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# The Spectre of Sources

Rose Parfitt\*

## 1 Introduction

The editors of this impressive and timely volume,<sup>1</sup> Anne Peters and Bardo Fassbender, begin their Introduction (at 2) with the following statement of purpose:

[W]e, the editors and authors, [have] tried to depart from ... the 'well-worn paths' of how the history of international law has been written so far – that is, as a history of rules developed in the European state system since the 16th century which then spread to other continents and eventually the entire globe.

Their aim is that the *Handbook* should represent 'a first step towards a global history of international law', and therefore also towards 'overcoming [the] Eurocentrism' by which this area of study has, as they observe, long been afflicted (at 1). Given that the history of international law has tended to be a history of states, and that most of the world's non-European states came into existence after 1945 (the *Handbook's* chronological cut-off point), this goal is not an easy one to achieve. Indeed, as Martti Koskenniemi points out (at 970),

[w]hat we study as history of international law depends on what we think 'international law' is in the first place; it is only once there is no longer any single hegemonic answer to the latter question, that the histories of international law, too, can be expected to depart from their well-worn paths.

What is required in order to meet the editors' goals, in other words, is nothing less than a revolutionary re-imagining of the discipline. In the following review of Part II of the *Handbook*, on 'Themes', it will be suggested that such a task presents special challenges for international legal doctrine.<sup>2</sup> For if 'doctrine' can be understood as the space in which international history is transformed, or 'imaged', into international *legal* history through its ordering into a particular kind of narrative, then it would seem that doctrine is where the process of revolutionary *re*-imagination and *re*-ordering must begin.

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<sup>1</sup> B. Fassbender and A. Peters, *The Oxford Handbook of the History of International Law* (2012).

<sup>2</sup> By 'doctrine' I mean the orthodox theory of international law as this is found in the judgments of international courts and tribunals, the conclusions of the International Law Commission, long-standing and well-respected treatises, textbooks, and so on.

## 2 Doctrine as Method

The classic doctrine of sources, as it emerged in the 19th century, eventually to be codified in Article 38(1) of the ICJ Statute, leaves no doubt as to the historical character of international law's claim to authority and legitimacy – of its claim *to be law*.<sup>3</sup> International law, according to Article 38(1), is that to which states consent to be bound, either explicitly (through the conclusion of treaties) or implicitly (through their words and acts). Yet the positivist notion of history implied by this doctrine is a notoriously problematic one. In the first place, the consent of *states* is understood to be of overwhelmingly primary relevance when compared to that of other entities, such as individuals or 'peoples'. In the second place, as Koskenniemi has pointed out, the doctrine provides no plausibly 'positivist' way in which to legitimate this restriction.<sup>4</sup> State consent is, however, not the only 'metasource' by which Article 38(1) is underpinned. The latter's reference to 'the teachings of the most highly qualified publicists of the various nations' as 'subsidiary means for the determination of rules of law' is understood to reflect the incomplete nature of the discipline's 19th-century abandonment of the ahistorical/eternalist 'natural law' understanding of sources. In the absence of any direct manifestation of the will of God (the ultimate metasource from a natural law perspective), the sources of international law were (and, hence, to a 'subsidiary' degree still are) identified with the treatises of the 'fathers of international law' – men such as Vitoria, Suárez, Gentili, Grotius, Vattel, and Pufendorf. These treatises draw their legal force from the perceived ability of these men to identify, through the application of Reason, the 'unchanging natural law' and to reconcile it with 'universal (or at least largely shared) institutions of civilized humanity' (Koskenniemi at 946). Naturalist approaches to international law are, in other words, no less co-reliant on their positivist alternative than *vice versa*. Equally, natural law conceptions of history are therefore no less restrictive than their positivist successors. For quite apart from precluding examination of the 'teachings' of individuals other than white, European men, or originating in entities which were not 'nations' but rather colonies or mere 'white spaces on a map',<sup>5</sup> natural law theory – like positivism – possesses no means of authorizing and legitimating the law-making capacity of its own (earthly) meta-source, Reason, that is external to the theory itself.

