopeful enterprise’.<sup>50</sup>

Challenging the received wisdom of the evolutionary narrative to reveal previously unseen events, actors, and points of tension is also present in the work of David Kennedy and Karen Knop. Like many other scholars in the ‘anti-internalist turn’ they have moved beyond the state as the centre of analysis. Kennedy uncovers the forgotten origins of the League of Nations’ idea in women’s peace movements and shows how those movements were excluded from the scene by the end of the First World War.<sup>51</sup> Knop’s examination of the history of self-determination has likewise uncovered the role of women, inhabitants of colonial territories, indigenous peoples, and other newly arrived actors in the development of the theory and practice of self-determination.<sup>52</sup> Her case studies reveal the ‘blind spots’ excluded from the dominant historical narrative of self-determination and underline the different interpretive and normative visions which exist alongside existing doctrinal accounts. Both Knop and Kennedy critique international lawyers’ conventional readings of the past – and particularly the assumption that ideas such as sovereignty, jurisdiction or custom can be perceived as historically stable notions and hence, provide a basis for transhistorical analysis. As Kennedy observes:

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<sup>44</sup>In his discussion of what the lawyerly tendency to perform ‘foreign office international legal history’ David Bederman sums up the points of criticisms as including: (i) a lack of analytical rigor in historical investigations, (ii) selective use of historical materials, (iii) sloppy or strategic methodologies in the review of historical sources, (iv) overt or implicit instrumentalism in the selection of historical data and/or the conclusions drawn from such material, and (v) an unwillingness or inability to reconcile conflicting sources, or an inability to accept ambiguity or incompleteness in historic record: D. Bederman, ‘Foreign Office International Legal History’, in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2006), at 80.

<sup>45</sup>A point which he demonstrates in his examination of *Sosa v. Alvarez-Machain* in the United States and the *Case Concerning Kasikili/Sedudu Island* before the International Court of Justice (ICJ).

<sup>46</sup>Berman, *supra* note 16. See also N. Berman, ‘Modernism, Nationalism and the Rhetoric of Reconstruction’, (1992) 35 *Yale J. Law and Humanities* 4; N. Berman, ‘“The Appeals of the Orient”: Colonized Desire and the War on the Riff’, in K. Knop (ed.), *Gender and human rights* (2004), 195.

<sup>47</sup>N. Berman, *Passion and Ambivalence: Colonialism, Nationalism and International Law* (2012), at 44.

<sup>48</sup>See, for example, N. Berman, ‘But the alternative is despair! European nationalism and the modernist renewal of international law’, (1993) *Harvard Law Review* 106.

<sup>49</sup>Berman, *supra* note 16.

<sup>50</sup>*Ibid.*

<sup>51</sup>D. Kennedy, ‘The Move to Institutions’, (1987) 8 *Cardozo Law Review* 841, at 878.

<sup>52</sup>K. Knop, *Diversity and self-determination in international law* (2002). See also K. Knop ‘The Tokyo women’s tribunal and the turn to fiction’, in F. Johns, R. Joyce and S. Pahuja (eds.), *Events: the force of international law* (2011), 145.

The rhetorical gestures and motives of scholars and statesmen are extremely hard to compare across time as applications of similar ideas or contributions to a single institutional project. Moreover, it is unlikely that historical actors were primarily concerned, or even noticed, the relationship between their actions and a transcendent historical development of something which would later come to be summarized as “international law”. The complexity of the historical record – different ideas about what “law” was, different attitudes about “sovereignty” and “war” and “right” – tend to disappear when one looks at historical events for evidence of what “the law” about some transhistorical phenomenon like “conquest” or “sovereign immunity” has been.<sup>53</sup>

Echoing Quentin Skinner’s criticism of historians’ tendency ‘to search for approximations to the ideal type (that) yields a form of non-history which is almost entirely given over to pointing out earlier “anticipations” of later doctrines, and to crediting each writer in terms of this clairvoyance’, Kennedy and Knop caution against a historical archaeology that supposes the pre-existence of the law being examined.<sup>54</sup>

In their attempts to underline that the categories, concepts, and practices that appear to us most natural are historically produced and that this history is one of contingency, the ‘anti-internalist turn’ draws upon Skinner’s and his ‘contextualist school’s’ episodic approach to the history of ideas and their insistence on the need to understand political, philosophical, and legal ideas as created in particular, social and cultural contexts.<sup>55</sup> They are, therefore, wary of functionalist and pragmatic approaches to history (for example, seeking to determine the rules of customary law) which considers historical material sources for insight or rule of contemporaneous relevance. For the ‘anti-internalist’ then, the challenge for the scholar approaching the history of international law is to escape the inbuilt legal ‘historiographic machine’ and its tendency towards instrumentalism. As Lesaffer argues:

Often international legal historians consider doctrine to be convenient shorthand for what the law of nations of a certain period was. They act as if the writings of the “classics of international law” offer a reliable or even authoritative statement of the then applicable law. They thus reduce the law of nations to what some influential authors said it was.<sup>56</sup>

By widening the scope of historic enquiry, the international legal histories that the ‘anti-internalist’ scholars attempt to construct are thus highly contextual, situating the decisions, rules, incidents, participants, and institutions of international law within the particular confines of the times in which they occurred and, in doing so, looking to a wide range of texts and participants for evidence. These histories are focused upon the ways in which international legal developments are embedded in their specific places and moments, demonstrating the contingency of events, exploring how and why decisions took the shape that they did, and explicating when and why certain ideas and practices took hold (and others did not). For these scholars the appeal of international law’s historical turn, as Koskenniemi has noted, is the chance to craft ‘better narratives’<sup>57</sup> and counter-narratives. In this context, new insights have been generated on various aspects of international legal identity and society, and the role of the image in international legal work.<sup>58</sup>

<sup>53</sup>D. Kennedy, ‘The Disciplines of International Law’, (1999) 12 *LJIL* 88.

