

The Radical Use of History in the Study of International Law^{*}

Henry Jones¹

“History as inspiration and ideology has a built-in tendency to become self-justifying myth. [...] It is the business of historians to try and remove these blindfolds” – Eric Hobsbawm, *What Can History Tell Us about Contemporary Society?*

“To learn from the past ... the distinction between what is necessary and what is the product merely of our own contingent arrangements, is to learn the key to self-awareness itself” – Quentin Skinner, *Meaning and Understanding in the History of Ideas*

“People know what they do; frequently they know why they do what they do; but what they don't know is what what they do does.” — Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*

Contents

Abstract.....	2
1. Introduction.....	2
2. The Historical Turn in International Law	5
3. False Necessity and False Contingency	12
4. Three Methods of Historical Research	15
4.1 Marxism	15
4.2 Contextualism	18
4.3 Michel Foucault.....	26
4.4 Don't be Vulgar	30
5. Conclusion	35

^{*} An earlier version of this paper was presented at the Helsinki Summer Seminar of International Law 2012. I am grateful to all who participated in the workshop, in particular Juan Amaya Castro, Anna Chadwick and Paavo Kotiaho for their detailed and helpful comments. Thanks also to Jason Beckett and Paul O'Connell for giving their time to lengthy discussions of these issues. All faults are mine alone.

¹ PhD Candidate, University of Leicester

Abstract

In this paper I look at the use of history in international law, starting with specific historical studies of the subject. I then go on to consider why history is useful; with particular reference to ideas of what is contingent and what is necessary. This leads to a detailed consideration in the majority of the paper of different approaches to history, all with a shared desire to use history to address the present. I look at the broad approaches of Marxist, Contextualist and Post-modern history, with the focus on key exponents of these positions; Eric Hobsbawm, Quentin Skinner and Michel Foucault. In conclusion, I argue that we must study the history of international law to understand and change its present. This work will be more productive with a proper consideration of historical method.

Keywords: International Law; History; Historiography; Contingency; Necessity

1. Introduction

A radical approach to something is commonly understood as being a thorough, far reaching proposal for change, in practice or understanding, addressing the fundamental nature of something. The etymology of the word is in physical science; radical refers to the most fundamental natural processes. In its common political use it is a term denoting a desire for large scale change, usually but not essentially, associated with the left and with revolutionary change. As Raymond Williams notes, the term in twentieth century political use arose out of difficulties in the use of the terms communist or socialist: '[r]adical seemed to offer a way of avoiding dogmatic and factional associations while reasserting the need for vigorous and fundamental change'.²

This last sense captures why I have used the word. I want to examine different approaches to histories, which I argue have a shared radical character, but which often fall into different dogmatic camps. I will not attempt to give any sort of complete radical history here, a task obviously beyond one paper, or even one person. I simply set out to explore different approaches to history, and in particular the history of ideas, which I find useful in understanding the history of international law. The potential radicalism of my approach lies in the use of historical study to question the present. This *use* of history, which may be termed political but is free of specific demands and conclusions, is to demonstrate the contingency of the present. I ask the twin questions of why things are the way they are and how could they have been different.

² Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Revised edition, Oxford University Press, 1983) at 252. For a recent and provocative discussion of the idea of radical international law, see Bill Bowring, 'What is Radical in "Radical International Law"?', 22 *Finnish Yearbook of International Law* (2011) 1-29

The history of International law has grown exponentially as an area of interest in recent years. The history of international law was the ‘most neglected’³ part of international law for some time, but this is no longer the case. There is a wealth of study which can be generally classed historical, both in mainstream and critical or theoretical scholarship. I want to argue in part that a weakness of much of this work comes from a lack of reflection on history itself. Whether the work is a history *of* international law, *within* international law, or international law *in* history,⁴ the method of historiography is often unclear. I am not attempting to represent ‘the state of the field’, merely to re-emphasise the potential in the use of history for political ends, rather than simply for its own sake.

The question of method is a very simple one; an historical method is simply how we choose our data. The question of what goes in and what is left out of a history leads to a lot of complicated issues, some of which I discuss below, but is at root this simple. Depending on what we want to say about the present, we choose different historical materials. After all, it should not be so controversial to suggest that a truly accurate history is either impossible or useless. As Paul Ricoeur very nearly says, a truly accurate history would be as useful as Lewis Carroll’s one-to-one scale map.⁵ A choice of scale is made, and this requires the inclusion and exclusion of material. But also a political choice is made. History which confirms the necessity of the present and the legitimacy of contemporary global arrangements does exist, and is consistently popular.⁶ Simply doing history is not radical, but a radical disaffection with the present inspires and demands a historical method to support it.

So, what is wrong with the present that would lead to this sort of search through the data of history? More specifically, what is wrong with the present of international law? Poverty is one familiar example of the gap between the promise of international law and the actual conditions imposed by regulation through international. As Susan Marks, for one, has demonstrated, international law is involved in both the promise of a better future through development, and the creation of so called poverty ‘traps’.⁷ Poverty is ‘something certain groups of people do to others’.⁸ In a search for a way to expose this relationship, and do something to oppose it, history offers a basis for argument. The objection to poverty is the political aim which inspires the choice of historical material.

³ Lassa Oppenheim, ‘The Science of International Law: Its Task and Method’, 2 *American Journal of International Law* (1908) 313-356. This sentiment was echoed by Wilhelm Grewe, *The Epochs of International Law* (Trans. M. Byers, De Gruyter, 2000) at 1

⁴ These terms are taken from Matt Craven, ‘Introduction: International Law and Its Histories’, in Matt Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff: Leiden, 2007) at 7

⁵ Lewis Carroll, *Sylvie and Bruno Concluded* (MacMillan, 1893). This is sometimes referred to as the paradox of the complete map. Ricoeur discusses different scales of history, and their uses, in Paul Ricoeur, *Memory, History, Forgetting* (Trans. K. Blamey & D. Pellauer, University of Chicago Press, 2004) at 209-216

⁶ The popular history writing of Niall Ferguson is one obvious example.

⁷ Susan Marks, ‘Human Rights and the Bottom Billion’, 1 *European Human Rights Law Review* (2009) 37-49

⁸ *Ibid.* at 48

The three historical methodologies or approaches which I am interested in are the Marxist, Cambridge School, and Postmodern. These broad terms are insufficient to cover the variety of methods which they contain. For a Marxist historian who has regularly explained and defended his methodology I will look at Eric Hobsbawm.⁹ One of the key academics in developing the Cambridge School approach to the history of ideas is Quentin Skinner,¹⁰ and he too has published widely and repeatedly on the subject of method and in defence of his method. Postmodern is perhaps the least useful term, and certainly does not help much in its unifying of diverse approaches to a variety of subjects under one label. I will be looking at the historical method and work of Michel Foucault.¹¹

The shortcomings of these labels must be highlighted from the start. Marxist and Postmodern are highly loaded terms, easily used in a tone of mocking chastisement.¹² Furthermore, and in common with Cambridge School, they do not serve to easily demarcate an area or type of study, referring to a wide variety of practices and political viewpoints. However, they do suggest a general approach to history, and are at least useful for this. I use the terms knowingly, and after considering their shortcomings, as still the best label for the work I am interested in.

Alongside this discussion of different radical approaches to history, I want to briefly look at one historical subject in international law; the work of Hugo Grotius. Specifically, I am interested in how the history of Grotius can be told in several different ways, each true to their own standards, each satisfying the most basic conditions of historical practice. However, that a variety exists tells us something about the practice of history in international law, and what it is for. In Hersch Lauterpacht's classic text, 'The Grotian Tradition in International Law',¹³ he describes a pragmatic tradition of international law scholarship which draws its origin from Hugo Grotius. In the work of Richard Tuck, we find a very different Grotius, one who is writing to justify the imperial practices of the Dutch

⁹ My starting point for Hobsbawm's discussion of the practice of history is Eric Hobsbawm, *On History* (Abacus: London, 1998) I am aware of alternative statements of Marxist methodology, but have chosen to focus on Hobsbawm's for purposes of space and clarity. Particularly notable is E. P. Thompson *Poverty of Theory and Other Essays* (Merlin Press: London, 1978)

¹⁰ Skinner has published a variety of works on historical method, as a starting point see Quentin Skinner, *Visions of Politics Volume One: Regarding Method* (Cambridge University Press, 2002)

¹¹ Foucault's reflections on methodology are dispersed throughout his works, but a good place to start is Michel Foucault, 'Questions of Method' in *Power: Essential Works of Foucault 1954 – 1984 volume 3* (James D. Faubion ed., Penguin: London, 2002) at 223 and Paul Veyne, 'Foucault Revolutionises History' in *Foucault and his Interlocutors* (Arnold I. Davidson ed., University of Chicago Press, 1997) at 146

¹² For example, Terry Eagleton uses the term postmodern critically in *The Illusions of Postmodernism* (Blackwell: Oxford, 1996), and with scorn in his earlier work 'Capitalism, Modernism and Postmodernism', *New Left Review* (1985) at 152. Marxism and Marx are given similar treatment by a variety of postmodernists; particularly relevant are Foucault's comments, dealt with later, in various interviews, lectures and books. Postmodern may be regarded as redundant following Sokal's Hoax, and Marxism rejected as the failed ideology of the Cold War.

¹³ Hersch Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yearbook of International Law* (1946) 1-53. This is discussed under The Historical Turn in International Law, below.

Provinces.¹⁴ In Benjamin Straumann's work we find a third Grotius, one who is deeply involved in the Roman philosophical arguments which fill his work, and from which his originality is drawn.¹⁵ This variety of interpretations is not explored to set up which is 'better' history, or which is more or less true, but simply to demonstrate the different aims and intentions which produce different histories.

In conclusion I argue that history can be used as a radical tool. Indeed, history used to demonstrate the contingency of current arrangements, 'history that *might have gone another way*',¹⁶ is a radical revisiting of the study of international law. By doing this I want to open up new possibilities for considering political action in international law. The classic history sustains a system of international law which continues to allow global inequality and catastrophic poverty.¹⁷ A radical history, under whatever methodological banner we might choose, can and should demonstrate the contingency of this present understanding of international law.

2. The Historical Turn in International Law

In the last few years there have been a number of attempts to sum up the 'state of the field' of the history of international law. George Galindo has argued that '*The Gentle Civilizer of Nations* represents a historiographical turn in the work of Koskeniemi and paves the way for the same in the field of international law.'¹⁸ Koskeniemi himself has offered an overview of current historical study of international law,¹⁹ particularly the work of German scholars and the Max Planck Institute's works in the history of international law in Germany.²⁰ Koskeniemi offers some explanations for the increased interest in the history

¹⁴ Richard Tuck, *The Rights of War and Peace* (Oxford University Press, 1999) This is discussed under Contextualism, below.

¹⁵ Straumann's main work is currently only available in German, *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht*. A selection of papers drawn from this work are available in English, see in particular Straumann, 'Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius' Early Works on Natural Law', 27 *Law and History Review* (2009) 55-85. For a general introduction to Straumann's work on Grotius see Randall Lesaffer's review essay 'On Roman Ethics, Rhetoric and Law in Grotius', 10 *Journal of the History of International Law* (2008) 343-347. This work of Straumann is discussed in the Conclusion, below.

¹⁶ Martti Koskeniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001) at 5 (italics in original)

¹⁷ See Susan Marks, 'Human Rights and the Bottom Billion' *supra* note 7 and Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007)

¹⁸ George Galindo, 'Martti Koskeniemi and the Historiographical Turn in International Law', 16 *The European Journal of International Law* (2005) 539-559

¹⁹ Martti Koskeniemi, 'The History of International Law Today', *Rechtsgeschichte* (2004). This article develops, along with 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011) 152-176, many concerns about the practice of history of international law first raised in the introduction to *The Gentle Civilizer of Nations*

²⁰ An overview and electronic copies of much of the research group's work can be found at <http://www.rg.mpg.de/en/forschung/voelkerrechtsgeschichte/> It should also be added that the Eric Castrén Institute in Helsinki has, under Koskeniemi, produced a huge amount of historical research. For a more detailed overview of the study of the history of international law, again with the focus firmly in Germany, see

of the discipline, particularly a ‘sense of increased political possibility connected with the end of the Cold War’²¹ and the new opportunities connected with a postmodern outlook which thinks against the old grand narratives. He also outlines three areas of history of international law which need developing; the intellectual history of international law, the focus on the west and its “Other”, and an historical sociology of international law. In intellectual history, Koskenniemi favours a contextualist outlook, drawing on the methodological work of the Cambridge school.²² The relationship of the West with the non-European world in the history of international law is also under researched, although there is important work from critical and postcolonial scholars, as well as other studies by third world lawyers and some significant treatment of colonialism.²³ The third and most open category of historical sociology includes the need to study the interplay of different types of international society and normative systems, as well as the connection between international law and other social developments, such as economics. Finally, sociology could also include the history of international law as a professional practice, again something Koskenniemi himself has engaged with.