International law can therefore be understood as simultaneously indeterminate (from the perspective of sovereign equals) and determinate (from the perspective of 'unequal sovereigns' and non-states).<sup>6</sup> And as is well illustrated by the seven thematic

<sup>3</sup> See Craven, 'The Invention of a Tradition: Westlake, the Berlin Conference and the Historicisation of International Law', in L. Nuzzo and M. Vec (eds), *Constructing International Law: The Birth of a Discipline* (2012), at 366.

<sup>4</sup> See M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (1995).

<sup>5</sup> I have borrowed this phrase from Nesiah, 'Placing International Law: White Spaces on a Map', 16 *Leiden J Int'l L* (2003) 1.

<sup>6</sup> For an elaboration of this argument see Parfitt, 'Book Review: Brad R. Roth. Sovereign Equality and Moral Disagreement', 23 *EJIL* (2012) 1175 and (specifically in relation to the Ethiopian Empire), Parfitt, 'Empire des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935–36', 24 *Leiden J Int'l L* (2011) 849. I borrow the term 'unequal sovereigns' from G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

chapters which make up Part II of the *Handbook*, this observation has particular methodological implications for the practice of writing international legal history. For in directing scholars of ‘pre-modern’ international law towards the writings of the ‘fathers of international law’, and in directing scholars of international law’s ‘modern’ history to state consent, the discipline’s orthodox approach to sources offers the international legal historian a ready-made methodology, amounting in effect to an inbuilt disciplinary historiography. If the international ‘past’ is fed into this legal-historiographical machine, then, whether we like it or not, the product that emerges will be exactly what the editors have striven to avoid – namely a ‘history of rules developed in the European state system since the 16th century which then spread to ... the entire globe’. Discard the methodology dictated by the classic approach to sources, on the other hand, and the possibility of ‘challenging Eurocentrism’ emerges – but at the risk of dissolving the specifically international legal character of the historical undertaking.

### 3 Method and ‘Themes’

Of the seven chapters that make up Part II, Koen Stapelbroek’s ‘Trade, Chartered Companies, and Mercantile Associations’ stands out in terms of its *rejection* of a methodology based on orthodox sources doctrine in favour of one based on contextualization. It stands out also in terms of its graceful execution of the editors’ mission. Focusing on the 17th and 18th centuries, Stapelbroek mounts a decidedly Skinneresque challenge to two orthodoxies – one historiographical, the other historical. The first of these is the assumption that historians of his topic can content themselves with doctrinal sources – primarily Grotius’s *De mare liberum* – and need not take the further step of examining ‘how legal positions on company trade fit with 17th- and 18th-century political and economic thought on inter-state relations’ (at 339–340). The second is the assumption that chartered companies were designed to and did function exclusively as ‘instruments of colonialism’ (at 340). Stapelbroek’s approach reveals that the contribution of chartered companies to the development of international law was in fact far more complex – and far more ‘global’ – than standard international legal histories have tended to indicate. Looking closely at these companies’ operations, Stapelbroek describes a world in which the chartered company and the nation-state were emerging *in parallel* (at 356), and in a profoundly unstable diplomatic context. On the one hand, the body of contracts initially understood to have been concluded between juridical equals came gradually to function as ‘the stepping stone to the initial stages of colonial conquest’ (at 350). On the other, relations among established and nascent European nation-states and their chartered companies manifested an intense colonial and commercial rivalry. Placing the doctrine that emerged in this context brings into view numerous otherwise invisible layers of complexity. For example, in unpicking the implications of Grotius’s concept of ‘propriety’, Stapelbroek points out that the very ‘federal structure of the Dutch Republic’, then struggling for its independence from Spain, had been ‘copied into the structure of the [Dutch East India Company]’, and suggests that with this concept Grotius put forward ‘a framework for

the development of international trade...that might ultimately be seen as a commercial political “reformation”: the defeat of the Iberian *Reconquista*-driven *imperium* by an entirely different order’ (at 347). As Stapelbroek invites us to conclude, far from being a side-issue to international law’s primarily statist concerns, the history of company trade contextualized and reimagined in this way offers ‘an ideal access point for grasping the development of inter-state rivalry’ (at 358).