<sup>54</sup>Q. Skinner, ‘Meaning and Understanding in the History of Ideas’, (1969) 8 *History and Theory* 10. For a similar point, set in the context of the ‘crises’ of international law in the Middle East, see K. Loevy, ‘Reinventing a Region (1915–22): Visions of the Middle East in Legal and Diplomatic Texts Leading to The Palestine Mandate’, (2016) 49 *Israel Law Review* 309, at 311.

<sup>55</sup>Craven *supra* note 5, at 17.

<sup>56</sup>Lesaffer *supra* note 1, at 36.

<sup>57</sup>M. Koskenniemi, ‘Vitoria and Us: Thoughts on Critical Histories of International Law’, (2014) 22 *Rechtsgeschichte* 119, at 127.

<sup>58</sup>See E. M. Morgan, ‘The Imagery and Meaning of Self-Determination’, (1988) 20 *N.Y.U. J. Int’l L. & Pol.* 355; A. Riles, ‘The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law’, (1995) 6 *Law & Critique* 39.

An additional characteristic of this scholarship is a greater degree of interdisciplinarity when approaching the history of international law which blends legal and international relations theory and its historical discourse, legal history and the history of ideas and political thought.<sup>59</sup> What Berman in particular advocates for is a reconceptualization of traditional pragmatism and the adoption of a plurality of approaches. His scholarship fuses a range of perspectives encapsulating philosophy, geography, sociology and economics. The effect is, as David Armitage states, a symbiosis of ‘turns – linguistic, historiographical, transnational and cultural’.<sup>60</sup> Opening up the historical narrative surrounding international law and escaping the echo chamber of sources is, in the words of Thomas Duve:

To envision a legal history that is able to establish new perspectives, either through opening for different analytical concepts or by fusing them with the [sic] own tradition, by tracing worldwide entanglements or by designing comparative frameworks which can shed light on unexpected parallel historical evolutions.<sup>61</sup>

### 3.2 Juridical thinking: Dissolving the distinction between past and present

A second strand of scholarship frames their engagement with history around the question of ‘how do ideas move through time?’. Here, a particular understanding of anachronism is used to disrupt the teleology of legal sources.<sup>62</sup> In their respective turns to history, Koskenniemi and Orford begin at and make the present their ultimate point of arrival. Both, having driven ‘the turn’ through early and continuous interventions and practices, turned to history through a diagnosis of the present state of international law as in ‘crisis’, allowing them to seek remedy through reordering the international legal project. The past becomes, in this strand of scholarship, a readily available source for the present, even where contemporary lawyers think that contemporary sources already provide the answer. In different ways, both pioneered the turn to history through their writings as well as in availing important platforms for emerging and established scholars within the field in heading large research programs and publication projects dedicated to international law and history.<sup>63</sup> Theirs is, as Kate Purcell puts it, a ‘juridical’ approach that largely remains within the ambit of the conventional sources doctrine, where such materials are treated as sources ‘rather than questioning the form and content of the archive itself’.<sup>64</sup> Instead, the past/present distinction is dissolved so as to invite anachronism into international legal reasoning and normative resources

<sup>59</sup>I. de la Rasilla, ‘The Shifting Origins of International Law’, (2015) 28 LJIL 3; C. N. Warren, ‘History, Literature, and Authority in International Law’, in M. Del Mar, B. Meyler and S. Stern (eds.), *Oxford Handbook of Law and Humanities* (forthcoming).

<sup>60</sup>D. Armitage, *Foundations of Modern International Thought* (2013), at 6.

<sup>61</sup>T. Duve, ‘European Legal History – Concepts, Methods, Challenges’, in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (2014), at 56.

<sup>62</sup>For a recent criticism of Orford’s deployment of anachronism and her use of Quentin Skinner’s work in context see Benton, *supra* note 2.

<sup>63</sup>As power players of the field, and through their respective and co-convened institutional platforms, they have been instrumental in fostering a particular methodological and historical consciousness among junior and emerging scholars. Relevant scholarship emerging from and constituting such platforms respectively include: A. Brett and M. Koskenniemi (eds.), *History, Law, Politics: Thinking Through the International* (2018); F. Fernandes Carvalho Veçoso, ‘History and critique in International Law in Latin America: Revisiting past discussions on legal education in the region’, (2017) 39 *Revista Derecho Del Estado* 91; M. G. Rovira, *supra* note 27; Greenman et al., *supra* note 20; M. Koskenniemi, W. Recht and M. Jimenez Fonzencas (eds.), *International Law and Empire: Historical Explorations* (2017); M. Koskenniemi, M. G. Rovira and P. Almorosa (eds.), *International Law and Religion: Historical and Contemporary Perspectives* (2017); L. Obrégón, *Writing the World through Law: Lawyers and their International Histories 1750-1870* (forthcoming); N. Tzouvala, “‘These Ancient Arenas of Racial Struggles’: International Law and the Balkans (1878-1949)”, (2018) 4 EJIL 1149. See also Orford, *supra* note 27; A. Orford, *International Law and the Politics of History* (2019).

<sup>64</sup>K. Purcell, ‘Faltering at the Critical Turn to History: “Juridical Thinking” in International Law and Genealogy as History, Critique, and Therapy’, (2015) *Jean Monnet Working Paper* 02/15, at 15.

from the past as innovation in the present.<sup>65</sup> Yet, the established hierarchy between authoritative sources embedded in the conventional doctrine recedes to the background.<sup>66</sup> As a result, international law is reworked in the present by recourse to the past, circumventing competing doctrinal sources (other than history and the particular histories pursued within their respective scholarships). The grammar of the sources doctrine is, thus, in the ‘past for the present’ turn, employed to conduct a conversation with international law and lawyers in a non-conformist way, inviting a more fluid and historical understanding of international law as a present practice.