Also written in the style of addressing the state of the field, and most useful here as a starting point, is Matt Craven’s introduction to the edited collection *Time, History and International Law*.²⁴ Craven splits the histories of international law in to three groups; histories *of* international law, histories *within* international law and international law *in* history. The history of international law is the grand history which Oppenheim hoped for. Instances of this sort exist, such as Nussbaum’s *A Concise History of the Law of Nations*²⁵ or Grewe’s *Epochs*²⁶ but are rarely and perhaps even ill advisedly undertaken. The problem of telling the history of international law is that a singular, unified history requires a grand narrative which ‘somehow captures ‘international law’ on a broad canvass as a singular idea or set of ideas tied together in some coherent manner.’²⁷ This approach then demands a set of assumptions about what constitutes international law, and who is involved in making its history. This shuts out any opposing voices, and ultimately denies the possibility of any other history.

One type of history of international law written in this style is Lauterpacht’s. Writing in the immediate aftermath of the Second World War, Lauterpacht uses Grotius’ work as the basis of a call to return to ‘principle ... against makeshifts’.²⁸ A Grotian international lawyer is one

Ingo Hueck, ‘The Discipline of the History of International Law – New Trends and Methods on the History of International Law’ 3 *Journal of the History of International Law* (2001) 194-217

²¹ Koskenniemi, ‘The History of International Law’, *supra* note 19 at 5

²² Which I deal with in some detail below.

²³ Koskenniemi himself has recently reiterated the need to write a non Euro-centric history of international law in Koskenniemi, ‘Dealing with Eurocentrism’, *supra* note 19

²⁴ Craven, ‘Introduction: International Law and Its Histories’, *supra* note 4

²⁵ Arthur Nussbaum, *A Concise History of the Law of Nations* (MacMillan: New York, 1947)

²⁶ Grewe, *The Epochs of International Law*, *supra* note 3

²⁷ Craven, ‘Introduction: International Law and Its Histories’, *supra* note 4

²⁸ Lauterpacht, ‘The Grotian Tradition’, *supra* note 13, at 1

‘who has found a workable synthesis of natural law and state practice’.²⁹ This is a pragmatic approach, which seeks to construct a functioning system of positive law while not being afraid to call on natural law to fill the gaps. On this basis, Grotius was not a Grotian, in Lauterpacht’s terms, as he failed to provide ‘a workable synthesis of natural law and state practice’.³⁰ While Lauterpacht is dismissive of Grotius’ method, which has ‘no redeeming feature’,³¹ he does approve of Grotius’ aim, the humanisation of the conduct of war. He then sets out to redescribe the content of Grotius’ work according to the need for it in contemporary international society, focusing on Grotius’ work on sources, practice, and the goals of international law. Lauterpacht’s is a history of law’s struggle against politics.

Iain Scobbie tells us that Grotius is used as ‘essentially a conceit upon which Lauterpacht hangs his own argument’.³² Lauterpacht was himself writing in the aftermath of the Second World War, and clearly was expressing his own concerns for the humanisation of war and the need to secure peace. While this is true, I want to highlight two aspects of Lauterpacht’s use of Grotius which I think demonstrate a problematic and unsatisfactory use of history, his argument for Grotius’ importance, and his discussion of ‘reason of state’. Lauterpacht accepts Grotius’ ‘pre-eminence’ unquestioningly, despite all the shortcomings of his work, for two simple reasons. Firstly, everyone else generally accepts the central importance of Grotius,³³ and secondly, his work is so often referred to by both his successors, and those making arguments in international law.³⁴ In a central section of Lauterpacht’s article he blames the ‘unprecedented ascendancy of the ideas of ‘reason of state’³⁵ for the horrors of war in the first half of the Twentieth Century. Lauterpacht, as an international lawyer writing in 1946 wants international law to exist as a final end to such arguments, as a limit on absolute state sovereignty. He roots this in Grotius, and finds it to be Grotius’ argument, and it does have to be found. Grotius never once mentions ‘reason of state’, as it is ‘so obvious and so fundamental that ... he regards it as below the dignity of his work to engage with ... the subject’. Grotius also makes no mention of Machiavelli, his ‘disapproval is one of silence’.³⁶ From these silences, Lauterpacht finds an absolute rejection of ‘reason of state’ thinking, and a strong and principled opposition to Machiavelli and his followers.

I do not think this is acceptable as a treatment of an historical text. The work of Grotius exists in a particular time, for a particular purpose. Lauterpacht’s arguments are strong and noble, but the question must be asked; why are they hidden behind Grotius? The answer must be that by adopting a starting point which everyone agrees on, that Grotius is the

²⁹ *Ibid.*, at 5

³⁰ *Ibid.*

³¹ *Ibid.*, at 4

³² Iain Scobbie, ‘The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function’, 2 *European Journal of International Law* (1997) at 266

³³ Lauterpacht, ‘The Grotian Tradition’, *supra* note 13, at 19

³⁴ *Ibid.*, at 15

³⁵ *Ibid.*, at 33

³⁶ *Ibid.*, at 30

Father of International Law, then by putting his arguments in Grotius' mouth they are more persuasive. This is true, but this is history in the rhetorical mode, used to tell a persuasive story, it hides a great deal about what international law does and has done. Lauterpacht never acknowledges that it is even possible to tell a different, but still accurate, history. This history shuts down debate and excludes politics. Any radical history must acknowledge that *all* history is ideological, and oppose Lauterpacht's claim of absolute truth.

The point I am trying to make is similar to that which Susan Marks makes when discussing the 'falseness' of false contingency.³⁷ Her point is that things are false not because they do not match reality, but because of what they exclude. Lauterpacht's history is 'generally true *so far as it goes*, but false as to what it excludes'.³⁸ The discussion of Grotius' contribution to international law, for example, stops at the positive. It excludes alternative narratives which highlight, for example, Grotius' deep engagement with Dutch colonialism. This is not to say that Lauterpacht did not know this, but he acted as if he did not. He acted as if no other narrative were possible. Lauterpacht was seeking to bolster a form of international law to which he was fully committed. This is the political position which directed his choice of method when he came to write history.

In Craven's account, there are histories of international law written primarily in opposition to the possibility of a unified history. These are the histories Koskenniemi described as made possible by a postmodern rejection of grand narratives. Craven draws attention to the work of Nathaniel Berman as an example, and the inspiration that he derives from the historical work of Foucault. *The Gentle Civilizer of Nations* also fits in to the position of being chiefly written *against* a traditional unified form of history, rather than necessarily for an alternative. This Koskenniemi sets out in his introduction, where he declares his 'non-rigorous' and 'experimental' method, mixing biographical and contextual history to present a narrative of the profession and its 'sensibility'.³⁹ As Craven points out, there are tensions within Koskenniemi's method, which he fails to resolve.⁴⁰ Koskenniemi does not succeed in writing either a non Eurocentric history of international law, or one which does away with the story of great men and their deeds. His history remains essentially 'Whiggish', in spite of his attempts to avoid this with talk of the 'sensibilities' of international lawyers. These criticisms, and others, were developed more fully by Galindo.

In an excellent, critical review of *The Gentle Civilizer of Nations*,⁴¹ Galindo argues that while the book is an important and brilliant contribution, it leaves many questions in need of an answer. Most of these questions concern Koskenniemi's historiography, or lack of it. Firstly, the book is supposed to answer some of the questions left by *From Apology to Utopia*, in particular the criticism that understanding law as a set of argumentative practices does not

³⁷ Susan Marks, 'False Contingency', 62(1) *Current Legal Problems* (2009) at 15-19

³⁸ *Ibid.*, at 17

³⁹ Koskenniemi, *Gentle Civilizer*, *supra* note 16, at 1-10

⁴⁰ Craven, 'Introduction: International Law and Its Histories', *supra* note 4, at 12-13

⁴¹ Galindo, 'The Historiographical Turn', *supra* note 18

tell us enough about what international lawyers do. The main objective of *The Gentle Civilizer of Nations* is to 'understand why international lawyers take certain positions and support certain arguments at different times and places'.⁴² The need for history in this task is that only 'investigation of international law as it was practised in the past can heighten the self-understanding of international lawyers today'.⁴³ Koskenniemi then consciously unites his theoretical and historical projects as directly related, an important step in bringing together historical and theoretical work more generally.

Koskenniemi certainly succeeded improving the understanding of the development of professional international law. The book has been hugely inspirational to many, a number in which I would humbly include myself. However, his work lacks a clear engagement or discussion of the practice of history. He describes his work as a history of ideas, but apart from some references to the historical concerns of Foucault, does not elaborate. As Galindo notes, Koskenniemi has referred positively to the Cambridge school elsewhere, and I disagree with Galindo's dismissal of this work as having nothing in common with Foucault. Certainly some of the familiar criticisms of Foucault as a historian may cross over in to the work of Koskenniemi, such as the disappearance of opposing continuities in the focus on discontinuities, but more crucial is this lack of open reflection on method. This is most apparent as a problem when Koskenniemi talks of spirit and sensibilities which unite his subject. The *esprit d'internationalité* of the international lawyers in this period is put forward as an *a priori* fact, and Koskenniemi does not go to any great lengths to demonstrate that it did not or could not have existed anywhere else.

Again the problem of the dialectic of necessity and contingency emerges. What in this narrative is necessary and what contingent? How could things have 'gone another way', and what would it have looked like? Ultimately, *why* did events not progress in that other way? This is the problem with not openly discussing and reflecting on method, and in not exploring why the history is written. *The Gentle Civilizer of Nations* says something important about the missed potential for a better world through international law, but it does not tell us why international law failed.

Finally, Koskenniemi describes his as a 'narrative' history, again without reflection on what this might mean. Two obvious engagements with this issue spring to mind from works on historical method; Skinner's work arguing against 'the Cult of the Fact'⁴⁴ and Hayden White's work.⁴⁵ I will develop both of these positions later. Ultimately, all of these criticisms concern Koskenniemi's lack of discussion of historiography as a major shortcoming in an otherwise brilliant work. Galindo, by questioning Koskenniemi's historiography, raises a

⁴² *Ibid.*, at 541

⁴³ *Ibid.*

⁴⁴ Quentin Skinner, 'The Cult of the Fact', in *Visions of Politics*, *supra* note 10, at 8-26

⁴⁵ Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (John Hopkins University Press: Baltimore, 1987) in particular Chapter 2 at 26. See more generally *Metahistory* (John Hopkins University Press: Baltimore, 1973)

similar issue to that which I address here: that a proper and open consideration of the methods of history must be engaged in to properly understand and even achieve the political possibilities of historical work. Koskenniemi does declare that his history is written to allow for action in contemporary international law, and that history is in this sense a political act.⁴⁶ However, the subtle way he describes his methodology, and the absence of a clear historiography, means that we are still left with a question of what this history is for, and how exactly it might be different.

