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The *Journal of the History of International Law*: A Forum for New Research

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In the editorial in the very first issue of this Journal in 1999, Ronald St. John Macdonald wrote that "the history of international law [has] been neglected for many years and that the time [has] come to dedicate a new journal to the study and promotion of the subject".[1] He went on to state that "the aim of the Journal is to open fields of inquiry, to enable new questions to be asked, to be awake to and always aware of the plurality of human civilizations and cultures, past and present, and an appreciation of patterns of cultural flow and interaction that centrally affect international law and development". It seems to us that this pioneering effort to create a journal that was so innovative in this sense both for international law and for history has been largely rewarded because since 1999 issue upon issue has been published to meet the ever greater demand for the historiography of international law. May the original members of the Journal be thanked here now that a new team is about to head the Editorial Board. It is a team that stands for both continuity and renewal, as is reflected by its composition. Many thanks to those who are remaining on board and to those who are now embarking for this new editorial adventure.

A Renaissance of Studies in the History of International Law

Corresponding to Ronald St. John Macdonald's hope in 1999, the history of international law has now achieved a vitality and a position within our intellectual universe that contrasts starkly with the virtually moribund state in which it had languished since the 1950s. Where once it furnished material for the odd book, it is now a thriving field of research. Recent years have seen the

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emergence of a wealth of studies which have rescued it from the state of abeyance and even illegitimacy in which it had been maintained. It is fascinating besides to observe that this resurgence of interest for the history of international law has revived with it a way of thinking about international law; and it has triggered a new dynamic, especially since the early 1990s, which a number of commentators have picked up on.

Most observers agree that this renaissance of historical studies in international law is associated with the new configuration of the world arising out of the end of the Cold War, which froze, as it were, inquiries into international law, but also with the recurrent fact that at the end of each crisis, internationalists have invariably returned to the history of their discipline to draw new strength and inspiration from its original historical impetus or, on the contrary, to move beyond it and not remain petrified in the forms of the past. In this respect, it is obvious that the context of the end of the Cold War and the spread of globalization have prompted a passionate and impassioned debate as to whether or not we had entered into a new era of post-Westphalian international law, forcing everyone to look to the past of international law to understand what it had been and whether it really had changed.

It should not be overlooked that these incontrovertible points about the transformation of the global landscape are compounded by other intellectual, cultural and epistemological factors. For example, we might cite the current prevalence of the discourse on human rights and the historical revisiting of mass crimes that are prompting keen debate in international law about memory and history.[2] There is also a certain decline in the methodological primacy of technicism (doctrinalism) and pragmatism in international legal scholarship. In the aftermath of the Second World War, the various technicist and pragmatist strands of all persuasions, whether positivist, formalist, de-formalist, sociological or realist had come to dominate the field, and this led to technicizing, trivializing, sociologizing and professionalizing international law as a discipline. From most of these perspectives, internationalists should be specialists, where possible practitioners, and preferably no longer resemble those overly theoretical, overly systematic and abstract theorists, and even adherents of natural law, who had made up the profession in the inter-war years. This new impetus spread worldwide. By the same token, many scholars and practitioners of

2 See only European Court of Human Rights, *Perinçek v. Suisse*, No. 27510/08, judgment of 17 December 2013 (Grand Chamber pending), finding that the penalization of denials of the Armenian genocide under Swiss criminal law amounted to a violation of the right to free speech under Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

international law relinquished the study of the history which had once been thought an essential foundation for an understanding of international law. In contemporary international legal scholarship, we witness maybe a slackening of traditional pragmatism, but at the same time a plurality of approaches, ranging from economism and quantitative approaches over neopositivism to cultural studies. This pluralism has opened up the possibility of no longer amputating from international legal scholarship its critical and historical dimension.

It should be added that the contemporary rejection of the traditional great doctrinal edifices has encouraged current reflection to free itself from pre-established certainties, but has left today's international law scholar particularly at a loss when confronted with technique alone or with the pragmatic approach. This also explains the current attraction exerted by a return to history. It is hard to see how to avoid historical studies without paying the price of exaggerating current problems in international law. This is what happens if contemporary issues are not set in a broader historical perspective, which would help in understanding what has become a highly complex international legal order. But this return to history, in a world which rejects pre-established truths, means precisely that historians of international law today no longer settle for the classical content of earlier accounts, but look instead to re-work a domain which they deem highly fertile – provided it is renewed. From this point of view, work on the history of international law must be understood as a contribution to international law itself.