In distinguishing legal from ‘purely’ historical modes of engagement with the past, Orford argues that ‘[t]he self-imposed task of today’s contextualist historians is to think about concepts in their proper time and place’, while ‘the task of international lawyers is to think about how concepts move across time and space’.<sup>67</sup> Orford defines her work as ‘informed’<sup>68</sup> by the contextualists, but emphasizes that in order to conduct ‘a legal rather than a historical study’<sup>69</sup> she must depart from Skinner’s ‘taboo’ on anachronistic readings of concepts over time. Such readings are not necessarily, Orford insists, a lack of schooling in historical method: it is a sign of schooling in the common law tradition and international legal methodology on ‘how to make a plausible argument about why a particular case should be treated as a binding precedent, or why it should be distinguished as having no bearing on the precedent’.<sup>70</sup> In contrast to the general historian performing contextual readings – and in contrast to the ‘anti-internalist’ and general legal historian’s concern with the past in its own right – lawyers are trained to recognize the ‘potential source of obligation in the *present*’ which ‘concepts or arguments from the *past*’ may have.<sup>71</sup> When Orford announces that ‘international legal scholarship is necessarily anachronistic because the operation of modern law is not governed solely by a chronological sense of time in which events and texts are confined to their proper place in a historical linear progression from then to now’,<sup>72</sup> she reminds general and legal historians of international law that this particular brand of law comes with its own sources doctrine in which history – not the least in terms of precedents and practice (including such which have been largely forgotten, ignored, or considered obsolete) – forms part of the current law.

While seemingly unradical – or, rather, doctrinal – Orford’s turn to the ‘past for the present’ in international law (implicitly) operates with a notion of history that becomes in a certain way a reminder of Berman’s scholarship and interdisciplinarity: Orford has always drawn on history in her work. However, shortly after the turn of the millennia a shift occurred in which her earlier explicit ‘misreadings’ of international law ‘in ways that such texts were generically and institutionally never meant to be read’ – framing her enquiries through feminist and postcolonial theories<sup>73</sup> – were continued by a mainly historical and a much more conventional international

<sup>65</sup>Other scholarship dedicated to the ‘past for the present’ turn includes M. Craven, ‘Between law and history: The Berlin Conference of 1884–1885 and the logic of free trade’, (2015) 3 *London Review of International Law* 31; M. Gunneflo, *Targeted Killing: A Political and Legal History* (2016); R. Giladi, ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, (2014) 25 *EJIL* 847; S. Dehm, *Ordering Human Mobility: International Law, Development, Administration* (2017); P. Wrangé, *Impartial or Uninvolved?: The Anatomy of 20th Century Doctrine on the Law of Neutrality* (2007); A. Alexander, ‘A Short History of International Humanitarian Law’, (2015) 26 *EJIL* 109.

<sup>66</sup>Purcell, *supra* note 64.

<sup>67</sup>Orford, *supra* note 39, at 2.

<sup>68</sup>A. Orford, ‘On international legal method’, (2013) *London Review of International Law* 166, at 170.

<sup>69</sup>*Ibid.*, at 171.

<sup>70</sup>*Ibid.* Benton specifically criticizes Orford for an all too selective and narrow reading of Skinner’s argument: see Benton, *supra* note 2, at 11 and onwards.

<sup>71</sup>Orford, in A. Kemmerer, ‘“We do not need to always look to Westphalia . . .” A Conversation with Martti Koskeniemi and Anne Orford’, (2015) 17 *Journal of the History of International Law* 1, at 3.

<sup>72</sup>Orford, *supra* note 68, at 175.

<sup>73</sup>Orford citing T. Threadgold in ‘Book review: Law and Literature: Revised and Enlarged Edition by Richard Posner’, (1999) 23 *Melbourne University Law Review* 839, at 838. See also A. Orford, ‘The Gift of Formalism’, (2004) *EJIL* 179; A. Orford, ‘Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice’, (2005) 18 *LJIL* 179.

legal terminology. Her method in conducting research has, however, mostly remained the same.<sup>74</sup> Central to her ‘turn to history’ is not a rejuvenation of just *any* particular history in the present but rather a critically informed history that brings to the fore international law as pivotal responses to contemporary crises, death, suffering, and global inequality: an ethos she shares with many of the ‘radical enterprise’ turners, but the radical ends which she does not in such explicit ways ascribe to in her own ‘turn’.

Koskenniemi, in contrast, has positioned his project as a history. Yet, he is cautious to deem the science of history any more ‘objective’ than that of law: both come with ‘projects’ and ‘normative commitments’.<sup>75</sup> Instead, he aims to ‘counter more celebratory histories of international law’ by providing a history of the discipline which weaves together its intellectual, sociological and political past. In particular, his almost biographical readings of key figures in the Western history of international jurisprudence has provided a rich history of international legal thought.<sup>76</sup> *The Gentle Civilizer*<sup>77</sup> is, as Orford puts it, seen as a ‘milestone’ in his work.<sup>78</sup> It focuses on the ‘history of the self-understanding and sensibility of international lawyers’<sup>79</sup> and flows in part from Koskenniemi’s sensibility as a practicing international lawyer – working in ‘a broader range of political, social, and cultural developments’.<sup>80</sup> An often overlooked biographical feature of Koskenniemi’s work is his substantial experience in the Finnish diplomatic service. Koskenniemi’s turn to history, in contrast to historians and international lawyers of the contextualist school, becomes an insider’s historicization of his own field of practice and scholarship. The ‘insider’ distinction matters as the disciplining aspects set Koskenniemi’s turn to history apart from general history and general international legal scholarship.