It is not possible to write a history of everything and everyone who might be included in the history of international law. The presentation of a unified history is always partial, and the critical historical responses to this tradition have highlighted many alternative versions of the same sort of history. History *within* international law, as an approach, involves the focus on the history of an aspect of international law, such as an idea, a theme or an institution. This is by far the most common form of history of international law. This sort of history starts from the simple observation that all lawyers are, to some extent, engaged in history,⁴⁷ and can include such diverse studies of the same object as Neff's *War and the Law of Nations: A General History*⁴⁸ or Kochi's *The Other's War*.⁴⁹ This sort of history has its own attendant shortcomings. Firstly, there is a risk of presuming that the object or idea under investigation has at all times remained the same. The meaning of concepts, such as territory or sovereignty, has changed over time. However, acknowledgement of this can lead to further difficulties, for what is the point of telling the history of sovereignty if the thing under consideration is not always the same? Alternatively, when telling a history of the evolution of a concept, the story quickly becomes yet another progress narrative and a lapse back in to a grand narrative dictated by a teleology of 'progress'.⁵⁰

Craven's third category, international law in history, is the history of international law as a social phenomenon, and its relation to others, such as politics, economics or sociology. International law is here seen as either taking a role within or against some other social force; international law as a *part of* politics, or as a corrective or restraint upon politics. An example of this sort of history is found in much of the critical history of international law and its role in imperialism. It is also present in a mainstream version, in the simplistic account of practice forming law, or in the many answers to the realist challenge passed down by Austin and Morgenthau.

It is in part as a solution to these various problems and shortcomings that I propose to draw greater attention to the methods of history. Hayden White first wrote about the political

⁴⁶ Koskenniemi, *Gentle Civilizer*, *supra* note 16 at 10

⁴⁷ Craven highlights the surprising places recognition of this can be found, giving examples from Ian Brownlie and David Kennedy. Craven, 'Introduction: International Law and Its Histories', *supra* note 4, at 6, footnote 40

⁴⁸ Stephen Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005)

⁴⁹ Tarik Kochi, *The Other's War: Recognition and the Violence of Ethics* (Birkbeck Law Press: Oxford, 2009)

⁵⁰ Such history was addressed decisively and in general by Karl Popper, *The Poverty of Historicism* (Routledge: London, 1957). Specifically in the area of international law, see Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Cambridge University Press, 2010)

potential of historical study in a 1966 article entitled 'The Burden of History'.⁵¹ In this work, White declared that 'we require a history that will educate us to discontinuity more than ever before; for discontinuity, disruption and chaos is our lot. [...] If human beings learn to see themselves as disconnected from the past ... they may come to realize what an enormous amount of freedom they enjoy'.⁵² The historian's role must be to 'participate positively in the liberation of the present from the burden of history'.⁵³ At this stage his approach is a little crude, but the political intention is plain to see.

In later work, studying what he came to call 'metahistory',⁵⁴ White stressed the contingency of different historical narratives, and the impossibility of one true account. Instead, he argued that many different and contradictory accounts could be equally true, and what mattered was the intention behind the history writing, or the mode it was written in. *Metahistory*⁵⁵ sets out a complex structuralist account of different forms of historical discourse, the detail of which is not important here. Instead it is the focus on the politics inherent in history writing, and the intention to make this visible, which I want to emphasise. In his other essential monograph, *The Content of the Form*,⁵⁶ White moves away from some of these structuralist limitations and the focus on 'tropes',⁵⁷ and instead discusses history as narrative, as a form more suited to literary criticism than scientific. History is written as narrative to make it comprehensible, but life is not lived according to a narrative. This imposition of an invented narrative on to past events hides the chaos and chance of lived reality, the 'meaninglessness which alone can goad the moral sense of living human beings to make their lives different for themselves and their children, which is to say, to endow their lives with a meaning for which they alone are fully responsible'.⁵⁸ White's politics may be a little too individualist for some tastes, but they are clear and presented openly. History writing is always a political act, and it is most useful for any radical political purpose if this is acknowledged and presented.

Are politics and method related? Yes, method is how we embody our politics. The political position I am putting forward here is very simple. International law is deeply involved in the ordering of the contemporary world. This is a world in which 'six million children under five years old die annually of malnutrition by causes that could be prevented by existing economic and technical resources'.⁵⁹ It is a world where 'the terrorism that shall be branded as the enemy of humanity [is not] the intellectual property system that allows hundreds of

⁵¹ Hayden White, 'The Burden of History', 5 *History and Theory* (1966) 111-134

⁵² *Ibid.*, at 134

⁵³ *Ibid.*, at 124

⁵⁴ The term is first used in 'The Politics of Contemporary Philosophy of History' 3 *Clio* (1973) 35-54, but is most associated with the book *Metahistory*, *supra* note 45

⁵⁵ White, *Metahistory*, *supra* note 45

⁵⁶ White, *The Content of the Form*, *supra* note 45

⁵⁷ Historical tropes were central to *Metahistory*, but the term appears only once in *The Content of the Form*

⁵⁸ Hayden White, *The Content of the Form*, *supra* note 45 at 72

⁵⁹ Martti Koskeniemi, 'What is International Law for?' in Malcolm Evans (ed), *International Law* (2nd edition, Oxford University Press, 2006) at 63

thousands of Africans to march into early death by sexually transmitted disease'.⁶⁰ These are the simple facts which are to be opposed. These are taken directly from Koskenniemi's work. These are the problems of contemporary reality that he opposes. Presumably, these are the political issues which drive his radical history. I do not claim that he does not have politics, or a method, but that they are at best obscure in his historical writing. In *From Apology to Utopia*, structural biases direct the otherwise indeterminate structure of legal arguments.⁶¹ These are unacknowledged in the operation of the law. By acknowledging and exposing them, Koskenniemi argues they can easily be undermined.⁶² This is the same work that a radical history does, and can contribute to. It is in revealing and undermining these biases and certainties that history is useful. This is the value of an open and clear method.

3. False Necessity and False Contingency

Before I begin to address the methods of history which I am interested in, I must address the issue of contingency specifically. I said I want to look at history which in some way demonstrates the contingency of the present. The idea of contingency in international law, and law in general, is familiar, and obviously prompts reference to the ideas of necessity and contingency, and their 'false' corollaries. These ideas and their importance were dealt with by Susan Marks in her important paper: 'False Contingency'.⁶³ Marks uses the idea of false contingency 'as a complement and corrective'⁶⁴ to false necessity. False necessity is most well known as a key idea in the thinking of Roberto Unger⁶⁵, and Marks elaborates this work excellently. The problem Marks identifies with this idea, whilst acknowledging its power and influence on herself and others, is that 'the idea appears to have taken root that to investigate "necessary factors" – limits, pressures, systemic constraints, and so on – is to commit yourself to determinism in the fatalistic sense.'⁶⁶

Marks article also concerns historical study. She begins with reference to the famous line from Marx that '[men] make their own history, but they do not make it just as they please in circumstances they choose for themselves; rather they make it in present circumstances, given and inherited'.⁶⁷ The idea of false necessity is in part an historical one. The claim that the present is *necessary*, that things have to be as they are and that historical development led inexorably to this situation, is what is to be criticised and undermined as *false*. However,

⁶⁰ Martti Koskenniemi, "'The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law', 65 *The Modern Law Review* (2002) 159-175 at 172

⁶¹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with new epilogue, Cambridge University Press, 2005) at 600-615

⁶² For an excellent discussion of *From Apology to Utopia* more generally, and structural bias in particular, see Jason Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project' 7 *German Law Journal* (2006) 1045-1088

⁶³ Marks, 'False Contingency', *supra* note 37

⁶⁴ *Ibid.*, at 11

⁶⁵ Roberto Unger, *False Necessity* (2nd edn., Verso: London, 2004)

⁶⁶ Marks, 'False Contingency', *supra* note 37, at 11

⁶⁷ Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte', in T Carver (ed), *Marx: Later Political Writings* (Cambridge University Press, 1996) at 32

this falsification of necessity should not, as Marks argues, lead to a situation where everything is seemingly possible in a world of chance and chaos. Everything may well be possible, but only certain things actually happen. The limits placed on the possibility of historical development must not be forgotten. There are various things which may be looked at that demonstrate false contingency, and the super-structures which Marx was interested in are a prominent one. Marks wants us to remember that while individuals do indeed make their own history, and that the present is contingent, the circumstances of making history are often determined. The point bears quotation in full:

I believe it is quite right to hammer the point that history is a social product, not given but made. For if it has been made, then it can be remade differently. [...] The worry I want to explore here, however, is that we may be undertaking this work in a way which causes us to neglect the equally important progressive point that possibilities are framed by circumstances. While current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures. In general terms what I wish to re-evoke is the idea that things can be, and quite frequently are, contingent without being random, accidental or arbitrary.

To do this Marks asks for a return to considering the determination of events. Rejecting both that things are inevitable, and that the range of outcomes is infinitely malleable, we are left with an historical exploration of what is possible. Marks calls her position 'anti-anti-Marxism',⁶⁸ that is it is not a defence of Marxism, but a resistance to rejections of Marxism. It is following this that I start with a consideration of the Marxist historical method, below.

There is an obvious absence from Marks' article; the work of Koskenniemi. As discussed above, Koskenniemi's historical work addresses exactly the issue of what to do after establishing the contingency of legal arguments. In particular, if *The Gentle Civilizer of Nations* is taken as a follow up to *From Apology to Utopia*, as Galindo suggests, then it is best read as an answer to exactly Marks' questions. *From Apology to Utopia* famously puts forward what is known as 'the indeterminacy thesis'. Koskenniemi, as much as anyone, is synonymous with highlighting the indeterminacy of international law. However he rejects, in terms similar to Marks', that this leads to 'an "anything goes" cynical scepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism'.⁶⁹ This is to misunderstand the purpose of deconstruction, and to view it as an end in itself. Deconstruction leads in Koskenniemi's work, as in many others, on to a reconstruction.⁷⁰

⁶⁸ Marks, 'False Contingency', *supra* note 37, at 21

⁶⁹ Martti Koskenniemi, 'Letter to the Editors of the Symposium' 93 *American Journal of International Law* (1999) 351-361

⁷⁰ For an excellent discussion of poststructuralism in international law, and particularly the idea of renewalism, see Akbar Rasulov, 'International Law and the Poststructuralist Challenge' 19 *Leiden Journal of International Law* (2006) 799-827

The reconstruction is the historical study, the demonstration of ‘a history that might have gone another way’.⁷¹

Koskenniemi’s work in this area does not make Marks’ article unnecessary or flawed however. This is because Koskenniemi’s history does not fulfil Marks’ project, if it even seriously engages with it. While Koskenniemi states that his historical study seeks to ‘infuse the study of international law with a sense of historical motion and political, even personal, struggle’,⁷² as discussed earlier the methodology, or lack of one, leaves his study politically vague and uncommitted. By not setting out his own political struggle, and how he has engaged in it, Koskenniemi does not allow us to decide if we want to join him. There is no opportunity to judge the value of his history, because we don’t know what he is struggling against, or how. The necessary factors are absent; the sense of “anything goes” lingers on.

Paavo Kotiaho has described this as the ‘contradiction between the appearance and essence of Koskenniemi’s work’.⁷³ Koskenniemi’s work appears as a challenge to the liberal international legal system; but the culture of formalism ‘is still embedded in the traditional structure of international legal argumentation ... within the same liberal theory of politics’.⁷⁴ This supposedly empty form of law is in fact ‘complicit in the perpetuation of the current status quo.’⁷⁵ Thus the essence of Koskenniemi’s work, and in particular the historical project, remains in support of the status quo, since the culture of formalism ignores any necessary factors in the practice of legal argumentation. As Akbar Rasulov has compellingly put it;

‘international legal argument almost never works like a coin ... it acts more like buttered toast: released in a free fall, it may flip over several times, but it will almost always land the same side down. (And the question must then become: why?) Any suggestion that ‘that is just what toasts do’ would give toasts “way too much credit”’.⁷⁶

There are necessary conditions which dictate certain outcomes, even where others are or were possible. The history of international law must address this, to address the possibility of radical change.