Whatever its causes, this undeniable resurgence of the historiography of international law seems to be transforming these studies, through that very action, into a discipline in its own right. The discipline is not yet fully autonomous: an informal survey of many colleagues worldwide shows that the teaching of the history of international law remains marginal in most countries, especially and above all within the internationalist academic world. Admittedly, a few isolated topics, for example the just war doctrine, are often taught specifically – but, on the whole, the history of international law is conducted essentially through research, articles, books and also through a journal like this one. While only a few autonomous academic courses in this field exist, still a host of studies have been published especially since the 1990s, by a body of increasingly specialized professionals in this branch. For the last twenty years or so, the historical field of international law seems to have been continually expanding, extending into many areas it never touched upon before. A whole series of teeming, heterogeneous, new histories are emerging and force us to take note of a co-existence of multiple types of separate historical narrative accounts. To take up an idea that marked a stage in the evolution of history writing in France, it can be said, borrowing terms from Jacques Le Goff and

Pierre Nora,[3] that the novelty of this history, or rather of these histories of international law, lies in three factors: the emergence of "new issues", "new subjects" and "new approaches". To which we shall add "new uses". We should emphasize that what is presented here as "new" is not an innovation but the reconfigured repetition of debates of the past. The question of the subjects, methods, issues, and uses, has always been discussed by the few historians of international law, so much so that in this respect it is nothing new. What is new is the fresh importance given to it, the fact that it has arisen in a doctrinal universe that has changed substantially with the result that the truly new components intertwine and reconfigure old concerns about the history of international law.

The New Issues

Duly bearing this reservation in mind, there are, it seems to us, new problems that arise insofar as contemporary historians have called into question the accounts of the history of international law that had prevailed until now and have lastingly problematized it. In this way, the historians of international law, wherever they may be from, have all challenged the standard Western-European-centred view among internationalists from the 19th to the mid-20th centuries, characterized by the grand narrative of international law as the purveyor of peace and civilization to the whole world. Of course, at all times, counter-narratives have been told, and far more subtle and distanced historical accounts have challenged this magnified, deterministic, progressist and evolutionist history. But overall, most of the textbooks of that earlier period, translated into many languages and imported into many countries, conveyed this view of the history of international law, which was itself the product of a context in which Western belief in science and progress – shared by numerous non-Western elites – was equally unshakeable.

In fact, nowadays, barring one or two exceptions, studies of the history of international law have all distanced themselves from and have criticized this former history of Eurocentric design. Today, a multiplicity of views of the history of international law from all parts of the world contrasts with the uniformity of the previous grand discourse. We know, however, that major imbalances of various kinds persist between North and South as to the possibility of making and writing the history of international law.

3 Jacques Le Goff and Pierre Nora (eds.), Présentation, *Faire de l'histoire. I. Nouveaux problèmes*, Paris: Gallimard, 1974, pp. 10 and 11.

Besides, and in a closely related way, current studies share common ground in that they reflect an awareness that the accounts given by historians are subordinated to the authors' subjectivity and to the conditions in which their texts are produced. This insight leads different commentators to draw different conclusions about the possibility of a scientific objectivity and truth of any historical account – an issue which also touches on the question of revisionism in international law. Still, virtually no-one today thinks that he or she could produce a new grand narrative of international law which would be objective, entirely neutral, absolute, and universal. Should international institutions seek to do so again today, as happened in statements on racism, colonialism, and slavery, made by some participants of the World Conference against Racism in 2001 ("Durban I"), researchers and historians caution against this temptation to write a new great postcolonial and post-Cold-War account that might replace the former Western narrative. History cannot reveal any universal truth that would ideally by shared by all and settle the scores of the past.

This awareness of the relativism inherent in the work of the contemporary historian of international law also means that the history of international law is reaching a familiar stage in the constitution of a discipline, at which it takes an ever greater interest in itself. It accords increasing significance to its own historiography, its practices and epistemological foundations, and also to the personal and professional identities of its specialists. Such a development is leading historians of international law to self-questioning, and the time will come – if it has not already – for the academic, political and social struggles to which all new disciplines give rise. It must be more "cynically" acknowledged that this consolidates and bolsters the interests of a whole array of academics and bestows on them a power associated with this new knowledge which, eventually, may bring them material and symbolic benefits as in any discipline that becomes autonomous and professional. Besides, like all journals, a journal like this, which accepts or declines papers for publication, is one of those seats of power and a major player in formulating historical questions themselves.