Koskenniemi, and the ‘turn’ he represents, follows conventional methods and writings on history, including setting historical time-periods apart for contextual scrutiny.<sup>81</sup> He performs careful readings of primary sources from traditional historical archives – often texts (already) considered canonical in the Western international legal tradition. He is thus often, mistakenly, regarded as an ‘anti-internalist’. Yet, he is quick to emphasize where his commitment – or as he puts it: ‘obsession’ – lies: ‘With the *Now*. With *Ourselves*’,<sup>82</sup> affirming his position as an international legal scholar concerned with the present, turning to history for present ends. Koskenniemi is, as he has recently put it, ‘trying to construct a persuasive argument from the bits and pieces of authoritative language lying about in the appropriate professional context’.<sup>83</sup> This is easy enough for a practicing international lawyer to identify with: Koskenniemi’s ‘obsession’ has never been about the past, but with availing the international legal arguments pursued by

<sup>74</sup>A. Orford, *Reading Humanitarian Intervention* (2003), especially Ch. 2.

<sup>75</sup>Koskenniemi, in Kemmerer, *supra* note 71, at 3. Even so his work has been received as ‘a true’ representation of the history of the profession (A. Orford, ‘International Law and the limits of History’, in W. Werner, M. de Hoon and A. Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017), 298, at 298), an unintended and unwished-for effect, especially as Koskenniemi states that ‘the essays [in the *Gentle Civilizer*] do not seek a neutral description of the past “as it actually was”’. Koskenniemi, *supra* note 1, at 10.

<sup>76</sup>Well aware of his focus on Western figures in international law Koskenniemi explains (in Kemmerer, *supra* note 71, at 7) that ‘Eurocentrism is perhaps not so much about the substance of what is being said or studied, but what the point of a statement or study is, what kinds of normative commitments it is intended to support (or actually support, independently of the intentions of who produced it).’

<sup>77</sup>Koskenniemi, *supra* note 1, at 3.

<sup>78</sup>Orford, *supra* note 74, at 298.

<sup>79</sup>*Ibid.*

<sup>80</sup>*Ibid.*

<sup>81</sup>See, for example, Rovira and Obrégon, *supra* note 63; I. Van Hulle and R. Lesaffer (eds.), *International Law in the Long Nineteenth Century* (c. 1775-1914) (forthcoming). On time-periods in TWAIL scholarship: G. R. B. Galindo, ‘Splitting TWAIL?’, (2016) 33 *Windsor Yearbook of Access to Justice* 37.

<sup>82</sup>Koskenniemi, in Kemmerer, *supra* note 71, at 3. See also M. Koskenniemi, ‘Less is More: Legal Imagination in Context: Introduction’, (2018) 31 *LJIL* 469.

<sup>83</sup>Koskenniemi, *supra* note 19, at 23.



lawyers, scholastics and theologians of their respective pasts to the international legal scholarship of the present.

In describing Koskenniemi's position, Kemmerer concludes that he 'sympathizes with the turn to contextual readings of international law', yet 'he is careful to draw some boundaries – not the least because the reduction of a historical narrative to context creates an artificial border between past and present'.<sup>84</sup> Like Orford, Koskenniemi is an optimistic reader of the potential of international law.<sup>85</sup> This sets his turn to history apart from many of the critical international legal historical projects, as well as from the many historical projects working with international law – the latter of which takes less of an interest in the critical potential of international law today. Each in their own way, Koskenniemi and Orford turned to history with an ethos to make history part of contemporary sources for the international legal scholar and practitioner looking to (re) construct an international legal argument *in* the present and *for* the present. For both, crisis and fragmentation have been a productive way of describing the current state of international law; urging scholars to revisit the history of international law in order to rethink it in light of its current challenges.

The promise of turning to history as a response to crisis in international law has turned out to be a *rewriting* project of contemporary international law for Orford and Koskenniemi. It is not necessarily stabilizing the field – which would be an order-conserving response to 'crisis' – but rather, evolving international law in the direction that both envision as a 'better' law for contemporary purposes. Instead, the 'past for the present' juridical turn disrupts well-trodden paths of conventional international scholarship urging for 'new answers' to 'new questions' by showing that even if the questions are new (which they often enough are not), the past, rather than the present takes on international law, holds a more convincing diagnosis for our present times. Yet, even if their diagnosis is one of the current crises in international law and beyond, the international legal arguments delivered through the 'past for the present' juridical turn stay within the logics of that which the turners identify as producing international law's 'crisis'. As Purcell cautions:

Writing history in a juridical mode – for example, by referring exclusively or primarily to materials that are also considered 'sources' of international law and, indeed, treating such materials *as sources* rather than questioning the form and content of the archive itself reproducing the ism of international legal reasoning; a variety of practices as historically continuous (if suppressed) forms of lawful effect a degree of change in present international law. Yet scholarship taking this form also cuts itself off from the greater critical potential of history in connection with international law.<sup>86</sup>

This particular brand of the turn to history may thus be quite successful in exploring the critical potential of working within the ambit of the conventional sources doctrine in international law, disrupting and dissolving its past/present boundaries only quite gently. Its potential success in communicating with the larger field of conventional scholarship and international legal practitioners resides in that balance. However, the specific critical potential which comes with history may be underexplored. Moreover, while Orford presents anachronism as already part of the method of international law it is – if we are to follow the conventional sources doctrine – only so to a certain degree: obsolete conventions and court cases remain obsolete, however useful they would be for contemporary purposes. What Orford seems to describe, though, is how normativity can be re-inscribed to historical text through putting them into contemporary use in international

<sup>84</sup>Koskenniemi, in Kemmerer, *supra* note 71, at 2.

<sup>85</sup>'The fate of international law', he has claimed, 'is re-establishing hope for the human species'. M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1, at 30.