To finish with Koskenniemi then, whom I have attempted to use as an interlocutor, not as a target, a few points need to be made. Koskenniemi, under what he calls ‘instrumentalism’,

⁷¹ Koskenniemi, *Gentle Civilizer*, *supra* note 16, at 5 (italics omitted)

⁷² *Ibid.*, at 2

⁷³ Paavo Kotiaho, ‘A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture’, 13, *German Law Journal* (2012) 483-496 at 485

⁷⁴ *Ibid.*, at 494

⁷⁵ *Ibid.*

⁷⁶ Akbar Rasulov, ‘Review: From Apology to Utopia: The Structure of Legal Argument’ 16 *Law and Politics Book Review* (2006) at 590 (Quoting Duncan Kennedy, ‘A Semiotics of Critique’ 22 *Cardozo Law Review* (2001) at 1185). Rasulov also employs the same metaphor excellently to address poststructuralism and international law more generally in Akbar Rasulov, ‘International Law and the Poststructuralist Challenge’, *supra* note 60, at 806

demonstrates a full and subtle awareness of the structural bias of international law. The content of the rules is indeterminate, but the focus of them is biased. As he puts it; 'it is never Algeria that will intervene in France, or Finland in Chechnya'.⁷⁷ There is a reality outside the formalism of international law which dictates its operation. These are the necessary conditions which limit international law. The point of formalism, as Jason Beckett has put it, is *empathy*.⁷⁸ It allows an appreciation for others. Under such conditions 'the inner anxiety of the Prince is less a problem to resolve than an objective to achieve'.⁷⁹ It was with this aim that Koskenniemi embarked on history. This is Koskenniemi's radicalism. I now turn to the methods of history to suggest how this radicalism could be joined and built upon by others.

4. Three Methods of Historical Research

4.1 Marxism

To delimit the method of historical research generally considered 'Marxist' is a difficult task. Marx's *The Eighteenth Brumaire of Louis Bonaparte*⁸⁰ is a fantastic piece of historical writing, and an excellent exemplar of the method of research. In this text Marx writes of how Louis Bonaparte's *coup d'état* demonstrated that tragedy repeats as farce, how historical processes are at once open and determined, and how unexpected outcomes may be explained through an analysis of conditions. In this one text we find a complex demonstration of dialectical materialist history, which never the less remains hugely readable, comprehensible and entertaining. This text is a demonstration of Marx's own method when writing history. To understand how this same work may be done today I turn to Eric Hobsbawm's work *On History*,⁸¹ and in particular the chapters which address the Marxist approach to history.

The role of Marx as an inspiration is a clear unifying element of different research which we might label as Marxist, but the existence of one label does not demonstrate one approach. The Marxist approach can be more or less nuanced. Hobsbawm calls the un-nuanced Marxism 'vulgar-Marxism'⁸². He gives seven main elements of vulgar-Marxism, worth quoting as a guide of what *not* to do;

- (1) The 'economic interpretation of history', that is the belief that 'the economic factor is the fundamental factor on which the others are dependent' (to use R. Stammler's phrase); and more specifically, on which phenomena hitherto not

⁷⁷ Koskenniemi, "'The Lady Doth Protest Too Much'", *supra* note 60, at 172

⁷⁸ Beckett, 'Rebel Without a Cause?', *supra* note 62, at 1070-2

⁷⁹ Koskenniemi, "'The Lady Doth Protest Too Much'", *supra* note 60, at 175

⁸⁰ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', *supra* note 67

⁸¹ Hobsbawm, *On History*, *supra* note 9

⁸² Hobsbawm, 'What do Historians owe to Karl Marx?', in *ibid.*, at 192

regarded as having much connection with economic matters, depended. To this extent it overlapped with

- (2) The model of 'basis and superstructure' (used most widely to explain the history of ideas). In spite of Marx and Engels' own warnings and the sophisticated observation of some early Marxists such as Labriola, this model of dominance and dependence between the 'economic base' and the 'superstructure' mediated at most by
- (3) 'Class interest and the class struggle'. One has the impression that a number of vulgar-Marxist historians did not read much beyond the first page of the Communist Manifesto, and the phrase that 'the [written] history of all hitherto existing societies is the history of class struggles'.
- (4) 'Historical laws and historical inevitability'. It was believed, correctly, that Marx insisted on a systematic and necessary development of human society in history, from which the contingent was largely excluded, at all events at the level of generalisation about long-term movements. Hence the constant preoccupation of early Marxist writers on history with such problems as the role of the individual or of accident in history. On the other hand this could be, and largely was, interpreted as a rigid and imposed regularity, for example in the succession of socio-economic formations, or even a mechanical determinism which sometimes came close to suggesting that there were no alternatives in history.
- (5) Specific subjects of historical investigations derived from Marx's own interests, for instance in the history of capitalist development and industrialisation, but also sometimes from more or less casual remarks.
- (6) Specific subjects of investigation derived not so much from Marx as from the interest of the movements associated with his theory, for example in the agitations of the oppressed classes (peasants, workers), or in revolutions.
- (7) Various observation about the nature and limits of historiography, derived mainly from no. 2 and serving to explain the motives and methods of historians who claimed to be nothing but impartial searchers after truth, and prided themselves on establishing simply *wie es eigentlich gewesen* [what actually happened].⁸³

These elements of vulgar-Marxist history had their uses. Hobsbawm allows that such simplified approaches to history attracted more attention because they were instantly utilisable to re-examine history. Furthermore, the desire to address pressing and obvious current issues directed interest to some elements of Marxism instead of others. However, Marxist history must be more than simply a general emphasis on economic and social factors. Elements of Marx's own work can be set aside, such as the teleology of his history, the specific hierarchy of levels and modes of interaction in the theory of basis and superstructure, and his thoughts on Oriental societies.

⁸³ *Ibid.*, at 192-3

So what should a Marxist approach to history consist of, after avoiding the vulgarity already discussed? Firstly, Marxism is an opposition to empiricism, which is the attempt to assimilate the study of the social sciences to the natural sciences. Societies are 'systems of relations between human beings, of which the relations entered into for the purpose of production and reproduction are primary for Marx'.⁸⁴ Marxism is about analysing the structure and functioning of these systems as self maintaining entities, both in their internal relationships and their relationships with the outside environment, both human and non-human. In this study Marxism insists on a hierarchy of social phenomena, base and superstructure, and on the existence of internal tensions, contradictions. The final point is that social systems must be viewed historically, and analysis must be aimed at the internal dynamic of change in social structure. While Marx's specific teleology may be rejected, the idea of history, or society, progressing cannot. What is needed, what must be constructed, and what must be used is a dialectical model, that is a model which accounts for 'the simultaneous existence of stabilising and disruptive elements'.⁸⁵

Marx himself wrote very little history, or what might be easily recognised as history. His most obviously historical works address current political situations with some historical consideration, as seen in *The Eighteenth Brumaire of Louis Bonaparte*⁸⁶ or *Class Struggles in France*.⁸⁷ The core of this is the materialist conception of history, and this idea, in Marx's own writing, is clearly explored in the *The German Ideology*⁸⁸. It can be reduced to a single sentence; 'it is not consciousness that determines life, but life that determines consciousness.'⁸⁹ This is Marx's own Copernican revolution in philosophy, and as important to his thinking as any categorical imperative.

Marx elaborates on the materialist conception of history in the same text;

This conception of history thus relies on expounding the real process of production – starting from the material production of life itself – and comprehending the form of intercourse connected with and created by this mode of production, i.e., civil society in its various stages, as the basis of all history; describing it in its action as the state, and also explaining how all the different theoretical products and forms of consciousness, religion, philosophy, morality, etc. etc., arise from it.⁹⁰

Hobsbawm stresses that process of production is not simply the material production of life, but 'the complex set of mutually dependent relations among nature, work, social labour and

⁸⁴ *Ibid.*, at 196

⁸⁵ *Ibid.*, at 202

⁸⁶ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', *supra* note 67

⁸⁷ Karl Marx, 'Class Struggles in France', in Karl Marx, *Political Writings Volume Two: Surveys From Exile* (David Fernbach ed., Penguin: London, 1973) 35-143

⁸⁸ Karl Marx and Friedrich Engels, 'The German Ideology' in *Collected Works of Karl Marx and Friedrich Engels Volume 5* (International Publishers: London, 1976)

⁸⁹ Hobsbawm giving his own translation from *The German Ideology*. Hobsbawm, 'Marx and History', in *On History*, *supra* note 9, at 211. His reference is to page 24 of *The German Ideology*

⁹⁰ Marx and Engels, 'The German Ideology', *supra* note 75, at 53

social organisation'.⁹¹ Furthermore production is from both hand and head. This is the programme of research Marx set down, and the programme followed by Marxist history.

So, crudely, Marxism in history is a decision that '[a]nalysis of any society, at any moment of historical development, must begin with analysis of its mode of production'.⁹² This is a radical approach to history, prioritising a particular determinative factor in human social development. Marx himself was interested in current political problems. When using historical methods, he started from contemporary society and worked backwards. History helped explain the present, and the key element was the mode of production, in all its many and complicated forms. It is this use of history, to help understand the present, and most importantly how to change it, that I call radical. To quote the famous aphorism; 'the philosophers have only *interpreted* the world in different ways; the point is to *change* it'.⁹³

When approaching the history of international law from a radical perspective, seeking to address fundamental issues, this focus on material elements challenges the image of law being created for the solution of purely political problems, out of humanitarian goodness, to fix problems suffered by all humanity. This is history with a conservative agenda, a history which reassures us that 'all is for the best, in this best of all possible worlds'.⁹⁴ As Hobsbawm, from his Marxist perspective, put it '[h]istory as inspiration and ideology has a built-in tendency to become self-justifying myth. [...] It is the business of historians to try and remove these blindfolds'.⁹⁵ Of course, it is actually only the business of *radical* historians to remove these blindfolds. The writing of different histories is a conflict, and there are plenty who happily write history as self-justifying myth.⁹⁶ Hobsbawm asserts the need to use history to understand the present as a first step towards political change. This is a radical aim, and it is an aim common to other approaches to history to which I now turn.

4.2 Contextualism

Contextualism is a general term for an approach to history which was pioneered by a group of historians of ideas at Cambridge University in the 1960s, taking inspiration from the works of Peter Laslett and Morrice Mendelbaum.⁹⁷ Laslett's edition of Robert Filmer's

⁹¹ Eric Wolf, *Europe and the People without History* (Berkeley, 1983) at 74

⁹² Hobsbawm, 'Marx and History', *supra* note 76 at 214

⁹³ Karl Marx, 'On Feuerbach' in Joseph O'Malley (ed) *Marx: Early Political Writings* (Cambridge University Press, 1994) at 118

⁹⁴ This famous paraphrasing of the lessons of Pangloss in Voltaire's *Candide* is used by Susan Marks, 'False Contingency' *supra* note 37 at 3

⁹⁵ Hobsbawm, 'What can History tell Us About the Present?', in *On History*, *supra* note 9, at 47

⁹⁶ Again, the work of Niall Ferguson seems the most appropriate example.

⁹⁷ For a useful discussion of the emergence of this school, see J. G. A. Pocock, 'Quentin Skinner: The History of Politics and the Politics of History' 10 *Common Knowledge* (2004) 532-550. Other sources of inspiration sometimes referred to include Wittgenstein and Isaiah Berlin. Thinkers associated with the Cambridge School who have written on aspects of international political thinking include Richard Tuck, James Tully, Anthony Pagden and David Armitage. There are others, and the impracticality of assembling a complete list further demonstrates that it is inappropriate to talk of a 'school' in any strict sense.

*Patriarcha*⁹⁸ in 1949 demonstrated that the work was written long before it was first published, written perhaps as early as 1630 and not published until 1679. His edition of Locke's *Two Treatises of Government*⁹⁹ discovered a similar time lapse, that Locke had most likely written the work in 1681, although it was published in 1690. These two discoveries undermined traditional interpretations of why the texts were written and how they were received. It also raised questions about what the publishers were trying to do with the text by issuing them at this later date. This raising of questions about what was intended in the writing of a text, and how it was received by its audience, started the investigation of the context of famous works of political thought. The approach, as with that in the previous section, begins with an exploration of what not to do.

In 1969 Quentin Skinner published an essay which quickly came to serve as a manifesto for this new approach; 'Meaning and Understanding in the History of Ideas'.¹⁰⁰ In this Skinner attacked, even ridiculed, a wide variety of received historical understanding of political thinking. His basic argument was that much of the activity termed the history of ideas 'suffered from a radical confusion between systematic theory (or "philosophy") and history'.¹⁰¹ Skinner then worked through a variety of what he called 'mythologies' which arise from this confusion, and the problems this creates. The two most prominent are anachronism, the attributing to authors of concepts which they could not have known, and prolepsis, treating the author as addressing problems about which he would not have known. The primary target of the article is 'the methodology dictated by the claim that the text itself should form the self-sufficient object of inquiry and understanding'.¹⁰² Scholars who adopt this position do so because the text contains "'timeless elements," in the form of "universal ideas," even a "dateless wisdom" with "universal application."'¹⁰³ This viewpoint, from which the historian is 'set'¹⁰⁴ in his approach to texts, produces mythologies.