By contrast, the other six chapters in Part II adopt a more straightforwardly doctrinal focus. It is perhaps this unwillingness to depart, in particular, from the orthodox approach to sources that can explain why Eurocentrism, though lamented (as for example, in David J. Bederman’s ‘The Sea’, at 360), is treated in these chapters as an inherent, and hence unavoidable problem for international legal history. This fatalism facilitates a substantive focus throughout the ‘Themes’ section that is heavily skewed towards Europe, with some discussion of Islamic law in the case of Antje von Ungern-Sternberg’s ‘Religion and Religious Intervention’ (see at 300–301). The reasons for this seem to be methodological. In the chapter on ‘Peace and War’, for example, Mary Ellen O’Connell<sup>7</sup> refers to her ‘story’ as being that of ‘how humanity reached the point of drafting the [UN] Charter’ (at 273). According to the editors’ aims, this statement is problematic. After all, in 1945, there were fewer than 75 states in existence. The rest of ‘humanity’, denied international personality on account of its lack of ‘readiness’, was therefore denied the opportunity to participate in the drafting of the Charter. According to the logic of classic sources doctrine, however, O’Connell’s description is entirely *unproblematic*, for that doctrine directs us to understand the ‘consent’ of colonial, protected, mandated, and indigenous populations as subsumed within that of the metropolitan states in control of them. To take another example, Daniel-Erasmus Khan, author of ‘Territory and Boundaries’, insists that ‘unanimity prevails’ regarding the status of ‘territoriality’ (defined as ‘claims to a certain territory to the exclusion of others’) as being ‘one of the key imperatives of human behaviour’ (at 225–226). The reason, Khan argues, is that ‘bounded’ territory provides its ‘owner’ with ‘a clear evolutionary advantage’ (*ibid.*). Almost no discussion of nomadic and other non- or differently-bounded/proprietary relationships to territory<sup>8</sup> is included except in one section, entitled ‘Territory and the Others’. Here Khan acknowledges that ‘[t]he delegitimization of all other forms of the exercise of supreme political authority in and over territory has ... been a continuous feature of the evolution of the very distinct “Westphalian” model’ – yet he concludes that the victory of the latter was ‘inevitable’ and ends his discussion there. The possibility of discussing other ‘models’ of territoriality is raised in the context of the colonization of North America,

<sup>7</sup> In one chapter in this section of the *Handbook*, namely Robert Kolb’s ‘Protection of the Individual’, the language of the ‘civilizing mission’ is explicit for reasons which do not appear to be linked to methodology. See, e.g., the statement that ‘keen attention to the fortunes of individuals supposes a high degree of civilization. At early stages, social ideology is caught up in the categories of group solidarity and moral close [*sic.*]. Only through a long historical evolution morality develops into the more refined flower of compassion and care for the individual and its personal fate.’

<sup>8</sup> See, e.g., Morris, ‘A Full Law’, 9 *Griffith L Rev* (2000) 211; C.F. Black, *The Land is the Source of the Law: a Dialogic Encounter with Indigenous Jurisprudence* (2011).

only to be dismissed immediately, for according to Khan, this history is ‘obfuscated behind the broad smokescreen of a complex and contradictory controversy on the legal nature, contents, and limits of aboriginal and other (territorial) title’ (at 235). Again, it is easy to justify the scope of Khan’s chapter if orthodox sources doctrine supplies the methodology, since the status of indigenous peoples under international law at the time of the treaties’ conclusion was profoundly ambivalent (though hardly non-existent). Yet, as Ken Coats points out in Chapter 33 of the *Handbook* (at 808), and as the work of Robert A. Williams Jr., Christopher Tomlins, and John Smolenski, among others, is concerned to demonstrate,<sup>9</sup> detailed historical research of this nature is not only underway, but would seem to be precisely what is required of a genuinely ‘global’ history of international law. To take a final example, Dominique Gaurier initiates the chapter on ‘Cosmopolis and Utopia’ by restricting its scope to ‘the various projects which have been planned over nearly six centuries, aiming towards a perpetual peace between European nations’ (at 250). When examined through the lens of orthodox sources doctrine, this restriction is – once again – valid: the only ‘nations’ to have existed as full law-making subjects for the best part of these six centuries as far as mainstream international law is concerned were either European states or neo-European settler states. That the intra-European ‘perpetual peace’ imagined by the authors Gaurier considers (Pierre Dubois, George of Podébrady, Maximilien de Béthune, Emeric de Crucé, the Abbé Castel de Saint-Pierre, Gottfried Wilhelm Leibniz, William Penn, Immanuel Kant, Jeremy Bentham, and Woodrow Wilson) was (and is) predicated on the legitimacy of perpetual war with ‘infidel’, ‘uncivilized’, or ‘illiberal’ outsiders is irrelevant from a doctrinal perspective since, as we have just seen, such outsiders were considered objects rather than subjects of international law.<sup>10</sup> Accordingly, Gaurier, like the theorists he examines, omits to mention this problematic utopian flipside. Yet the results of this chapter, again, sit uncomfortably with the editors’ aims. In the subsection on the English Quaker and founder of Pennsylvania, William Penn, for example, Gaurier declares that ‘[i]t is not necessary to retell here the peaceful means of colonization, his religious tolerance, regular and equitable treaties with the Indian tribes, etc.’ (at 261). However, while Penn, though himself a slave-owner, does appear to have treated the Native Americans whom his project of territorial settlement and expansion encountered with an unusual degree of respect, it is not obvious that this should make it *unnecessary* to examine his idiosyncratically ‘peaceful means of colonization’ (*ibid.*). After all, Penn initially became ‘proprietor’ of the land in question (in 1781) for reasons which had nothing to do with its original inhabitants (he had been given it in a Royal Charter by Charles II of England in repayment for a debt owed to Penn’s father). Moreover, as Tomlins has pointed out, law in the