<sup>86</sup>Purcell, *supra* note 64, at 15.

legal practice and scholarship: a disruptive and possible distressing enterprise that may promise a ‘better’ international law, but which may equally well be pursued, in practice, for other ends.<sup>87</sup> In turning to history, ‘the past for the present’ juridical turners have (re)discovered a method in which to substantiate scholarly claims and legal argument already set by their critical or otherwise commitments and ethos. Perhaps – as recent criticism indicates – the trajectory into history has distracted one or two critical scholars from providing productive and succinct answers to pressing contemporary legal and political problems.<sup>88</sup> The analyses put forward through the ‘past for the present’ juridical turn – spearheaded by Orford and Koskeniemi’s work – remain sharp, insightful, and refreshing. However, it remains to be shown how the diagnosis of ‘crisis’ professed by this scholarship is supposed to cure us. One take-away from our analysis of the ‘past for the present’ juridical turn to history is, thus, that although the turn disrupts the teleology of progression in international law and scholarship it risks leaving the international lawyer, who is keen to see the ‘cure’ coming, in want of anything but a historically more informed state of despair, distress, and disillusion. Maybe, but maybe just so, this state-of-mind of professional and scholarly anxiety is where productive answers and actions are (yet) to be found.

### 3.3 Radical enterprises: Dissolving the here/there and law/non-law distinctions

A substantial part of the general ‘turn to history’ in international law is performed by critical international legal scholars,<sup>89</sup> who, as Skouteris notes, deploy history as a ‘technique of criticism and as part of a larger intellectual project of “reinventing” international law’; these are ‘radical enterprises’ taking on a nominally conservative and order-conserving genre of international law.<sup>90</sup> The critical agenda brings the ‘radical’ turners together or, as Koskeniemi puts it: ‘such studies differ in many ways from older histories of the field that were either more neutral in conception or associated the growth of international law with peace and enlightenment’.<sup>91</sup> Within this turn, Genevieve Painter identifies:

two threads [that] hold together the field’s varying methodological approaches: first, a rough consensus about the role of critique in a political project to unseat a teleological, triumphalist narrative of international law’s past, and second, a lively debate on the proper “context” for understanding international legal history.<sup>92</sup>

This turn to history offers – whether an explicit aim or not – a challenge to the grammar of international law as embodied in the conventional sources doctrine. In pursuing contextual readings – akin to how the contextualists employ history, but dissimilar in terms of the explicitly critical (at times revolutionary) aims – the sources availed for rethinking and reordering international law and its history are infinite. The potential international laws (and its histories) are similarly infinite, and yet, caught in an imperialist trajectory, unless the methodological choice of the international lawyer disrupts the normative baggage of the conventional approach to history and its use

<sup>87</sup>See Arvidsson, *supra* note 7.

<sup>88</sup>d’Aspremont, *supra* note 1.

<sup>89</sup>Apart from the scholarship analysed below this also includes scholarship not only or primarily concerned with history as such. Relevant examples include N. Seuffert, ‘Queering International Law’s stories of Origin: Hospitality and Homophobia’, in D. Otto (ed.), *Queering International Law* (2018), 213; Y. Otomo, *Unconditional Life: The Postwar International Law Settlement* (2016); M. Elander, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal* (2018); Hohmann and Joyce, *supra* note 20; A. Orford, ‘Feminism, Imperialism and the Mission of International Law’, (2002) 71 *Nordic Journal of International Law* 275.

<sup>90</sup>Skouteris, *supra* note 1, at 111.

<sup>91</sup>M. Koskeniemi, ‘Expanding Histories of International Law’, (2016) 56 *American Journal of Legal History* 104.

<sup>92</sup>G. 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, at 9.

of the sources doctrine. Antony Anghie's contribution to the Third World Approaches to International Law (TWAIL) movement has been pivotal to the 'radical enterprises' turn.<sup>93</sup> Contemporary TWAILers turn to history in order to revisit contemporary unequal global relations governed by international law, tracing imperialist ideology, Eurocentric 'universalism', and inequality as ingrained in contemporary international legal scholarship and practice.<sup>94</sup> What is at stake is not only rewriting history, but also, as Vasuki Nesiiah puts it, 'the particular and contested backstories with specific political stakes' through which international law's histories are told.<sup>95</sup> The sources employed by TWAILers are, in part, conventional: international treaties, canonical texts, and ICJ case law. The difference between these and conventional scholarships resides in the interpretation of sources and the purpose of analysis: TWAIL histories, more often than not, move towards interdisciplinarity.

TWAIL and related enquiries into international law's imperial past and efforts to trace its continuing effects – the legacies of colonialism in particular – have unsettled traditional accounts of international law in terms of both content and approach. Responding to Chimni's call in 'Customary International Law: A Third World Perspective'<sup>96</sup> of an agenda aimed at fostering 'a counter repertoire of custom that can democratize and pluralize the sources currently feeding CIL [Customary International Law]', Nesiiah suggests 'that a turn to history will reveal anti-imperial/anti-capitalist international law-relevant norms and practices that are already hidden in plain sight'.<sup>97</sup> The 'radical enterprises' turn to history in similar ways tend to emphasize, not unlike 'purist' historians and international legal history scholars, a historical method over conventional international legal sources doctrine.<sup>98</sup> The latter, Parfitt argues, necessarily reproduces Eurocentric histories of international law, and is why a critical (re)imagination of international law must abandon the conventional sources doctrine for wider contextual readings.<sup>99</sup>

Parfitt, together with Madelaine Chiam, Luis Eslava, Genevieve Painter, and Charlotte Peevers have set out to showcase what it might mean to purposefully abandon the conventional sources doctrine, writing new histories in international law, focusing on 'other' sources, or in their case,

<sup>93</sup>Anghie, *supra* note 27.