The first and most persistent mythology is that an author will have produced a set of doctrines on each of the topics in his subject. This 'mythology of doctrines'¹⁰⁵ leads to the task of anyone working on the history of ideas being the discovery of the doctrines of the classic authors. This might mean that a few scattered remarks on a subject are brought together as a 'doctrine', or that some familiar terms may be read as part of a doctrine about which the author could not have known, such as reading Edward Coke as having a position

⁹⁸ Robert Filmer, *Patriarcha and Other Political Writings* (Peter Laslett ed., Oxford: Blackwell, 1949)

⁹⁹ John Locke, *Two Treatises of Government* (Peter Laslett ed., 2nd edn, Cambridge University Press, 1967)

¹⁰⁰ Originally published as Quentin Skinner, 'Meaning and Understanding in the History of Ideas' 8 *History and Theory* (1969) 3-53. The essay was revised and included in Skinner, *Visions of Politics*, *supra* note 10. My references are to the original publication.

¹⁰¹ J. G. A. Pocock, 'Quentin Skinner: The History of Politics and the Politics of History', *supra* note 82, at 537

¹⁰² Skinner, 'Meaning and Understanding', *supra* note 100 at 4

¹⁰³ *Ibid.*, at 4, references in the original omitted.

¹⁰⁴ Skinner borrows this idea from psychology, that an observer's mentality is set by past experiences to perceive things in a certain way. Skinner, 'Meaning and Understanding' *supra* note 100, at 6

¹⁰⁵ *Ibid.*, at 7

on judicial review some centuries before the idea existed.¹⁰⁶ Alternatively, the search for doctrines in the history of ideas becomes an exercise in tracing the emergence of a doctrine which was always somehow immanent. The doctrine was always there, waiting to be discovered, and research should be in to who discovered which parts. Skinner rightly points out that this approach assumes that ideas stand independent of agents; that the idea somehow existed without anyone there to think it.¹⁰⁷

The corollary to this mistake is to take the work of a classic author who fails to enunciate a clear doctrine. This leads to either their chastisement for this failure, such as Lauterpacht's paradoxical claim that Grotius was not a Grotian,¹⁰⁸ or more usually to supplying the author with the doctrine 'proper to their subject, but which they have unaccountably failed to discuss.'¹⁰⁹ Just one example of this absurdity is the criticising of Locke for not making clear his position on universal suffrage.¹¹⁰ Furthermore, the assumption that an author is contributing to the argument of a certain discourse, their writing is then judged as poorer for failing to take in to account some crucial element. This repeatedly leaves the question of whether any of these writers were intending, or could have intended, the undertaking which they are castigated for failing to undertake.

The second mythology is 'the mythology of coherence'.¹¹¹ This is the belief that where a writer's position on a perceived essential doctrine is unclear, it is the task of the historian to provide the missing coherence. At its most basic, this work rules out the possibility of authors simply changing their minds, or making mistakes, and instead seeks some unifying first principle that the author held. Skinner concludes that 'history thus written becomes a history not of ideas at all, but of abstractions: a history of thoughts which no one ever actually succeeded in thinking, at a level of coherence which no one ever actually attained.'¹¹² This leads to two practices labelled pejoratively as 'metaphysical'.¹¹³ The first is to discount elements of the author's own work which do not fit in to the idea they were supposedly writing about, such as ignoring the early work of Locke on government as it contradicts the later work and is not addressing the 'liberal' political views Locke is supposed to have held.¹¹⁴ The second 'metaphysical belief' is not to exclude contradiction, but to forcibly include it. Contradictions in a body of work cannot be contradictions, and the historian's role is to explain how a perceived contradiction is in fact part of the coherent

¹⁰⁶ This is a surprisingly persistent reading of Bonham's Case. See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge University Press, 1957) Chapter 11 for a powerful treatment of this absurdity.

¹⁰⁷ Skinner, 'Meaning and Understanding' *supra* note 100, at 11

¹⁰⁸ Lauterpacht, 'The Grotian Tradition', *supra* note 13, at 5

¹⁰⁹ *Ibid.*, at 13

¹¹⁰ Skinner's reference is Richard I. Aaron, *John Locke*, (2nd edn., Oxford University Press, 1955) at 284-5

¹¹¹ Skinner, 'Meaning and Understanding', *supra* note 100, at 16

¹¹² *Ibid.*, at 18

¹¹³ *Ibid.*

¹¹⁴ Skinner's reference is to M. Seliger, *The Liberal Politics of John Locke* (Allen & Unwin: London, 1968) but there are several contemporary examples, such as Matthew Kramer's dismissal of Locke's colonial involvement in Matthew Kramer, *John Locke and the origins of private property : philosophical explorations of individualism, community, and equality* (Cambridge University Press, 1997)

whole. Therefore an earlier text is made to submit to analysis in line with later work, or the ideas present in the earlier work are held to continue to exist in the mature text.

These mythologies continue in more subtle ways; for example in the continued fascination with setting out lineages from one thinker to another, leading to the ultimate explanation of a theory. This is the reading of, in Skinner's example, Machiavelli as the father of modern political thought, or as in the example of Lauterpacht, Grotius as the father of international law. This may be true as a statement of an author's historical significance, but it contributes nothing to understanding the text itself. Worse, it leads to the reading of the text looking for the signs of anticipating the next generation, and the sowing of the seeds for the final outcome. This is again the reading of historical texts for what they say about the present, and as contributions in the construction of a necessary present. This is apologetic history. Ultimately, the reception of a work at any time, and any renewal of interest, raises the question again of why the work is being read, and how it is being understood.

Skinner's solution is a modification of the approach of reading the text in its context. The contextual approach is not free of problems itself. While clearly holding advantages over this study of the history of ideas for contributions to timeless and universal debates, a narrow insistence on reading a text in its context has its own problems. Skinner argues that this practice rests on 'a fundamental mistake about the nature of the relations between action and circumstance.'¹¹⁵ Put briefly, the problem is that an insistence on the explanation of actions is grounded exclusively in the conditions of the action. This rules out many considerations which may be useful in understanding what an author was trying to do. Intention to do something is part of causation and prior to an act, but intention *in* doing something is not, it is concurrent with the action and cannot be a cause. A study purely of the context which caused an action misses this out. Secondly, looking only at the cause of an action misses the way a text was understood. This is the difference between the meaning which an author puts in to a text, and the understanding with which it is received. The reception of a text must be taken in to account to gain a full appreciation of it.

Skinner's method for the history of ideas is that to know what an author was doing we must know what he intended to do and what he was understood as doing. His intentions can be, and must be, informed by the present historical context, but we must also take account of how the text was understood, and also what the author themselves thought they were doing. The context does not determine what is said; rather it is the framework for understanding what is said and what it might have been possible to say in the given context. The radical intention of this method is then made clear in Skinner's conclusion;

[I]t has I think become clear that any attempt to justify the study of the subject in terms of the "perennial problems" and "universal truths" to be learned from the classic texts must amount to the purchase of justification at the expense of making

¹¹⁵ Skinner, 'Meaning and Understanding', *supra* note 100, at 42

the subject itself foolishly and needlessly naïve. Any statement, as I have sought to show, is inescapably the embodiment of a particular intention, on a particular occasion, addressed to the solution of a particular problem, and thus specific to its situation in a way that it can only be naïve to try to transcend. [...] [T]here simply are no perennial problems in philosophy: there are only individual answers to individual questions, with as many different answers as there are questions, and as many different questions as there are questioners.¹¹⁶

This absolute focus on contingency as an attack on the majority of work done in studying the history of ideas does not lead to a desperate conclusion however. This contingency does not render the study purely academic and ultimately impossible, although it may seem to. Instead, by discovering for example what Locke's questions were, and what his answers were for himself, and how he was received, it should be possible to see how different his society was from ours. Locke should not be read to find what Jeremy Waldron has slightly foolishly called 'as well-worked-out a theory of basic equality as we have in the canon of political philosophy'.¹¹⁷ Locke should be read to discover what Locke meant by equality, and what he was trying to do. This way we can be free to think about what we might desire by the term equality, or whether we desire it at all.¹¹⁸ There exists the possibility to think again unburdened by the 'great texts', since they have been put in their proper place.

The historian of this school most often referred to by international lawyers is Richard Tuck. *The Rights of War and Peace*¹¹⁹ is an engagement with the history of international law by a historian. It prioritises the analysis of texts, as discursive acts, in their context. I will also pay particular attention to Tuck's version of Grotius, as the second example of a history. Firstly, I want to look at this work as an example of contextualist history.

Tuck argues that, read in their context, which is as they were intended and understood as speech acts, the famous liberal works from Grotius and Hobbes to Rousseau and Kant could not argue for a sovereign individual without also arguing for a sovereign state. The emergence of the sovereign individual is inextricably linked to the emergence of the sovereign state, both of which are made possible by new ways of thinking demanded by European expansion. As Weber put it, 'the historical origin of modern freedom has had certain unique preconditions which will never repeat themselves',¹²⁰ that is, the discovery and conquest of new worlds. The invention of freedom and democracy was made possible by this expansion. Without any new worlds to discover, their existence ceases to be possible

¹¹⁶ *Ibid.*, at 50

¹¹⁷ Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002) at 8

¹¹⁸ As Tzvetan Todorov argues, 'the prejudice of equality ... consists in identifying the other purely and simply with one's own "ego ideal" (or with oneself)'. Tzvetan Todorov, *The Conquest of America* (Harper Perennial, 1985) at 165

¹¹⁹ Tuck, *The Rights of War and Peace*, *supra* note 10

¹²⁰ Max Weber, *From Max Weber: Essays in Sociology* (H. H. Gerth and C. Wright Mills trans. and ed., Routledge: London, 1948) at 71-2

‘under the domination of highly developed capitalism’.¹²¹ This use of the context in which ideas of individual liberty were created leads to a questioning of the philosophical foundations upon which that liberty rests. Ultimately, in a world where the free sovereign state has largely ceased to exist, and the language of international affairs refers more often to the police action of the international community, the opportunity to even think about the free individual has passed.¹²² This creates space for a re-examining of the origins of these ideas and demands a new account of how people might live morally.

Tuck’s Grotius, as opposed to Lauterpacht’s, is a writer completely situated in his time.¹²³ Grotius is writing primarily about the private war being waged by the Dutch East Indies Company against the Portuguese crown. Grotius is also concerned with the war for independence between the United Dutch Provinces and Spain, and in *The Law of War and Peace* particularly, the on-going Thirty Years War. This history of Grotius emphasises his ‘strong version of an international right to punish, and to appropriate territory which was not being used properly by indigenous peoples’.¹²⁴ Tuck also situates Grotius as starting the modern liberal rights discourse, with ‘a far reaching account of what agents can do to one another, both in the state of nature and in the international arena’.¹²⁵ His successors then had to struggle with these ‘brutal implications’.¹²⁶

This contextual approach produces a fundamentally different story to the traditional history offered by Lauterpacht. Grotius is no longer the Father of an international law which seeks to limit the excesses of state behaviour, to humanise and ultimately end war. Instead he launches a rights discourse which is hugely permissive, and focused on punishment and appropriation. Tuck uses history to consciously attack these traditional narratives, and offer a radical alternative. This alternative Grotius not only gives us an argument that the origins of international law were explicitly imperial, but it also reveals the politics behind Lauterpacht’s writing. This Grotius would not be such a suitable candidate for Lauterpacht’s tradition, and Lauterpacht’s arguments do not fit quite so comfortably in this mouth. This critique provides the opportunity to challenge and oppose the politics behind a history such as Lauterpacht’s.