<sup>9</sup> Tomlins, ‘The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century’, 26 *L and Social Inquiry* (2001) 331. See also, among others, J. Comaroff and J. Comaroff, *Of Revelation and Revolution* (1991); R.A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (1997); J. Smolenski, *Friends and Strangers: The Making of Creole Culture in Colonial Pennsylvania* (2010); J. Smolenski and T.J. Humphrey (eds), *New World Orders: Violence, Sanction and Authority in the Colonial Americas* (2005).

<sup>10</sup> See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

colonial context should be understood as ‘an imaginative resource not entirely under the colonizer’s control’ – neither exclusively benign *nor* exclusively malignant.<sup>11</sup> On this point, the fate of Penn’s ‘equitable’ treaties provides a useful illustration – for it was Penn’s own sons who, in the infamous ‘Walking Purchase’ of September 1737, defrauded the Delaware nation of an area roughly the size of Rhode Island by means of a treaty ostensibly signed by their late father, transforming Penn’s ‘desire to treat Indians with justice into a means of extending their legal authority far into the colonial hinterlands’.<sup>12</sup> Given the *already* globalized legal situation into which Penn and his sons intervened (the colony of New Sweden, for example, having already been established in the area) (at 876), Gaurier’s unwillingness to engage further with the international legal dimensions of this ‘benevolent’ imperialism is surprising.

#### 4 You as Me; Then as Now

But is this critique a fair one? Is it actually possible to liberate the historiography of international law from the constraints of sources doctrine without transforming it into a historiography of something else? Responses to these questions can be grouped into two, not altogether distinct, categories. The first group includes the work of scholars who challenge the particular image of order which sources doctrine is designed to validate, based on a fundamental distinction between ‘law’ and ‘not-law’. The other goes even further to confront the dichotomy between ‘past’ and ‘present’ itself.

That the distinction between law and what is not law (politics, ethics, and so on) has become nothing more than a rhetorical device which allows the discipline of international law to present its history in terms of an internally-consistent ‘progress narrative’ is an axiom of critical approaches to international law.<sup>13</sup> By projecting ‘certain parts of international law ... into some non-legal sphere called “empire”’, as Berman puts it, international law gives itself ‘an alibi, a claim it was not present at those events the discipline now condemns’.<sup>14</sup> Orthodox sources doctrine plays an obvious role in this process of alibi-creation in rendering non-state forms of political collectivity invisible,<sup>15</sup> making it ‘difficult to recognise other laws as lawful’.<sup>16</sup> However, given the logically unsatisfactory nature of sources doctrine even when taken on its own terms, as argued by Koskenniemi and others (see above), it is particularly difficult in this context to understand why the law/not-law distinction which rests on it should continue to be fetishized. Australasian legal scholars have been among the most insistent askers of this question

<sup>11</sup> Tomlins, *supra* note 9, at 331. On the Conestoga interpretation of the 1701 treaty negotiated by this people and Penn, on behalf of the Pennsylvania colony, see Williams, *Handbook*, at 110–111. For a detailed account of Indian–Quaker interaction before and after Penn’s death see Smolenski, *supra* note 9.

