Historicizing international humanitarian law[1]

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> *There is no set of maxims more important for an historian than this: that the actual causes of a thing's origin and its eventual uses, the manner of its incorporation into a system of purposes, are worlds apart; that everything that exists, no matter what its origin, is periodically reinterpreted by those in power in terms of fresh intentions; that all processes in the organic world are processes of outstripping and overcoming, and that, in turn, all outstripping and overcoming means reinterpretation, rearrangement, in the course of which the earlier meaning and purpose are necessarily either obscured or lost.*[2]
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> *Friedrich Nietzsche*

1. Introduction

In 2005, the International Committee of the Red Cross published its monumental study "Customary International Humanitarian Law". In three volumes of over 5,000 pages, 161 rules are being derived and explained.[3] In 2015, the US Department of Defence published another monumental work, a "Law of War Manual", comprising some 1,200 pages of rules. By looking at the covers and perusing the tables of contents of these two works, one notices that they to a large extent cover the same types of rules but do so under different names – "international humanitarian law" vs "the law of war". One further notices that the law of war manual refers to both the just war tradition and to chivalry as well as provides mini-histories

[1] I would like to thank participants at the Stockholm Centre for International Law and Justice Thursday brown bag lunch seminars (Mats Deland, Nikola Hajdin, Mark Klamberg, Said Mahmoudi, Martin Ratcovich) for helpful comments. Mistakes are mine. This chapter builds partly on Chapter 2 in my *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality*, Dokumaten, Visby, 2007.

[2] Nietzsche, 1956, P. 209. The quotation continues thus: "No matter how well we understand the utility of a certain physiological organ (or of a legal institution, a custom, a political convention, an artistic genre, a cultic trait) we do not thereby understand anything of its origin. I realize that this truth must distress the traditionalist, for, from time immemorial, the demonstrable purpose of a thing has been considered its *causa fiendi* -- the eye is made for seeing, the hand for grasping."

[3] Henckaerts and Doswald-Beck, 2005.

of a number of rules – on 14 occasions going back as far as antiquity. By contrast, while the ICRC volume briefly acknowledges the old customary practices, it was "Henry Dunant who was the true pioneer of contemporary international humanitarian law" and its "driving force" has been the ICRC.[4] These seemingly superficial linguistic and historiographical differences are not only interesting, they are also of legal and political significance.[5] The histories of a legal regime help determine the pedigree, the identity and the content of its norms.

2. Why history of international (humanitarian) law?

Historiography has some general benefits: For instance, it can point out that both the world and our perceptions of it are contingent: What was once different from now can again be different.

But there are also specific gains to be made. The most obvious interest for a lawyer is to understand and assess concrete arguments about what the law is. As David Kennedy notes, "an argument about a rule or principle ... is almost always an argument about history – that the particular norm proffered has a provenance as law rather than politics, has become general rather than specific, has come through history to stand outside history."[6] In legal argument, the use of history is determined by legal doctrines: doctrines of sources (which ones count?) and doctrines of interpretation (the original intention, subsequent practice, the textual context, etc). If meaning is dependent upon the intention of the author (the judge, the legislator, the commentator) or on what the recipient thought, we want to know who the relevant author or recipient was. So doctrine and history collude to assign authority, to determine whose meaning of the law it is that governs us, here and now.[7]

International law as we know it cannot be thought of without history: In fact, "international law is ... a field of practice whose meaning and significance is constantly organised around, and through the medium of, a discourse that links present to past."[8] As Craven says, it was after "... the turn to history at the end of the 18th Century" that "international law was to acquire its specifiable and discrete (disciplinary) content

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[4] Henckaerts and Doswald-Beck, 2005, Vol I, pp. xv, xxxi, xxxi. See also ICRC, 2010: "Efforts to regulate warfare … [in] history … remained temporary, local arrangements, until the middle of the 19th century when the newly-created ICRC encouraged the adoption of the first Geneva Convention."

[5] Alexander, 2015.

[6] Kennedy, 1999. See also Skouteris, 2017, p. 1

[7] This follows from many text-books in law. For the purpose of this debate, it has been developed in Orford, 2013, pp. 171-174. For a more general but still very pertinent discussion, see Walker, 2015, p. 152.

[8] Craven, 2016, 34.

through the articulation of historical accounts of its emergence".[9]

While law is indeterminate in the sense that one can not settle the outcome of a legal argument by logic, it is not the case that anything can happen in real life. Regimes of legal argument constrain the way an issue is talked about and law takes place in a discursive community.[10] A historical review can explain how these regimes have developed and how that community has been created.