Anne Orford has very recently dismissed the radical potential of contextual history: ‘the self-imposed task of today’s contextualist historians is to think about concepts in their proper time and place – the task of international lawyers is to think about how concepts move

¹²¹ *Ibid.*

¹²² Or rather, it has become a circular argumentation and recitation of the same questions and answers. See for example Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2001)

¹²³ Richard Tuck, *The Rights of War and Peace*, *supra* note 10, Chapter 3

¹²⁴ *Ibid.*, at 108

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

across time and space.’¹²⁷ This discards too much that can be useful in the contextualist study of history. I also find it curious that Orford takes this position, since her own preferred method of description seems to fit in with the historical method I am discussing here. Orford has recently argued for ‘a turn to description as a mode of legal writing’.¹²⁸ Emerging from various attempts to understand the concept of the Responsibility to Protect, Orford, rather than seek ‘what the ... concept really meant at some deeper level’ instead approaches ‘the concept as an articulation of international authority’s ‘consciousness of itself’.¹²⁹ Or, to quote Foucault, Orford sets herself the task to ‘make visible precisely what is visible ... to make us see what we see’.¹³⁰

It strikes me that this is exactly the same task that a radical history undertakes. By removing grand narratives, the myths of doctrine and coherence, the contextual approach to history as set out by Skinner and practiced by Tuck, does help us see what we see. History can be freed to explore again what is contingent, and what is necessary, in contemporary social reality. Furthermore, it demonstrates why this is so, and opens space to ask what is to be done about it. Orford’s approach is largely inspired by Foucault. However, before turning my attention to him, I want to introduce a third Cambridge school historian who has most obviously engaged with Foucault’s work and attempted to adopt some techniques from his methodology.

James Tully first attempted a ‘Foucauldian’ history in *An Approach to Political Philosophy*¹³¹, and continued his reading of Foucault in *Strange Multiplicity*¹³² and most recently in the two volumes of *Public Philosophy in a New Key*.¹³³ Tully, drawing inspiration from Wittgenstein, Skinner and Foucault, prioritises practices of governance as an area for study, with the aim of disclosing ‘the historically contingent conditions of possibility of this historically singular set of practices of governance and of the range of characteristic problems and solutions to which it gives rise’.¹³⁴ This Tully calls ‘practical philosophy’, which is practical in two senses; firstly because it has a *use* and secondly because it *engages* with ‘concrete struggles’. The use of history in addressing these problems of governance is ‘as an object of comparison and contrast’, which shows ‘the practices and their forms of problematisation as a limited and contingent whole’. This historical and critical relationship with the present is then used to engage with ‘concrete struggles, negotiations and implementations of citizens who

¹²⁷ Anne Orford, ‘The past as law or history? The relevance of imperialism for modern international law’, IILJ Working Paper 2012/2 (History and Theory of International Law Series) at 2, finalized June 2012. Available online at: <http://www.iilj.org/publications/2012-2.Orford.asp>

¹²⁸ Anne Orford, ‘In Praise of Description’, 25 *Leiden Journal of International Law* (2012) 609-625

¹²⁹ *Ibid.*, at 612, quoting Foucault, *The Birth of Biopolitics*

¹³⁰ *Ibid.*, at 617, quoting Foucault, ‘La philosophie analytique de la politique’

¹³¹ James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press, 1993) Chapter 6

¹³² James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)

¹³³ James Tully, *Public Philosophy in a New Key* (Two volumes, Cambridge University Press, 2008 & 2009)

¹³⁴ *Ibid.*, Volume 1 at 16

experiment with modifying practices of governance on the ground'.¹³⁵ Foucault provides a synopsis of the approach which Tully favours;

The critical ontology of ourselves must be considered not, certainly, as a theory or a doctrine; rather it must be conceived as an attitude, an *ethos*, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits imposed on us and an experiment with the possibility of going beyond them.¹³⁶

In *An Approach to Political Philosophy*, Tully's Foucauldian approach begins with a discussion of the emergence of the new governance problems which arose out of European expansion in the 16th and 17th centuries.¹³⁷ This new mercantilist system is the system of governance which Tully argues Locke was writing in and about. Locke is revisited as writing about the problems of the juridical way of governing which was created in this period. In *Strange Multiplicity* Tully's focus is on struggles of cultural recognition, but in *Public Philosophy in a New Key* the focus is widened to recognition more generally. For Tully, the scope of recognition is co-extensive with governance. Recognition concerns the way individuals or groups are recognised as part of a governance system, by other members of that system. By then exploring a variety of historical issues attached to the recognition of people for governance, most obviously imperialism¹³⁸ and Indigenous peoples,¹³⁹ but also questions of cosmopolitanism,¹⁴⁰ constitutionalism¹⁴¹, mass communications¹⁴² and globalisation.¹⁴³ Tully questions and undermines the notion of unified public, and instead prioritises the struggle over recognition itself. Tully then uses a contextual history, while considering governance and power after Foucault, to try and increase the opportunity and space for struggle. In conclusion, he suggests a practical identity engaged with these free, open and pluralistic struggles, and that solidarity to this engagement is a source of peace in a conflicted society.¹⁴⁴

I disagree then with Orford's charge that contextual history is not an engagement with contemporary reality. I will discuss later more general criticisms of the contextual approach, but for now I think it is enough to say that while people can still ask what Grotius thinks about the invasion of Iraq,¹⁴⁵ the lessons of contextual history are yet to be learnt in

¹³⁵ *Ibid.*, at 16-17

¹³⁶ *Ibid.*, at 19, quoting Foucault 'What is Enlightenment?', in *The Politics of Truth*, at 33

¹³⁷ Tully, *An Approach to Political Philosophy*, *supra* note 131, Chapter 6

¹³⁸ Tully, *Public Philosophy in a New Key: Volume 2*, *supra* note 133, Part 2

¹³⁹ *Ibid.*, Part 3

¹⁴⁰ *Ibid.*, Chapter 1

¹⁴¹ *Ibid.*, Chapter 4

¹⁴² *Ibid.*, Chapter 6

¹⁴³ *Ibid.*, Part 1

¹⁴⁴ *Ibid.*, Conclusion

¹⁴⁵ Some examples include Ove Bring and Per Brostrom, 'The Iraq War and International Law: From Hugo Grotius to George W. Bush' in Jan Hallenberg and Håkan Karlsson ed., *The Iraq War: European Perspectives On Politics, Strategy And Operations* (Routledge, 2005) 118-141, Noel Cox 'International Law After Iraq - An Ethical

international legal scholarship. These lessons start with what not to do, but also provide positive instructions on what to do. They allow the construction of historically defensible arguments in the history of ideas. Skinner's politics may not be our politics, but he is involved in a political struggle over meaning and understanding. This is the struggle of any engagement in an argument, and it can be usefully taken on.

The purpose of the contextual study of famous texts is to better understand the present, to understand 'the distinction between what is necessary and what is the product merely of our own contingent arrangements'.¹⁴⁶ This is a purpose with radical possibilities, with a lot in common with the Marxist approach, and which answers the call of discovering contingency whilst not forgetting what is necessary. My next subject would certainly reject the focus on authors, but is never the less an approach to history I also want to call radical.

4.3 Michel Foucault

The general label of 'postmodern' is even less helpful than the previous two. Including within it approaches to the study of science, knowledge, art, literature, and psychology, amongst other things, by authors with sometimes even less in common than the country and decade of their birth. I won't use it until I turn to the disagreements between the different approaches I have been discussing. Instead I will focus on the historical works of Michel Foucault.¹⁴⁷

Foucault's work is difficult to summarise, and his statements on his own methodology are scattered throughout his work. However, there are some texts in which he sets out what he is trying to do, and also the work of Paul Veyne, which Foucault highlighted as the best explanation of his work available.¹⁴⁸ Veyne described the central thesis of Foucault's work: 'What is made, the object, is explained by what went into its *making* at each moment of history'.¹⁴⁹ This captures Foucault's interest in objects and the practices which go in to them. So for example in the study of prisons,¹⁵⁰ the focus is not on "institutions," "theories," or "ideology" but *practices*.¹⁵¹ Foucault is not interested in authors, and they are peripheral in much of his work, something which places a big gap between him and Skinner. However structures are very important and his position is by no means as far from the

or Historical Approach to Justification of Self-Defence' in *Right of Private Defence – Expanding Horizons* (Satyanarayana Prasad ed. The Icfai University Press: Hyderabad, India, 2008) 214-243 and for an imagined consultation with Grotius on the legality of the war, see Dean Flavy 'What would Grotius Do? The Founder of International Law Speaks Out on Iraq' at http://writ.news.findlaw.com/commentary/20030403_falvy.html

¹⁴⁶ Skinner, 'Meaning and Understanding', *supra* note 100, at 53

¹⁴⁷ For a recent engagement with Foucault's history writing, and its uses for international law, see Matt Craven, 'On Foucault and Wolff or From Law to Political Economy', 25 *Leiden Journal of International Law* (2012) 627-645

¹⁴⁸ Michel Foucault, 'Questions of Method', *supra* note 11, at 238

¹⁴⁹ Paul Veyne, 'Foucault Revolutionises History', *supra* note 11, at 160

¹⁵⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (transl. Alan Sheridan, Penguin: New York, 1979)

¹⁵¹ Foucault, 'Questions of Method' *supra* note 11, at 225

Marxist as it might seem, and as he sometimes said.¹⁵² Practices produce information. This information is studied and ordered. This process is rationality. Rationalities are the conditions of truth, the way that something can be verified as 'true'. The rationality in turn explains and orders the practice. A good example of this type of historical study is the lecture 'Truth and Juridical Forms'.¹⁵³ Here, Foucault traces the development and evolution of trials and judging. The move from trial by ordeal to trial by jury is a production of different types of rationality, different conditions of truth.

In his explanation of Foucault's work, Veyne starts by generously setting aside the problematic word 'discourse', with its suggestion of linguistics, and instead clarifying that the focus of Foucault's work was always practice, even when it was practice by way of discourse.¹⁵⁴ Foucault's focus within practice is 'exceptionality, *rarity*'¹⁵⁵ or to use another familiar Foucauldian term 'discontinuity'.¹⁵⁶ He draws attention to the things which don't fit, or seem to make sense, such as the shock at the use of the prison for general punishment in the nineteenth century, and uses this discontinuity in the continuity of 'what everybody knows' as a starting point to complicate the picture. Veyne stresses repeatedly that Foucault is simply doing history, proper history, which all historians should feel comfortable with.¹⁵⁷ The idea of practice allows consideration of all processes; society, the economy, the form of government, and orders them through practice.

The problems thrown up by ideas such as 'there are no facts',¹⁵⁸ or 'madness does not exist',¹⁵⁹ are explained by Veyne. Madness exists as a phenomenon, but it is not a thing. The contrary is also true, madness does not exist, but it is not therefore nothing. Madness is not a natural object; it is made to seem so by a series of practices. Madness itself, the description of it, the response to it, and the treatment of it, is made up of a series of practices, and to study the practice is to study the whole thing. Ultimately, this is all part of Foucault's attempt to move away from rationality.

Foucault's starting point in studying this history is that '[w]e are ... at war with one another; a battlefield runs through the whole of society, continuously and permanently, and it is this battlefield that puts us all on one side or the other'.¹⁶⁰ From this starting point, all ideas of neutrality and objectivity are abandoned. To understand the present state of the world, we have to trace the battles which were fought and the victories which were won to make it so.

¹⁵² This is picked up below, at 32.

¹⁵³ Foucault, 'Truth and Juridical Forms' in Foucault, *Essential Works* *supra* note 11, at 1-90

¹⁵⁴ Veyne, 'Foucault Revolutionises History' *supra* note 11, at 146 and footnote 1

¹⁵⁵ *Ibid.*, at 147

¹⁵⁶ Foucault, 'Questions of Method', *supra* note 11, at 226

¹⁵⁷ For an example of why Foucault might make historians uncomfortable, see Foucault, 'Lives of Infamous Men' in Foucault, *Essential Works* *supra* note 11, at 157-175

¹⁵⁸ Friedrich Nietzsche, *The Will To Power: An Attempted Transvaluation of All Values* (Trans. A. M. Ludovici, T. N. Foulis: London, 1909) at 62

¹⁵⁹ Veyne, 'Foucault Revolutionises History', *supra* note 11, at 170

¹⁶⁰ Michel Foucault, *Society Must Be Defended* (Penguin: London, 1997) at 51

This is not a traditional historical way of speaking, but is instead an historico-political discourse. This is a history which is directed by political struggle. There is no neutral position, the 'truth' of history is 'a truth that can be deployed only from its combat position, from the perspective of the sought-for victory and ultimately ... of the survival of the speaking subject himself'.¹⁶¹ By accepting this link between truth and force, Foucault reveals that the claim of truth is *always* used as a weapon in a struggle. Taking a side, being against something, is to move away from a position which accepts the truth and instead to challenge it. It reveals the ways that we are made to 'believe we are living in a world in which order and peace have been restored'.¹⁶² Foucault's history reignites a struggle which has been hidden and obscured by a more traditional form of history, the history which tells us that all is for the best.

