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# International Legal Histories as Orders: An Afterword to Martti Koskenniemi's Foreword

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## Abstract

*In this article I address the question of what Martti Koskenniemi refers to in his EJIL Foreword as Hugo Grotius' legal imagination – the type of values he was trying to convey and the strategies he meant to pursue while constructing his idea of an international legal order. As a matter of fact, focusing on such an apparently narrow aspect is not just relevant to those with a historical interest in Grotius. It also tells us something about the inveterate relationship between international law and historiographic practices. What I want to suggest here is that the history of international law is not just an a posteriori critical reflection on the international legal order – a subgenre for lovers of intellectual escapism in search of a distraction from the many problems of the contemporary world – but, rather, that one of the many successful projects of international law was (and still is) the ambition to order the world through histories.*

A common theme being explored by contemporary literature seems to concern the demystification of the authenticity and reliability of memory; rather than being an original, authentic creation, memory is a selective process of invention, fed by our own imagination in the attempt to construct our identity, as explored by the characters of many contemporary memoirs and fiction books.<sup>1</sup> The whole process resembles the experience of buying furniture for a new apartment, an activity that is at the same time self-defining, challenging and expensive: always a negotiation between the often poor resources we have at our disposal and that very chic couch we cannot afford, but

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<sup>1</sup> Just to mention a few, very compelling examples, see T. Westover, *Educated* (2018); R. Cusk, *Outline* (2014).

that we are positive will loyally represent our personal story, and the constant moving from one house to the other of our multiple personalities.

The fact that the authenticity of memories is delusional is a key part of the construction of narratives, as recently pointed out by the literary theorist Albrecht Koschorke. This does not make them less powerful, however; quite on the contrary, their normative power lies precisely in this misconception: ‘Within the narrative’s configuration, originally freely invented material can form a sediment in the collective consciousness and become a hard social fact; there in the course of time it solidifies into lexical phrases, manners of speaking and thinking, concepts, even substantives. We could say that it takes on *authenticity* – in any event its *inauthenticity* is gradually forgotten during the metamorphosis.’<sup>2</sup> By so doing, ‘the narration thus not only produces a separate world next to the real one but also has an impact on social practice and is even a defining element in that practice’.<sup>3</sup>

In his EJIL Foreword, Martti Koskenniemi similarly suggests that to reconstruct the authority of arguments of jurists of the past, and why they mattered in the contextual conditions that made those arguments possible, helps us not only to understand where we stand *vis-à-vis* our past but also to deconstruct the power of narratives.<sup>4</sup> Most specifically, he describes Hugo Grotius’ citation practice as an activity of bricolage.<sup>5</sup> In his famous texts, *De iure praedae* (1604–1606) and *De iure belli ac pacis* (1625), Grotius constructs his argumentations by relying on an impressive variety of ancient sources, selected according to their authoritativeness and persuasiveness to make specific arguments. Koskenniemi writes that ‘instead of continuing the construction of a just international world from such well-trying materials [languages of contemporary international law: globalization, human rights, and so on], we are compelled – perhaps a little like Grotius – to bricolage, grasping other texts and utopias so as to try as best we can to persuade new audiences of the authority of what we have to say, provided that there is anything we are able to say’.<sup>6</sup> Thus, looking at Grotius’ citation techniques helps us understand the meaning of what Koskenniemi refers to as Grotius’ legal imagination – the type of values he was trying to convey, the strategies he meant to pursue. However, focusing on such an apparently narrow aspect is not just relevant to those with a historical interest in Grotius. It also tells us something about the inveterate relationship between international law and historiographic practices. What I want to suggest here is that the history of international law is not just an *a posteriori*, critical reflection on the international legal order – a sub-genre for lovers of intellectual escapism in search of a distraction from the many problems of the contemporary world – but, rather, that one of the many successful projects of international law was (and still is) the ambition to order the world through histories.

<sup>2</sup> A. Koschorke, *Fact and Fiction* (2018), at 14 (emphasis in original).

<sup>3</sup> *Ibid.*

<sup>4</sup> Koskenniemi, ‘EJIL Foreword: Imagining the Rule of Law: Rereading the Grotian “Tradition”’, 30(1) *European Journal of International Law* 17.

<sup>5</sup> *Ibid.*, at 24.

<sup>6</sup> *Ibid.*, at 28.