<sup>94</sup>Relevant examples include U. Baxi, 'India-Europe', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 744; A. Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World', (2012) 14 *Oregon Review of International Law* 131; J. Dehm, 'Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s', (2018) 31 *LJIL* 871; J. T. Gathii, 'Imperialism, colonialism, and international law', (2007) 54 *Buffalo Law Review* 1013; A. H. Khan, 'Tragedy's Law(s): Receiving The Mythology of Modern Law Today', (2017) 43 *Australian Feminist Law Journal* 273; V. Kumar, *International Law and Revolution* (forthcoming); A.-C. Martineau, 'Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force', (2016) 29 *LJIL* 95; M. W. Mutua, 'Savages, victims and saviors: the metaphor of human rights', (2001) 42 *Harvard International Law Journal* 201; U. Natarajan et al. (eds.), *Third World Approaches to International Law: On Praxis and the Intellectual* (2018); Nesiiah, *supra* note 16; V. Nesiiah, 'Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars', (2016) 110 *AJIL Unbound* 323; L. Obregón, 'Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt', (2018) 31 *LJIL* 597; O. C. Okafo, 'Critical Third World approaches to international law (TWAIL): theory, methodology, or both?', (2008) 10 *International Community Law Review* 371; S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011); U. Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty', (2011) 24 *LJIL* 799; B. Rajagopal, *International law from below: development, social movements and Third World resistance* (2003); P. Singh 'The Scandal of Enlightenment and the Birth of Disciplines: Is International Law a Science?', (2010) 12 *International Community Law Review* 5; P. Starski and J. A. Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?', (2017) 19 *Journal of the History of International Law* 50.

<sup>95</sup>V. Nesiiah, 'Doing History with Impunity', in K. Engle, Z. Miller and D. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (2016), 95, at 113.

<sup>96</sup>Chimni, *supra* note 17.

<sup>97</sup>Nesiiah, *supra* note 16, at 316.

<sup>98</sup>Chiam et al., 'History, Anthropology and the Archive of International Law', (2017) 5(1) *London Journal of International Law* 3. See also Nesiiah, *supra* note 16; V. Nesiiah, 'Placing International Law: White Spaces on a Map', (2003) 16 *LJIL* 1.

<sup>99</sup>Parfitt, *supra* note 3.

artefacts.<sup>100</sup> Taking their cue from Koskenniemi, they ask what international law *really* is, subjecting its history to a reading that is neither faithful to international legal sources doctrine nor to traditional historiographical methods – or to anthropological and other conventional methods. They profess to perform an anthropologically inspired turn to historiographical sources, understanding ‘international law as archive’, in order to ‘question the conventional archive of international law’.<sup>101</sup> In contrast to scholars with a more explicitly contextualist turn to history (the ‘anti-internalists’ along with mainstream legal historians and general historians), the critical potential of expanding the sources invoked in order to understand international law (past and present) is more fully explored and the aim often openly set within the framework of postcolonial theory, feminist critique, and critical race theory. Emerging strands of Marxist scholarship have played a particularly influential role in expanding the radical potential of history in international law.<sup>102</sup> This scholarship redeploys history to foreground the structural connection between capitalism and international law,<sup>103</sup> tracing the development of modern inter-state relations as dominated by Western powers and the capitalist logic of the ‘transnational capitalist classes’, to reveal the ideological bankruptcy of the belief that international law is ahistorical, apolitical, and neutral.<sup>104</sup>

Much like Orford, many ‘radical enterprise’ turners are set on tracing concepts and imperial residues in international law over time and collapsing the past/present distinction. Some do this by collapsing the geographical structural biases of Eurocentrism in international law by bringing voices from the ‘periphery’ into disruptive conversation with conventional narratives on the history of international law, potentially opening up for considering ‘other’ source and materials.<sup>105</sup> This critical turn is moving towards a global international legal history, expanding the archives geographically from which to draw a global history. The methodology is drawing on (legal)

<sup>100</sup>Chiam et al., *supra* note 98. See also R. Parfitt, ‘Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest is History . . .’ (2018) 31 LJIL 509; R. Parfitt, *The Process of International Legal Reproduction* (2019); L. Eslava, ‘The Moving Location of Empire: Indirect Rule, International Law, and the Bantu Educational Kinema Experiment’, (2018) 31 LJIL 539; M. Bak McKenna, ‘Designing for International Law: The Architecture of International Legal Organisations 1922–1952’, (forthcoming) *London Review of International Law*.

<sup>101</sup>M. Chiam, ‘Tom Barker’s “To Arms!” poster: internationalism and resistance in First World War Australia’, (2017) 5 *London Review of International Law* 125, at 128.

<sup>102</sup>Relevant examples include C. Miéville, *supra* note 18; R. Knox, ‘Marxism, International Law, and Political Strategy’, (2009) 22 LJIL 413; G. Baars, *The Corporation, Law and Capitalism A Radical Perspective on the Role of Law in the Global Political Economy* (2019); B. Bowring, ‘What is Radical in “Radical International Law”’, (2011) 22 *Finnish Yearbook of International Law*; M. Fakhri, *supra* note 20; J. Linarelli, M. E. Salomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018); M. Bak McKenna ‘Blood, Breastmilk, and Dirt: Silvia Federici and Feminist Materialism in International Law (Parts One and Two)’, (2018) *Legal Form*; N. Tzouvala, ‘A false promise? Regulating land-grabbing and the post-colonial state’, (2019) 32 LJIL 235; N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2019); U. Özsü, ‘Grabbing land legally: A Marxist analysis’, (2019) 32 LJIL 215.

<sup>103</sup>In Pashukanis’ words: ‘[m]odern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world’. E. B. Pashukanis, ‘International Law’, in P. Beirne and R. Sharlet (eds.), *Pashukanis: Selected Writings on Marxism and Law* (1980), 168, at 169.

<sup>104</sup>B. S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, (2004)15 EJIL 1, at 1.