The other vital aspect of Foucault's work is that it is 'history of the present'.¹⁶³ Foucault's approach is both historical and critical. He writes history consciously from his present, and he is ultimately the focus in an attempt to understand the limits on present consciousness. That is to say that when Foucault asks why other historians wrote the history they did, he does not hide from the implied question of why he writes the history he does. History addresses the present by exposing the limits to our understanding and experience that are historically constructed. Critical history study is an attempt to break these limits.¹⁶⁴ As Foucault puts it: 'It's a matter of shaking this false self-evidence, of demonstrating [the object's/practice's] precariousness, of making visible not its arbitrariness but its complex interconnection with a multiplicity of historical processes'.¹⁶⁵

Roth pushes the idea that Foucault is writing from a present of epistemic shift.¹⁶⁶ The episteme begun by Kant, in which knowledge was governed, fundamentally, by anthropology, is coming to an end. The new episteme, or *a priori* in Roth's preferred term, is begun by removing man as the limit on what is and can be known. Foucault explicitly compares himself to Kant:

Anthropology constitutes the fundamental arrangement that governed and controlled the path of philosophic thought from Kant until our own day. This arrangement is essential, since it forms part of our history; but it is disintegrating before our eyes, since we are beginning to recognise and denounce in it, in a critical

¹⁶¹ *Ibid.*, at 52

¹⁶² *Ibid.*, at 53

¹⁶³ Michael Roth, 'Foucault's "History of the Present"', 20 *History and Theory* (1981) 32-46

¹⁶⁴ This project of exposing the structures which control knowledge are the subject of Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock Publication: New York, 1970)

¹⁶⁵ Foucault, 'Questions of Method', *supra* note 11 at 225

¹⁶⁶ Roth, 'Foucault's "History of the Present"' *supra* note 140, at 32-46 On the concept of episteme see Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock Publication: New York, 1970) and Michel Foucault, *Aesthetics, Method, Epistemology: Essential Works of Foucault 1954 – 1984 volume 2* (James D. Faubion ed., Penguin: London, 2002) for another view, and a good discussion of the causes of epistemic shift, see Alistair MacIntyre, 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science', 60 *The Monist* (1977) 453-72.

mode, both the forgetfulness of the opening that made it possible and a stubborn obstacle standing obstinately in the way of an imminent form of thought.¹⁶⁷

This is obviously radical. But it is also, I believe, a position not so far from what I have already discussed. This again is a use of history to question the present, without ignoring the structures limiting possibility. Foucault, partly as described by Veyne, gives us a series of things to do and not to do, as have the Marxists and the Contextualists. Objects are dismissed, truth is made contingent, ideology is forgotten, along with all ‘-isms’, as merely reified rationalities. This might make things complicated, and I think the commentary on Foucault is sometimes over complicated, but it does leave something very useful. It demands the exploration of all the surrounding factors of any historical question. This Foucault calls ‘eventalization’, and his aim is to remove the burden of explaining causality by constructing all the different ways of understanding a singular event.¹⁶⁸ Nothing is left out, nothing is necessarily prioritised. This may be contingency with all falseness forgotten, but I don’t think so.

Foucault was not interested in the outrage he might cause in the traditional study of the penal system, or psychiatry, or whatever else. For him ‘[t]he only important problem is what happens on the ground’.¹⁶⁹ By ‘shaking’ the faith in the usual answer to the question of what is to be done about prisons, the question of ‘what is to be done’ is put back in to the hands of the people actually affected by imprisonment. Foucault’s critique takes the authority to propose reform away from those who govern, and also away from himself or any other commentator. This is crucial in understanding Foucault’s usefulness, and challenging the rejection of his work as not useful for not proposing any serious reform. In challenging and revealing structures of domination and control, and the on-going nature of political struggle, Foucault argued as much against leaders or philosophers as any other target. It is absolutely and demonstrably *not* the purpose of political philosophy or critical thinking to propose reform. But that does not mean there is nothing constructive here. Foucault constructs the very possibility of resistance and struggle, in revealing the nature and form of control and subjugation. Critique:

should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn’t have to lay down the law for the law. It isn’t a stage in a programming. It is a challenge directed to what is.¹⁷⁰

Or as Marx once described his project; ‘ruthless criticism of everything existing’.¹⁷¹

¹⁶⁷ Foucault, *The Order of Things*, *supra* note 164, at 342

¹⁶⁸ Foucault, ‘Questions of Method’, *supra* note 11, at 227

¹⁶⁹ *Ibid.*, at 235

¹⁷⁰ *Ibid.*, at 236

¹⁷¹ Karl Marx ‘For a ruthless criticism of everything existing’, in R Tucker *The Marx-Engels Reader* (Norton, 1978) at 12–15

Foucault wrote 'I would like my books to be a kind of tool-box which others can rummage through to find a tool which they can use however they wish in their own area. [...] I don't write for an audience, I write for users, not readers.'¹⁷² Foucault allows us to understand better the construction and control of the present. This is clearly a fecund area for political action, if not a political project in and of itself.

4.4 Don't be Vulgar

In these three authors or approaches I have sought to draw a unifying line of using the past to question the present. History can and should be employed in political argument, as a tactic against the crushing use of ideology founded on a (wilful?) misreading or misappropriation of history and of the present. I now want to briefly deal with some of the problems of putting these three groups together, and some of the attacks made by or on behalf of each group. I keep in mind the imperative 'don't be vulgar' after Hobsbawm's characterisation of 'vulgar Marxism'. Ultimately, I think many of the conflicts between different approaches are based on a 'vulgar' reading of the method.

The vulgar Marxism Hobsbawm attacked was set out earlier, and was an attack on an oversimplified reading of Marx, which focused exclusively on certain big ideas whilst failing to pay attention to the subtleties of the approach proper. In two other essays in the same collection, Hobsbawm looks at postmodernism, and the failings of this new approach to history, and even the dangers of doing it.¹⁷³ Foucault answers some of Hobsbawm's complaints, as does Skinner. I contest that his use of 'postmodern' is itself vulgar, over simplified and putting certain eye-catching statements in the foreground whilst ignoring the subtleties.¹⁷⁴

Written as a review essay of Richard Price's *Maroon Societies*,¹⁷⁵ 'Postmodernism in the Forest' has plenty of praise for the content of the work while criticising the author's 'doubts about the possibility of objective knowledge or unified interpretation, that is to say, about the legitimacy of research as hitherto understood.'¹⁷⁶ Price's book does not follow these traditional practices, according to Hobsbawm, instead attempting to satisfy 'the requirements of postmodernism'.¹⁷⁷ The book, it seems, is full of useful information, presented in an incomprehensible way. In particular, it tells Hobsbawm nothing about the

¹⁷² Michel Foucault, 'Prisons et asiles dans le mécanisme du pouvoir [1974]' In *Dits et Ecrits vol. 11*. (Paris: Gallimard, 1994) at 523-4

¹⁷³ Eric Hobsbawm, 'Postmodernism in the Forest' and 'Identity History is not Enough' both in *On History*, *supra* note 9, at 254-265 and 351-366 respectively.

¹⁷⁴ There are a large number of such arguments, the most well-known being Terry Eagleton, *The Illusions of Postmodernism* (Blackwell, 1996) Alex Callinicos, *Against Postmodernism: A Marxist Critique* (Polity Press, 1989) and David Harvey, *The Condition of Postmodernity* (Blackwell, 1990). In my limited experience, such rejections of postmodernism seem to be peculiar to British Marxism, but this is not the place for an exploration of this issue.

¹⁷⁵ Richard Price, *Maroon Societies: Rebel Slave Communities in the Americas* (John Hopkins University Press: Baltimore, 1979)

¹⁷⁶ Hobsbawm, 'Postmodernism in the Forest', *supra* note 173, at 258

¹⁷⁷ *Ibid.*, at 263

most important questions of slavery, ownership of people and ownership of land. The study of alien peoples is what history has often done, accepting that the past is a different country, without the invention of postmodernism.¹⁷⁸ Ultimately Hobsbawm feels that this was better, and told us more of what he has decided we need to know.

*Identity History is not Enough*¹⁷⁹ raises more clearly Hobsbawm's complaints against 'postmodernism'. Here Hobsbawm focuses the discussion on the experience of Nazi retreat in 1944 in southern France, particularly the slaughter of the men of the villages and towns. These events raise many questions for historical understanding of universality, identity, past and present, lived historical memory and detached academic research. History is a product used and misused by non-historians. It is an historian's duty to seek truth and point out fiction. However, the 'fashion' for 'postmodernism' is based on a sceptical approach to the enlightenment project and rationality.¹⁸⁰ This leads to, amongst other things, the return of fiction as equally valid, the disavowal of the importance of truth and a very dangerous space for reckless invention and misuse of history. Hobsbawm's emotive example of fact is the Holocaust, and apparently a postmodern approach allows the denial of the Holocaust's historical truth.¹⁸¹ To be fair, Hobsbawm is not seeking a return to any form of scientific positivist truth, but instead believes the value of history and the public responsibility of historians, to be undermining ideological fictions by producing truth. Historians are 'myth-slayers'.¹⁸²

This is, I argue, a vulgar reading of postmodernism. Firstly, on the question of 'facts', I want to turn to Skinner to clarify. In attacking an extreme proponent of positivist history, much stronger than Hobsbawm's claims, Skinner characterises Geoffrey Elton and his insistence on the purity of historical method as 'the cult of the fact'.¹⁸³ The cult of the fact believes that 'by uncovering the facts of history, the historian can aspire to discover "the true reality of the past"'.¹⁸⁴ This assumes that what is *fact* is self evident, and that the truth is recognisable from the assembly of facts. Again, Hobsbawm claims nothing like this, and would probably join Skinner in rejecting this image of history. However, Hobsbawm does cling to the idea of facts.

Skinner demonstrates how difficult it is to say what a fact is. His example is in cataloguing the art which has been owned or displayed in Chatsworth House.¹⁸⁵ To assert this as fact requires an answer to what a work of art is, a definition which is hardly uncontested but which is required instantly for the historian to do any work. The dismissal of facts as absolute things is here dealt with at a higher level than saying that something was or wasn't

¹⁷⁸ *Ibid.*, at 263-4

¹⁷⁹ Hobsbawm, 'Identity History is not Enough', *supra* note 173, at 351-366

¹⁸⁰ *Ibid.*, at 357-8

¹⁸¹ *Ibid.*, at 358-9

¹⁸² *Ibid.*, at 363

¹⁸³ Quentin Skinner, 'The Cult of the Fact', in *Visions of Politics*, *supra* note 10, at 8

¹⁸⁴ *Ibid.*, at 12. Skinner's reference is to Geoffrey Elton, *The Practice of History* (1969) at 79

¹⁸⁵ *Ibid.*, at 19

in Chatsworth House. It is a problem of definition, of concepts, and of perceptions. This is the subtlety which is at the heart of any move away from facts and the search for truth.

Secondly, and more generally, I think that Hobsbawm's complaints misconstrue Foucault's work, as a leading example of what he terms postmodern. Hobsbawm makes no reference to Foucault as a historian, but does note that '[Price] is to be congratulated for deliberately avoiding references to Barthes, Bakhtin, Derrida, Foucault *et al.*'¹⁸⁶ I want to briefly draw on two writers who have tried to reconcile Foucault and Marx, so as to better contest current political struggles.