Moreover, the subjective and relative way to understand the craft of the historian of international law means that the question asked over the document investigated is primary, and that the document is constructed in part by the historian's questioning. The result is that historical accounts in international law can never exhaust what the document has to tell us, and that the source may be investigated again and in different circumstances and by other historians. This awareness of the intrinsic relationship between the historian's questioning and the document referred to leads to new subjects and new approaches.

The New Subjects

There are new subjects, since historians of international law are breaking in upon new, previously unknown domains such as indigenous peoples, sexuality, gender, postcolonial studies, biopolitics, technologies for governing international institutions, mindsets, mass crimes, oppressed voices, the poor, expertise, globalization, culture, animals, progress, and the unconscious or passions. This whole array of new subjects, the list of which is expanding, enhances the history of international law, making it more complex, providing new insights so far left wholly unexploited and leads to a questioning of international law itself. But the new subjects also prompt reflection on the very idea of "historical category", and they again raise the question of anachronism when using denominations of issues that simply did not exist in the period under study.

The New Approaches

New approaches are emerging and are now to be found alongside what have remained more classical ones – not in any pejorative sense of the word – and these sometimes clash. Among them, we might mention the global history approach, which seems to be particularly relevant for international law. But that perspective, too, has not gone unchallenged and is being attacked as too general and superficial (history *lite*), and as constituting yet again a kind of academic colonialism by Europeans.[4] These quarrels about approaches cause debates which are familiar enough internally, over chronology, structure, place, context, scales, classification, means of analysis, resort to records, recourse to "historical traces", to the role of narrative, writing and aesthetics, scientific stringency or historical truth.

The New Uses

Lastly, and not least, new uses for the history of international law can be seen to emerge. These new uses arise, firstly, from internationalists themselves who, taking a far closer interest in the history of their discipline, have moved from a

4 For a discussion of the criticisms voiced against global history and the limits of this approach, see Sebastian Conrad, *Globalgeschichte: Eine Einführung,* Beck 2013, chapter 4 'Kritik und Grenzen der Globalgeschichte', pp. 87–111.

historiography that mentions aspects of international law in passing to a historiography centred on the development of international law. The new uses are associated above all with the fact that the history of international law is increasingly attracting the attention of scholars of the humanities, notably of historians, but also of those with a background in philosophy, geography, sociology or economics. These voices provide stimulating new comparative perspectives that are sometimes "off-beat".

To which should be added the new uses made of this history by certain groups which are moving far beyond the realms of academic history writing. We are beginning to see what is usually referred to as a "public use" and a renewed use of the history of international law through the slant of its "bottom-up" and not "top-down" re-appropriation. This is done by groups which had long been deprived of their ability to speak out on this subject, such as decolonized peoples initially, but also currently by indigenous peoples, subalterns, minorities and women. In this way, the inquiries into the history of international law respond to a demand for understanding the past. And such intelligibility is in turn felt to be a pre-requisite of the recognition of the traumas inflicted on some groups in the past by means of international law. The result is sometimes that Westerners and non-Westerners, or dominant groups and dominated groups from various parts of the world, argue continuously over their past and their history of international law on a world scale in a healthy confrontation. This sometimes ends in a genuine failure to understand the others' interpretations, which shows the limits of the exercise. On the other hand, these confrontations also help in conceiving a far more open history, a history of international law that can better track the way by which legal practice and discourse have contributed to the imposition of domination of all kinds, but also to the forging of connections between identities and cultures.

Moving Forwards

It is against this backdrop of a renewal of historical studies of international law that we are taking the helm of the Journal of the History of International Law. We align ourselves more than ever with the initial objectives of the Journal which set out to be open to all possibilities of telling and making the history of international law, while respecting the necessary rigour in the use of records and sources – of whatever kind – which remains the historian's corner stone. We continue, therefore, to argue more than ever for a plurality of visions of the history of international law, but also for debate on such plurality itself, on the methods, subjects and uses, as well as the bounds and dead-ends of this

emerging discipline. This is why we plan from time to time to devote more space in the Journal to examining in greater depth a specific theme in the history of international law or a question about the epistemology of that history.

We do not wish to close these few remarks by resembling the "historian crayfish" which, being concerned exclusively about origins, ended up not just swimming backwards but "believing backwards".[5] The history of international law is not just knowledge of the past but also a window on the world today. That is the objective of this Journal, too.

5 François Chaubet, *Histoire intellectuelle de l'entre-deux-guerres. Culture et politique*, Paris: Ed. Nouveau monde, 2006, p. 8.