<sup>105</sup>See the ‘periphery’ project in the *Leiden Journal of International Law*: F. Johns, T. Skouteris and W. Werner, ‘Editors’ Introduction: Alejandro Álvarez and the Launch of the Periphery Series’, (2006) 19 LJIL 875. Several chapters of Fassbender and Peters’ *Handbook* serve similar ends, especially chapters presented in part III of the book. B. Patel’s chapter on ‘India’ (in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), at 500) is an example of how sources that are not usually considered part of international law are made part of its historical narrative. See also M. Koskenniemi, *supra* note 35; A. Becker-Lorca, ‘Eurocentrism in the History of International Law’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 1034; Natarajan et al., *supra* note 94; V. Hamzić, ‘Mir-Said Sultan-Galiev and the Idea of Muslim Marxism: Empire, Third World(s) and Praxis’, in U. Natarajan (eds.), *Third World Approaches to International Law: On Praxis and the Intellectual* (2018), at 105; A. H. Khan, ‘International lawyers in the aftermath of disasters: inheriting from Radhabinod Pal and Upendra Baxi’, (2016) 37 *Third World Quarterly: Third World Approaches to International Law* (TMAIL) 2061.

historians, yet far from aiming for a more ‘objective’ reading of the past, for the purpose of better understanding the past, the point is to open up the narrative of present day international law, which is closely associated with the ethos of ‘dissolving the past/present’ turners in international law.

Other scholars in this turn to history in international law, like Arnulf Becker-Lorca who repositions semi-peripheral international lawyers’ interventions into (what ought to, in Becker-Lorca’s account be) a general and mainstream international law and history, specifically call for a re-reading of conventional international legal sources and material. Becker-Lorca’s scholarship is, in a remarkable turn, *reinforcing* the conventional sources doctrine in international law for explicit critical ends. The difference between his and conventional scholarships is the re-evaluation of international legal sources that has hitherto been dismissed from the agenda of canonical narratives on the history of international law and present day international legal practice, either because they do not fit with the notion of ‘progression’ or because they are considered ‘minor’ or ‘other’ histories in the general trajectory of international law.<sup>106</sup> An emphasis in Becker-Lorca’s work is to show how mainstream narratives on international law are ideologically and geographically biased: the Eurocentrism is, he argues, neither historically correct nor does it fit with conventional international legal sources doctrine if we care to take into account *all* relevant sources that the sources doctrine avails us. Conversing well with conventional international legal scholarship through the recourse to a shared commitment to international law’s conventional sources doctrine, Becker-Lorca’s scholarship has also been well received outside of critically inclined scholarly circles.<sup>107</sup>

An often-voiced critique directed at TWAILers is that they neither do history ‘proper’ because of the explicit critical and theoretical engagements in which the past/present distinction is collapsed,<sup>108</sup> nor is the scholarship received as international law ‘proper’ because the historically and theoretically infused methods and analysis make use of sources and arrives at conclusions considered too unconventional. What becomes apparent when considering the different explicitly critical and ‘radical’ turns to history in international law is that the methodological employment of sources and the way in which the conventional sources doctrine in international law is made use of is both strategical and eclectic. The sources doctrine is employed as either a strategy of arguing and being heard in more mainstream debates on international law *or* as a means to disrupt conventional narrations and understandings of both the past and the present conditions of international law. The critical international legal histories emerging from this turn both widens and constricts the disciplinary limits of sources available to the international legal scholar, challenging the conventional sources doctrine on many levels by inviting plurality and at times excepting, but simultaneously dismantling, the hierarchy of sources. Both content and hierarchy of the conventional sources doctrine are, consequently, put into question. As a result, what international law is and can be emerges as almost infinite: it all depends on which sources you invoke and how you interpret them. As Parfitt notes, ‘those who wish to look critically at international law and its material effects cannot do so without reaching beyond sources doctrine, which in turn puts at risk their claim that what they are “doing” is indeed “international law”’.<sup>109</sup>

As old and established hierarchies of sources and disciplinary boundaries are dismantled, there is greater ‘democratization’ in terms of sources, voices, and methodologies. A visionary ‘other’ law can be, and often is, imagined – one which is not building on international law as a ‘Eurocentric’ knowledge-production.<sup>110</sup> As scholars turn further away from the conventional sources doctrine,

<sup>106</sup>Becker-Lorca, *supra* note 27.

<sup>107</sup>Illustratively, Becker-Lorca’s book was awarded the 2016 European Society of International Law Book Prize: its gesture to bring international law’s ‘peripheries’ to its ‘core’ converses well with conventional scholarship’s aim to strengthen international law’s global reach rather than to disrupt, radicalize or revolutionize its effects.

<sup>108</sup>Orford, *supra* note 68, at 304.

<sup>109</sup>Parfitt, *supra* note 3, at xxxix.

<sup>110</sup>Chimni, *supra* note 104; Nesiha, *supra* note 16; Parfitt, *supra* note 3.



mainstream scholars and practitioners find it increasingly difficult to follow. The difficulty, however, is not particular to the ‘radical’ turners. Instead, this is the trademark of a methodological diffusion of the conventional sources doctrine, in particular the diffusion of its historical archive: coinciding in time with the broader and critically bent scholarly ‘turn to history’, practitioners and scholars of a wholly different strand than the one featured in this article have been engaging in a *reactionary* turn to history. Their methodologies in writing histories and working with archives share significant features with the methodologies employed by ‘radical’ turners, leaving both ‘radicals’ and ‘reactionaries’ in the same boat: international legal arguments and analyses based on sources that mainstream legal scholarship does not recognize as authoritative casts doubt not only over the arguments, but also over the scholars professing them. After all, it is not the sources that are unrecognizable to mainstream international legal scholars, but the law that flows from radical as well as reactionary endeavours and ends.