As identified by Koskenniemi, at least three types of critical research questions pertaining to history can be identified. First, "to contextualise the legal ideologies or concepts within the intellectual, social, and political environment in which they have operated." Second, to get out of Eurocentrism by providing stories about the influence of people from and events in other parts of the world and thirdly to write a "social history of international law", like studies of the relation between normative systems and "types of international society" or "macro-level economic and social developments".[11]

This leads us to wider sets of questions, about the procedural and substantive legitimacy of the law.[12] Has it come about in a fair manner? Whose interests has it served?[13] And such questions can lead to policy questions like the ones that Tony Anghie asks, namely if "the postcolonial world [can] deploy for its own purposes the law which had enabled its suppressions in the first place?"[14] Or, in slightly more optimistic terms, how to rethink "current strategies directed at harnessing the political potential of international law."[15]

To sum up, I quote Allot's magnificent opening essay in the first issue of the *Journal of the History of International Law*:

> The writing of the intrinsic history of international law – the history of the law itself – will re-

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[9] Craven, 2016, 32.

[10] Cf. Kratochwil, 1989, p. 132 and MacIntyre, 1984, p. 10.

[11] Koskenniemi, 2004. For a critique of how historiography is actually carried out at present – not entirely in line with the program set out in the body text -- see Katz Cogan, 2014, p. 375

[12] Skouteris notes the "significance of the field's historical consciousness for its legitimacy." Skouteris, 2017.

[13] Cf. Kingsbury and Straumann, 2010, p. 51.

[14] Anghie, 2005, p. 8.

[15] Pahuja, 2011, p. 5.

> form our consciousness of the identity, the functioning, and the potentiality of international law as law. The writing of the extrinsic history of international law – its relationship to the history of other social phenomena – will reform our consciousness of the role of international law in the forming, re-forming, and re-making of international society. In particular, it will re-make international law's idea-of-itself ...[16]

3. Contextualization in history

How, then, should historical research be carried out? Lesaffer complains that to many writers, "[t]he past is only the mine where facts and figures are to be found to sustain and corroborate existing theories."[17] Much of this debate has centred around concerns brought to the fore by the so-called Cambridge school of intellectual history, which has attacked, *inter alia*, anachronism, prolapses (reading a future meaning into a word or a text), and teleology (the assumption that there is a meaning to history).[18] Their standard call has been for contextualizing: "to understand texts for the specific speech acts that they are, we need to understand the historical context in which they were uttered."[19]

This is not a straightforward matter, however. As Brett notes, it is important to keep in mind that "there may be plural contexts for any one text, and these contexts may themselves overlap or be related in certain ways."[20] "'[C]ontext' can be multidimensional: a specific political situation, a social or cultural milieu, an institutional context like a courtroom. ... what other people were saying at the time and the conventions governing that saying."[21] Lawyers would point out that legal and other arguments made by governments have to be explained (also) in terms of the prevailing legal views at the time, so a treaty has to be assessed and understood in the context of its contemporary legal universe.[22]

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[16] Allott, 1999, p. 20.

[17] Lesaffer, 2007, 35. See also Kennedy, 1999, 89. Even dedicated historical research by trained international lawyers has been criticized along these lines: Hunter, 2013. For a discussion of this critique, see Orford, 2015.

[18] Bourke, 2016, p. 1. See als the seminal Skinner, 1969.

[19] Brett, 2002, p. 116.

[20] Brett, 2002, p. 123.

[21] Brett, 2002, p. 116.

[22] As Tony Carty says: "It is impossible not only to interpret state practice but even to determine what is relevant state practice and how it forms, or does not form, international law, without a prior decision about what is international law, and such answers cannot be provided by states. … It is therefore difficult -- I would say impossible -- to write a history of international law in all its aspects without including doctrine, or, in other terms, the internal perspective." (See Carty, 2012, p. 973).

Further, whatever context one considers, the question what a statement means is crucial. “Meaning” can be taken as either the “objective” meaning, what the words say, or the “subjective” meaning, what the author really meant, and neither is a simple matter. Pocock says: “What we have called paradigms are linguistic constructs recognized as carrying increasingly complex loads of biases, but at the same time carrying loads in excess of what can be predicted or controlled at a given moment.”[23] Consequently, “what evokes a certain cluster of factual assertions, and value judgments concerning them, to one set of hearers will simultaneously evoke another cluster and recommend another resolution of conduct in the ears of another set.”[24] So, there are meanings that are beyond the control of the author or the grasp of the reader.