<sup>12</sup> *Ibid.*, at 283–285.

<sup>13</sup> See, e.g., Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, 17 *Queensland L Rev* (1997–1998) 99.

<sup>14</sup> Berman, ‘In the Wake of Empire’, 14 *Am U Int’l L Rev* (1999) 1537.

<sup>15</sup> For a fascinating new study see J. Evans, A. Genovese, A. Reilly, and P. Wolfe (eds), *Sovereignty: Frontiers of Possibility* (2013).

<sup>16</sup> Black, McVeigh, and Johnstone, ‘Of the South’, 16 *Griffith L Rev* (2007) 303.

in the context of the ongoing controversy regarding the legal status of Aboriginal lands and laws. In attempting to reconcile indigenous, national, and international law, from an ethical as much as from a legal point of view, the approach of Christine Black, Shaunnagh Dorsett, Shaun McVeigh, and Sundhya Pahuja, among others, has been to switch from the language of doctrine to that of jurisdiction,<sup>17</sup> emphasizing the need to pay more attention to the 'meeting of laws' and to 'framing' that meeting 'in terms of conduct', and less to the doctrinal legitimacy of specific legal sources.<sup>18</sup> The purpose of these scholars is to focus attention on the simultaneous authority of many coexisting legal orders, and on the responsibility of the legal scholar for the manner in which those different 'laws' have met in the past and continue to meet in the present:

The rendering of accounts of imperial and post-colonial occupation and the critique of the global North are not the only forms of law that pattern the South. Even the Australian High Court has now recognised what others have long known: that Australia and the South were not, and are not, without law. These laws [the laws of the South] shape the South according to different cosmologies, laws of relationship, rights and responsibilities, and protocols of engagement. Respond to these laws ... and a different patterning of legal relations emerges.<sup>19</sup>

It might be argued, from a mainstream perspective, that the staging of a 'meeting' *today* not only between indigenous and state law but also between indigenous and international law would amount to a jurisprudential anachronism. Yet the effects, for example, of the now-obsolete doctrine of *terra nullius* on Australia's indigenous peoples are ongoing. To deny the need for such an encounter would be to make oneself, as a legal scholar, complicit in the violence of state sovereignty.<sup>20</sup> Nor can the task of encountering the authoritative lawful position of non-state groups with respect be solved by the traditional 'turn' to universal human rights, as Orford has argued. For recognition by the human rights regime requires 'indigenous subjects' to adopt a hybridized and essentialized vocabulary of identity in return for a reward that is clearly inadequate: namely, incorporation into 'a model of perfect circulation, an economy of gifts and obligations or of monetary compensations contained by a state that exists unchanged over time'.<sup>21</sup> Nonetheless, impossible as the task of escaping international law's inbuilt historiography may appear, the history of international law 'need not lead inexorably to such a state-centric position' in Orford's view – for this history 'also offers an archive of the many attempts to solve the problems that arise in the encounter with strangers ... and their laws'.<sup>22</sup> Orford's reference point, turning Eurocentrism back on itself, is the diplomatic culture of early modern Europe, which, with its 'focus on rituals and on the reciprocal exchange of letters, privileges

<sup>17</sup> Dorsett and McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking', 36 *Melbourne U L Rev* (2012) 473. See further S. Dorsett and S. McVeigh, *Jurisdiction* (2012); C.F. Black, *The Land is the Source of the Law: A Dialogic Encounter with an Indigenous Jurisprudence* (2010); Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', 1 *London Rev Int'l L* (2013) 63.

<sup>18</sup> Dorsett and McVeigh, 'Conduct of Laws', *supra* note 17, at 474.

<sup>19</sup> Black, McVeigh, and Johnstone, *supra* note 16, at 300.

<sup>20</sup> See Evans *et al.* (eds), *supra* note 15.

<sup>21</sup> Orford, 'Ritual, Mediation and the International Laws of the South', 16 *Griffith L Rev* (2007) 364.