#### 4. Conclusions

To say that international law has always sought to establish and reinforce its status as a discipline in its central historical narrative, is to state the obvious. History (and historiography) offers itself, as it were, as a mode of rethinking or reinforcing international law’s normative authority – both in the past and in the present – and it does so for a variety of ends. For those wishing to radically reconceptualize, reorder or disrupt the discipline, then history marks the entry point for this process; a space in which to reveal the blind spots, biases and, of course, hidden emancipatory (or otherwise) potentials. In this sense, the turn to history in international law is not a return to the past, but a detour through the past, to use Walter Benjamin’s terminology, in order to think about the present.

The historical engagement that centres on the scholarship forming the base of our analysis in this article becomes a form of political re-enchantment, one where the overlaps, contradictions, and complexities that underline the formation of international law and its contemporary role can be revealed. The transformative potential of expanding beyond the disciplinary boundaries of the sources doctrine, we have argued, works in different ways to disrupt universalizing narratives of historical truth that dominant doctrinal retellings of international law’s past. The point of revisiting the past, from this perspective, is, as Benjamin asserts, not ‘to satisfy an imagined desire for an improved understanding of the past’, but rather to create, in an explicitly political way, ‘new, historical objects or dialectical images that join together what may be quite distinct phenomena, whose significance can emerge only posthumously or retrospectively, in a relationship with the now that has apprehended their significance’.<sup>111</sup>

In considering three different kinds of turns to history in contemporary critical international legal scholarship, we do not claim to have provided an all-purposes ‘taxonomy’ of the field. Rather, analysing the scholarship of Nathaniel Berman, David Kennedy, and Karen Knop who, together with other scholars, have sought to counter functionalist and celebratory histories of international law by providing a more complex and nuanced history of the discipline, moving beyond doctrinal boundaries and hierarchies, as an ‘anti-internalist’ turn to history in international law, has enabled us to pin down why it is that scholars gravitating towards history ‘proper’ in international law seem, at least at times, to speak more of anything and everything rather than international law: the crux is that once it goes beyond the given sources of the conventional sources doctrine, the disciplinary language is no longer that of international law as mainstream scholars and practitioners (care to) know it. This makes conversations between scholarship of this brand of the turn to history in international law and that of mainstream scholarship uneasy or, at worst, non-existent. A similar reordering of disciplinary priorities, prefaced upon the expansion of temporal and spatial limits, takes places in the work of scholars adhering to the ‘past for the present’

<sup>111</sup>W. Benjamin, *On the Concept of History*, quoted in H. Eiland and M. W. Jennings (eds.), *Walter Benjamin: Selected Writings, Volume 4, 1938–1940* (2006), at 463.



turn to international legal history. Exposing the deep method political tensions that underpin the historiographical turn, the scholarship of Anne Orford and Martti Koskenniemi and others engage a ‘necessarily’ anachronistic dimension in their historical accounts, as a way of thinking juridically about ‘crisis’ and the international legal argument in the present. While this approach comes with a nominal adherence to the sources doctrine (less so for Koskenniemi than for Orford), it nevertheless diffuses the sources’ authoritative hold, by emphasizing history and normative innovation over doctrinal hierarchies, and ‘bring[ing] legal principles down from the conceptual heaven and into a real world where agents make claims and counterclaims, advancing some agendas, opposing others’.<sup>112</sup> While (at least implicitly) promising something beyond ‘crisis’ – in best case a ‘better’ international law – this turn to history has yet to deliver any ‘cure’ if it is not simply supposed to leave the international scholar and practitioner in a historically more informed state of despair, distress, and disillusion. Similarly, ‘radical enterprises’ in the turn to history, including TWAIL and Marxist scholarship by B. S. Chimni, Vasuki Nesiah, and others, have challenged the formal authority of international law by blurring the boundaries between international law and politics, destabilizing the historiographies upon which mainstream international law depends. Bringing to the fore the need to go beyond the conventional sources doctrine – indeed, to diffuse its archive – in order to escape its ingrained Eurocentrism, Rose Parfitt, with others, has reinvented international law’s archive by including artefacts, stories, and figures. The result is a reconfigured international law (often) far from mainstream scholarship – sometimes too far to be recognized by and as international law and scholarship – offering new and promising ways of thinking about international law’s past, present, and potential.

While scholars make radically different uses of history in their respective turns to history in international law, what brings the critical international legal scholarships analysed in this article together is a strateg use of sources and the centrality played – explicitly or implicitly – by the conventional sources doctrine in those turns. The three groups of critical scholarship disrupt and democratize – and thus open up – international law and its conventional sources doctrine in ways that invite thinking about international law in new (or, perhaps, old) ways. Yet, contemporary examples of turns to wholly *other* histories through reactionary aims resulting in unjust ends should act as a warning of how disrupting and opening up the conventional sources doctrine – especially in terms of the histories invoked – is not a universal cure to crises, imperialism or injustice: it can also (and does) work the other way around. A key task for critical international legal scholarship, both part of the turn and otherwise, is thus to critically examine the methodological employment of sources and histories employed in international legal scholarship and practice. On a more optimistic note, it must also be noted that while a turn to history may not save us – or international law, or anything but the global actors of academic publishing looking for ever expanding markets of new ‘fields’ and ‘turns’ – the methodological work done by critical international legal scholars within the many turns to history is impressive and inspiring. Used in a strateg way, and by focusing on the conventional sources doctrine, the way in which ‘history’ (whatever that is or can be) has been employed in order to rethink and rewrite international law could serve as a template for a new attention to sources beyond an engagement specifically within the ‘turn’ or history. A call for critical international scholarship to turn to history beyond the establishment of a new field or genre of legal scholarship is thus a pressing one. By focusing on the methodological aspect of how ‘turners’ have hitherto employed the sources doctrine, the potential creative and reigniting force within ‘the turn’ can be better understood and adopted in international legal scholarship broadly.

<sup>112</sup>Koskenniemi, *supra* note 57, at 123.