At any rate, it seems to be the contemporaneous conditions of meaning which are the object of Pocock's analysis.[25] Nevertheless, total contextualization is impossible, since that would presuppose that we can understand the past as the people of those days did.[26] And that is impossible, because even if we could reconstruct the discursive universe of, say, Grotius, we could never eradicate our own. That is, we would have to forget a good deal of what we now know, and Grotius did not know. And if we could do that, how would we then communicate our findings to present readers, who have not gone through the same process? Therefore, any historiography must be treated as an act of intervention rather than one of discovery.[27]

4. Approaches to the history of international (humanitarian) law

International law scholars who engage in serious work in legal history generally recognize that contextualization is necessary.[28] But they also recognize that this need is determined by “the chosen approach and the historical problem to be solved.”[29] As Orford points out, “a legal reading differs from a historical reading, in that it is not concerned with the past as history but with the past as law.”[30] As

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[23] Pocock, 1971, p. 287.

[24] Pocock, 1971, p. 17.

[25] Cf. “[T]here must be reasons of a contemporary nature that render it plausible that their thought should have heen so conditioned." Pocock, 1971, p. 33. Cf also Binder and Weisberg, 2000, p. 359.

[26] This discussion owes a bit to the Harlan-Hollinger debate, in Harlan, 1989, p. 581 and in Hollinger, 1989, p. 610.

[27] I have borrowed and extended the scope of these words from Craven, p. 34.

[28] Peters and Fassbender, 2012, p. 13.

[29] Peters and Fassbender, 2012, p. 1.

[30] Orford, 2013, p. 177.

already mentioned, the international lawyer's historical interest is usually based on a concern for the present and the future rather than the past as such. In other words, it is about what has been passed down rather than about presenting the past "as it really was". But because of the great legitimacy of that "passed down", there is struggle over what it is. "The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation,"[31] and must therefore be subjected to critical assessments. For an "internal" history of international law, a number of approaches are possible in addition to those of the Cambridge school.[32] In my own work I have used conceptual history, as developed by Reinhart Koselleck. I wanted to know the role of concepts, like neutrality, sovereignty, international, war, peace – how they affect one another, how they have been talked about, and how they function in international legal discourse.[33] Moreover, I have tried to describe the discursive production of concepts in texts. By "describe" I mean not merely to show how it has happened but, to quote Foucault, one could also "seek the immediate reason for them … in the discursive system and in the possibilities or impossibilities of utterance which it provides."[34] Another useful approach, in particular in order to enrichen the Cambridge approach is to use reception history (*Rezeptionsgeschichte*), pioneered by German scholar Hans Robert Jauss. Yet another approach, suggested by David D'Avray, is to use Niklas Luhmann's system theory, in order to describe the relation between various systems of thought.[35] One could also eschew monolithic rigour and engage in thick description or – conversely – try to find historic causation between the law and the world. Or perhaps one would like to do both and then add some or all of the other approaches mentioned, and more, all the time admitting that the most interesting facts are often the ones that are the least possible to prove.

In this chapter, Sebastian Spitra discusses different historiographies of the protection of cultural heritage, which provides quite different perspectives and delimitations of this body of law, and finds that most or all of them contain important silences, or gaps, which inhibit a broader understanding of the legal treatment of such property. Damian Rogers analyses some crucial instances of the rise of international criminal law from propitious politico-strategic circumstances in the deeper and more profound context of the politico-cultural project of modernity. Mark Lewis writes a fascinating pre-history of current

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[31] Orford, 2013, p. 175

[32] See also Peters and Fassbender, 2012, p. 13.

[33] See, for instance, Koselleck, 1985. For a very interesting discussion on historical and philosophical analyses of concepts, see Bartelson, 2007.

[34] Foucault, 1972.

[35] International lawyers may be more familiar with Luhmann's followers, Günther Teubner and Andreas Fischer-Lescano.

international police cooperation, showing the growth of an administrative practice of trans-border cooperation during World War I in that very place that shortly thereafter came to be the home of what is now Interpol. In my own text, I trace different understandings of the issue of so-called combatant privilege (to kill in war) for non-state actors and I find that a conditional combatant privilege has been introduced through humanitarian and international criminal justice discourses. These four pieces display different approaches to the history of international law but they all contribute to a deeper and more critical understanding of their subject matters.

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