<sup>22</sup> *Ibid.*, at 367 (references omitted).

and obligations contributed to creating the sense of a common culture of norms and values',<sup>23</sup> and yet which (unlike human rights law) 'had an awareness of its limits'.<sup>24</sup> As these authors suggest, the orthodox approach to the sources of international law is incapable of reflecting the complexity of international legal interaction over the last 500 years. As the foundation of a historical methodology, therefore, sources doctrine is profoundly distorting – yet in a way that is far from random or 'indeterminate'. There is perhaps reason to be hopeful, then, that contextualizing the emergence and operation of specific international legal doctrines (as in Stapelbroek's approach, for example) might facilitate the construction of a less Eurocentric, more 'global' history of international law by making apparent the way that orthodox sources doctrine allows the discipline to homologize events from different eras while externalizing their inconsistencies, in order to shore up a pre-determined doctrinal pattern.

Yet it may be necessary to go a step further, and to challenge the very linear concept of time which the method of contextualization takes for granted. Even as they attack the law/not-law dichotomy, critical scholars of international law have often relied on another dichotomy, that between 'past' and 'present'. In the historical context, such scholars have drawn explicitly on the approach of the 'Cambridge School' of historians, echoing their insistence that a 'clear separation of past and present' is essential to the validity of any historical method.<sup>25</sup> As we have seen, this approach, in mitigating the distortion associated with the lens of sources doctrine, constitutes an immensely productive critical methodology. However, as Tomlins and Orford have both argued recently, though in different ways, the adoption of such a radically historicist methodology – one premised on 'the theoretical contention that whatever the realm of action in relation to which law is situated, the outcome is the same: indeterminacy marked by radical contingency, alternative possibility, paths not taken' – is not without problems when it comes to the study of law and legal history specifically.<sup>26</sup> As Tomlins points out, 'critical legal history' premised on contextualization,

shares in the general turn in the qualitative social sciences and humanities towards complexity. The results of this contextualizing or relational approach have been empirically rich but are inevitably marked by an abandonment of authoritative causal explanation (metatheory) for thick description.<sup>27</sup>

This contextualist approach – born of the revolt, on the one hand, against anachronism, and on the other, against the *specific* metatheory of the European civilizing mission – is, on this view, in danger of throwing the baby out with the bathwater and, in particular, of abandoning its commitment to emancipatory change. Moreover, as Orford points out,

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

<sup>24</sup> *Ibid.*

<sup>25</sup> Orford, 'The Past as Law or History: The Relevance of Imperialism for Modern International Law', NYU Institute for International Law and Justice Working Paper 2012/2 (History and International Law Series), at 6.

<sup>26</sup> Tomlins, 'After Critical Legal History: Scope, Scale and Structure', 8 *Annual Rev L and Social Science* (2012) 31, at 31. See also Orford, 'On International Legal Method', 1 *London Rev Int'l L* (2013) 166 and Orford, *supra* note 25.

<sup>27</sup> Tomlins, *supra* note 26, at 31.



to attack (international) legal scholarship on the grounds of anachronism (the greatest methodological sin from the contextualist point of view<sup>28</sup>) is not merely to enter into a methodological dispute but actually ‘to challenge the core of legal method’ – a core which consists in ‘the art of making meaning move across time’.<sup>29</sup> (International) legal scholarship, she argues, is ‘necessarily anachronistic’ and ‘inherently genealogical’, in that ‘the past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation’.<sup>30</sup> Yet it is in this distinction between ‘the past as history’ and ‘the past as law’ that both authors see an opportunity to redeem the political potential offered by contextualization.<sup>31</sup> According to Orford, this is a question both of widening the scope of ‘context’ beyond that of a text’s immediate temporal habitat, and of asserting the validity of ‘juridical thinking’ about the past.<sup>32</sup> For his part Tomlins, drawing on the work of Walter Benjamin, constructs the value of anachronism in terms of political ‘re-enchantment’.<sup>33</sup> It was Benjamin’s insistence that since ‘[h]istorical time is infinite in every direction and unfulfilled at every moment’, one ‘cannot conceive of a particular empirical event that would have a necessary relation to the specific time in which it occurs’.<sup>34</sup> Instead of viewing the past as a ‘fixed point’ to be observed from the present, Benjamin advocated a ‘dialectical reversal’ of this relationship in a ‘flash of awakened consciousness’, forcing ‘the facts’ to become ‘something that just now first happened to us’, so that ‘to establish them’ becomes ‘the affair of memory’.<sup>35</sup> The point of writing history, from this perspective, is not ‘to satisfy an imagined desire for an improved understanding of the past’, but rather to create, in an explicitly political way, ‘new, historical objects or dialectical images that join together what may be quite distinct phenomena, whose significance can emerge only posthumously or retrospectively, in a relationship with the now that has apprehended their significance’.<sup>36</sup>

## 5 Conclusion

The invitation offered by Orford and Tomlins to approach the (legal) past as an activity unavoidably undertaken in the present collapses the past/present dichotomy, just as the jurisdictional approach described above undermines the law/not-law dichotomy.