Foucault wrote that 'Marxism exists in the nineteenth century like a fish in water: that is, it is unable to breathe anywhere else',¹⁸⁷ but his work is filled with allusions and references to Marx, particularly some of the collections of lectures:

I often quote concepts, texts and phrases from Marx, but without feeling obliged to add the authenticating label of a footnote with a laudatory phrase to accompany the quotation. As long as one does that, one is regarded as someone who knows and reveres Marx, and will be suitably honoured in the so-called Marxist journals. But I quote Marx without saying so, without quotation marks, and because people are incapable of recognising Marx's texts I am thought to be someone who doesn't quote Marx. When a physicist writes a work of physics, does he feel it necessary to quote Newton and Einstein? He uses them, but he doesn't need the quotation marks, the footnote and the eulogistic comment to prove how completely he is being faithful to the master's thought.¹⁸⁸

I think it is revealing, but should not be over stated, that Foucault put Marx in such a position in his thinking. Similarly to Kant, Marx is accepted as a master, who has to be learnt from and used, but also addressed critically, and surpassed. Part of the tension between a Foucauldian study and a Marxist study is that Foucault places Marx in this previous episteme, the one he is trying to escape. This is why he can say that Ricardo and Marx are the same, they both look at society in the same way, looking at economics and wage relationships, and the conflicts between them as merely 'storms in a children's paddling pool'.¹⁸⁹ However, whilst this epistemic distinction continues, Foucault's attitude to Marx changes, or at least softens in later work. These two highly critical engagements with Marx take place in a book which is filled with aggressive attacks on Marxism, and written perhaps

¹⁸⁶ Hobsbawm, 'Postmodernism in the Forest', *supra* note 173, at 261 note 8

¹⁸⁷ Foucault, *The Order of Things*, *supra* note 164, at 262

¹⁸⁸ Michel Foucault, 'Prison Talk', trans. Colin Gordon, in Colin Gordon ed., *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon: New York, 1980) at 52

¹⁸⁹ Foucault, *The Order of Things*, *supra* note 164, at 199

with a conscious effort to distance the author from the particular form of French Marxism then prevalent.¹⁹⁰

Alan Hunt writes an autobiographical story of his own struggle to reconcile his interests in both Marx and Foucault. He finds value in the very different focuses of Marx and Foucault, and believes that both can be held in mind when addressing his interests in law. The two come closest together in this reading on the question of practices. While Foucault clearly states his interest in practices, Hunt argues that Marx also held practice as a central focus, quoting from *The German Ideology*:

The social structure and the state are continually evolving out of the life process of definite individuals [...] as they actually are, i.e. as they act, produce materially, and hence as they work under definite material limits, presuppositions and conditions independent of their will.¹⁹¹

This shared interest provides a starting point for reconciliation, and hope that there is some legitimacy in using both authors. Ultimately, Foucault reminds us of contingency and Marx of process and determinacy.

Simon Springer offers a more thorough attempt to use Foucault and Marx together, and a demonstration of what is to be gained.¹⁹² By looking at neoliberalism through the methodology of Foucault and Marx, Springer finds neoliberalism as a discourse, but a discourse which is constituted by and constitutive of material forms.¹⁹³ It is neither best understood as ‘top-down ideological hegemony’ or ‘bottom-up, as in post-structuralist notions of governmentality’.¹⁹⁴ The discourse is instead rooted in the material, with primacy given to both structure and agency. His project is not complete, and he does not claim success, but finds that anything useful in destabilising neoliberalism’s rationalities is useful in itself. This sentiment is very Foucauldian.

A couple of further points need to be made concerning Foucault’s relationship with Marxism. Firstly, there is a context which might explain some of the scorn Foucault directed towards Marx and Marxism; the French Communist Party (FCP). In an interview with Duccio Trombadori in 1978 Foucault discussed Marxism and his own experiences at length.¹⁹⁵ He joined the FCP in 1950, like many of his contemporaries, in search of ‘an utterly different reality’.¹⁹⁶ He left the party in 1953, after the party had supported the fictitious and anti-

¹⁹⁰ Sartre’s review of *The Order of Things* captures this well. The original review appears in *L’Arc* no. 30, Oct. 1966, pp. 87-88

¹⁹¹ Karl Marx and Friedrich Engels, *The German Ideology*, as quoted in Alan Hunt, ‘Getting Marx and Foucault into Bed Together!’ 31, *Journal of Law and Society* (2004) at 605

¹⁹² Simon Springer, ‘Neoliberalism as Discourse: between Foucauldian Political Economy and Marxian Poststructuralism’ 9 *Critical Discourse Studies* (2012) 133-147

¹⁹³ *Ibid.*, at 143

¹⁹⁴ *Ibid.*, at 135

¹⁹⁵ Michel Foucault, ‘Interview with Michel Foucault’ in *Essential Works*, *supra* note 11, at 239-297

¹⁹⁶ *Ibid.*, at 249

Semitic ‘Doctors’ Plot’ against Stalin.¹⁹⁷ He also felt excluded because of his homo-sexuality, and that the Communist Party upheld the traditional bourgeois conceptions of normal life.¹⁹⁸ Foucault had joined the party under the influence of Althusser, one of his tutors at the École Normale, and they remained friendly for the rest of Althusser’s life, despite Foucault’s rejection of Marxism and the FCP, in which Althusser played a prominent role. His time in the party, Foucault claimed, at least taught him something about the pliability of truth; ‘the fact of being obliged to maintain something that was radically opposed to what one could believe was also part of that exercise of dissolution of the self and the search for the entirely other’.¹⁹⁹

Christopher Chitty has recently produced a new English translation of a text which is absent from any current English language collections of Foucault’s work; ‘Les Mailles de Pouvoir’ – ‘The Mesh of Power’.²⁰⁰ Chitty argues that Foucault’s growing interest in power as a subject of study coincides with a renewed interest in Marx.²⁰¹ The ‘Mesh of Power’ text is the most obvious engagement with Marx by Foucault. In it Foucault claims that his theory of power is, at least in part, derived from the second volume of *Capital*;²⁰²

What we may find in the second volume of *Capital* is that *one* power does not exist, but many powers. Powers, this means forms of domination, forms of subjugation that function locally, for example in the workshop, in the army, on a slave plantation or where there are subservient relations.²⁰³

He also attributes to Marx the local functioning of power existing first, and only later forming a State;

These powers cannot and must not simply be understood as the derivation, the consequence of some kind of overriding power that would be primary. The schema of the jurists, whether those of Grotius, Pufendorf, or Rousseau, amounts to saying: “In the beginning, there was no society, and then society appeared when a central point of sovereignty appeared to organise the social body, which then permitted a whole series of local and regional powers”; implicitly, Marx does not recognise this schema. He shows, on the contrary, how, starting from the initial and primitive

¹⁹⁷ *Ibid.*

¹⁹⁸ James Miller, *The Passion of Michel Foucault*, (Anchor Books: London, 1993) at 58

¹⁹⁹ Foucault, ‘Interview with Michel Foucault’, in *Essential Works*, *supra* note 11, at 249

²⁰⁰ Michel Foucault, ‘The Mesh of Power’, 2 *Viewpoint Magazine* (September 2012) available at <http://viewpointmag.com/the-mesh-of-power/>

²⁰¹ Christopher Chitty, ‘Towards a Socialist Art of Government: Michael Foucault’s “The Mesh of Power”’ 2 *Viewpoint Magazine* (September 2012) available at <http://viewpointmag.com/towards-a-socialist-art-of-government-michel-foucalt-the-mesh-of-power/>

²⁰² Foucault is making a reference here to the second volume of *Capital*, but he does not mean Volume Two, but the edition published by Editions Sociales in France. This second volume comprises Sections, 4, 5, and 6 of Volume One of *Capital*, the sections on the production of relative and absolute surplus value.

²⁰³ Foucault, ‘The Mesh of Power’ *supra* note 200, at 3

existence of these small regions of power – like property, slavery, workshops, and also the army – little by little, the great State apparatuses were able to form.²⁰⁴

The link between power and production is clear. The exercise of these different forms of power was, and is, to improve production;

The original, essential and permanent function of these local and regional powers is, in reality, being producers of the efficiency and skill of the producers of a product. Marx, for example, has superb analyses of the problem of discipline in the army and workshops.²⁰⁵

Foucault is here himself attacking a crude form of Marxism. Marx did not prioritise the State as an object of study or as the principle exerciser of power over citizens. Instead, Foucault finds Marx much more aware of the micro-levels at which power operates, and the fundamental importance of awareness that power is *productive*. In this piece, Foucault rejects outright certain ‘Marxists’, while making his clearest statements in favour of the importance of Marx as an inspiration;

To privilege the State apparatus, the function of preservation, the juridical superstructure, is, basically, to “Rousseauify” Marx. It reinscribes Marx in the bourgeois and juridical theory of power.²⁰⁶

5. Conclusion

To try and offer some sort of conclusion, I want to take something from all these approaches into my study of the history of international law. The contingency of the present is important to remember, and I think history is often the best demonstration of this. That remains the shared aim of everyone I have mentioned – to change the present by understanding the past. The problem of too much contingency is that this can leave no ground on which to build any political action. As I have said, I think this is primarily a failing of a vulgar form of post modernism. However, in trying to respond to the challenge set out by Susan Marks, I agree that Marxism, or perhaps simply materialism, must have its place in any radical history. My personal preference is for the contextual work of James Tully, with his open acknowledgement of Foucault’s influence. His book *Locke in Contexts* begins the analysis with a discussion of the birth of the ‘welfare-warfare’ state, and the material desires of European peoples breaching their national borders at the end of the Wars of Religion. I think this is a useful reminder of the conditions in which men were able to make their own history.

I also want to conclude my parallel discussion of historiography more generally. I have used histories of Grotius as examples in this piece, and I want to end with a third history of

²⁰⁴ *Ibid.*, at 3-4

²⁰⁵ *Ibid.*, at 4

²⁰⁶ *Ibid.*, at 5

Grotius. Benjamin Straumann has produced a lot of research dealing with the use of Roman sources by Grotius.²⁰⁷ Grotius' work is full of references to and quotations from classical sources, particularly Cicero and the Stoics. This fact is overlooked or dismissed in both the versions of Grotius offered by Lauterpacht and Tuck. By placing this in the foreground as an object of study, Straumann can tell a different story. Grotius drew on the normative Roman tradition to formulate his secular doctrine of international rights. This is the strength of his argument, and the authority for his radical claims in defence of the war waged by the Dutch East Indies Company. It also suggests that Grotius' fundamental concern, and the basis upon which he founded his systematic approach, was the clash between natural sociability and commercial unsociability. For modern scholarship, this raises important questions about the origins of modern liberalism and the rights discourse. The founding texts may be ancient, and not modern, and the twentieth century 'Roman' as much as it is 'Grotian'.

In this article I have introduced three different histories of Grotius. While Lauterpacht's version may be easily dismissed as ideological, it is fundamentally a true history. So too are the histories of Tuck and Straumann. It is their purposes that are different. Lauterpacht is seeking a source for his own project, calling it Grotian to borrow the authority of the 'Father of International Law'. Tuck is seeking to undermine the tradition of liberal rights thinking, by demonstrate its specifically imperialist context. Straumann seems to be looking for a new way to talk about contemporary theories of international law, by exposing long forgotten Stoic thinking about international society. These histories are all possible and all true to their own standards because history has many different stories within it, and absolute truth is utterly impossible.

To return to Hayden White, at the beginning of *Metahistory* he asks 'What does it mean to *think historically*, and what are the unique characteristics of a specifically *historical method* of inquiry?'²⁰⁸ As he says, definitive answers may not be possible, but what can be revealed are the different styles of historical thinking. A style is adopted when writing history, when choosing this form of argument. A step is taken in deciding the form of narrative used to turn 'knowing into telling', there are choices to be made over the form of the history, and its content.²⁰⁹ This is the political choice taken. I have set out three related political choices, each united by wanting to use history to change the present. This task can be more successfully undertaken by reflecting on the method of history which is being used. If we want to change the world, we must understand why things are the way they are, and how they could have been different. I finish on White's own understanding of why history is important in any political project;

One can never move with any politically effective confidence from an apprehension of "the way things actually are or have been" to the kind of moral insistence that

²⁰⁷ Straumann, *supra* note 15

²⁰⁸ White, *Metahistory*, *supra* note 45, at 1

²⁰⁹ White, *The Content of the Form*, *supra* note 45, at 1

they “should be otherwise” without passing through a feeling of repugnance for and negative judgement of the condition that is to be superseded.²¹⁰

²¹⁰ *Ibid.*, at 73