<sup>28</sup> Skinner discusses anachronism in terms of a ‘needlessly constricting and philistine’ obsession with ‘relevance’. According to the ‘orthodox’ view associated with this obsession, he argues, ‘the history of philosophy is only “relevant” if we can use it as a mirror to reflect our own beliefs and assumptions back at us ... The only way to learn from the past, in short, is to appropriate it’: Q. Skinner, *Visions of Politics, Vol. II: Renaissance Virtues* (2004), at 195. For a deployment of this critique in the context of international legal history see, e.g., Lesaffer, ‘International Law and its History: a Story of Unrequited Love’, in M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds), *Time, History and International Law* (2007), at 27–41.

<sup>29</sup> Orford, *supra* note 26, at 172.

<sup>30</sup> *Ibid.*, at 175.

<sup>31</sup> *Ibid.*, at 166, 177; Orford, *supra* note 25.

<sup>32</sup> Orford, *supra* note 26, at 166.

<sup>33</sup> See Tomlins, *supra* note 26.

<sup>34</sup> Walter Benjamin, quoted in *ibid.*, at 42.

<sup>35</sup> Benjamin, quoted in *ibid.*, at 56.

<sup>36</sup> *Ibid.*, at 42.

In both cases, the effect is to force the question of ethics onto the historiographical table – precisely the question which the classic approach to sources invalidates. When applied to the construction of a ‘global history’ of international law, these methodologies render inescapably immediate and visible *all* communities which continue to find themselves on the receiving end of the discipline’s historical violence – communities which sources doctrine renders distant and obscure. On the one hand, the otherwise broken link between ongoing suffering and previously-inflicted wounds can be restored. On the other, the consent of entities which are *not* states, and of entities *before* they became or were incorporated into states, can be recognized both as lawful and as itself a source of international law which must be respected.<sup>37</sup> And indeed, such an approach is already underway in the field of international legal history. See, for example, the argument of TWAIL (Third World Approaches to International Law) historians like Antony Anghie and B.S. Chimni that ‘[i]t was principally through colonial expansion that international law achieved one of its defining characteristics: universality’ and hence that ‘the doctrines used for the purpose of assimilating the non-European world into this “universal” system ... were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship’.<sup>38</sup> Or see Teemu Ruskola’s queer history of international personality, which ‘analyses the injury of colonialism as a kind of homoerotic violation of non-Western states’ (would-be) sovereignty’.<sup>39</sup> From the contextualist point of view, approaches of this type inevitably invite the charge of presentism – in effect, that of blaming the past for not being the present. Yet as Orford has argued, the view embraced in such explicitly political engagements with the history of international law is that history is ‘something alive rather than dead’ – and specifically that colonialism ‘is not a matter of past history but of present obligation’.<sup>40</sup> The teleological implications of such a politically ‘re-enchanted’ methodology will, of course, be obvious. Yet for those who would agree with these scholars, as with many of the contributors to the *Handbook*, this is precisely the point. Only by challenging the substantive (Eurocentric) teleology inherent in international law’s orthodox approach to sources with the methodological (critical) teleology of a ‘materialist historiography’<sup>41</sup> can the conditions be created in which a more ‘global’ and hence more ethical history of international law might emerge – the political aspirations of which need no longer be frightened away by the spectre of sources doctrine.

<sup>37</sup> See Orford, *supra* note 21, at 355.

<sup>38</sup> Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Armed Conflicts’, 2 *Chinese J Int’l L* (2003) 84.

<sup>39</sup> Ruskola, ‘Raping Like a State’, 57 *UCLA L Rev* (2009–2010) 1477.

<sup>40</sup> Orford, *supra* note 25, at 9.

<sup>41</sup> Benjamin, quoted in Tomlins, *supra* note 26, at 57.