One common misconception is that jurists like Grotius were describing, instead of normatively orienting, their world. Even when they were doing history, what they were doing was, rather, myth-making. And that was perfectly legitimate to them, to the extent that the invention of the past aimed at producing a political reality.<sup>7</sup> In fact, one could argue that debates on what is history and how to write it are deeply engrained in discourses of *ius gentium*. Before Grotius, Francesco Guicciardini, Niccolò Machiavelli, Jean Bodin and Alberico Gentili reflected on the moral and political value of reading and writing history and were deeply conscious of the authoritativeness of its paradigmatic power. This is also true of Grotius. However, instead of fitting the past into contemporary issues, as we are commonly tempted to do by our contemporary sensitivity, Grotius was trying to do the opposite: he would fit the present into categories of the past instead. This was an undoubtedly conservative – one might say, revisionist – enterprise, one where a strong moral model was taken as an example, from which a certain type of legal order would follow. Alberico Gentili, for example, famously believed that one could simply read Virgilian poetry to have a systematic account of the laws of war.<sup>8</sup> On the other hand, we no longer believe in the paradigmatic power of history – a point that echoes Theodor Adorno's tragic realization of the impossibility of philosophy after the Holocaust.<sup>9</sup> International law's past is problematic, messy and full of colonialism, slavery and inequality, which can be hardly taken as a model. History seems to be a repository of violence rather than of authority, and, hence, we have become sceptical of its power to order the world and live in constant fear of anachronism.

Grotius, on the other hand, as Koskenniemi very well shows, did not have any of those qualms. Quite on the contrary, he thought texts were his to be used and was very clear about the kind of (often creative) textual interpretations or translations he was doing. Textual accuracy does not, for him, always go hand in hand with contextual precision. Rather, texts were often used as weapons against reluctant contexts to perpetuate moral paradigms from an ideal past.

In the case of Grotius, this feature is perhaps less explicit than it is for Gentili, who openly addressed questions of method and historiography in his famous *De armis Romanis*, published one year after *De iure belli* (1598).<sup>10</sup> While Gentili addresses the question of the reliability of historical witness, in the constant search for the perfect historian whose example he would follow, Grotius seems to be reluctant to justify the choices he was making (what kind of sources he was quoting and why). Rather, he famously appealed to the almost mathematical fashion of his discourse – in this sense, contributing to the mystification of the authenticity of the sources he was using. While no pre-Spinozian mathematical demonstrations were at all involved in Grotius'

<sup>7</sup> Jan Waszink has addressed this aspect extensively in his edition of H. Grotius, *Antiquity of the Batavian Republic* (2000).

<sup>8</sup> C.N. Warren, *Literature and the Law of Nations* (2015), at 31–58.

<sup>9</sup> T. Adorno, *Can One Live after Auschwitz? A Philosophical Reader* (2003).

<sup>10</sup> See contributions from D. Luper and D. Panizza in B. Kingsbury and B. Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (2011).

method, he engaged in a careful selection of sources, whose philosophical diversity has led scholars to describe Grotius as an eclectic.<sup>11</sup> Philosophical eclecticism was a precise rhetorical choice for Grotius. Far from being an instance of encyclopaedism or systematicity, Grotius was trying to recreate, by relying on an impressive amount of allegations, (i) an inter-confessional legal order to serve as a foundation for the law of nations and (ii) a system of individual rights.

Concerning the first aspect, Grotius wanted to react to the religious instability of his times with a religious and intellectual ideal of Unitarianism; he presented all of his sources in a way in which their content was to converge and create a universal consensus on principles of natural law beyond confessional divisions. The wider the consensus, and the more various the authors bearing witness to a given principle of natural law, the more convincing this was, which leads us to the second aspect.<sup>12</sup> Creating a system of horizontal rights, a claim made by Koskenniemi, was the answer that Grotius came up with to address a huge, divisive problem of his time: that of predestination. Against the dogmatism of Calvinism, Grotius, a follower of Jacob Arminius, believed that humans enjoy total free will, and there is no fate or divine predestination governing their actions. Humans have to have free will; otherwise, they would not be accountable for their deeds. In such a paradoxical (and theologically explosive) situation, God would be responsible for evil. Instead, Grotius thinks that punishment is triggered every time we break the rules of natural law, as the fatal consequence that everyone needs to expect from their deviant behaviour.<sup>13</sup> Fate is, then, according to Grotius, nothing more than moral necessitation. From certain actions, certain consequences inevitably follow. By humanizing fate and turning it into a legal device, based on the dynamics between accountability and punishment, Grotius oriented the selection of his sources, as witnessed by his activity as a translator: he translated the famous idea that man is *autoexiouston*, meaning that man has free will and is thus capable of determining himself, into the Latin *sui iuris*, 'free according to his own right', by deliberately adding a legal nuance to the term that can neither be found in the original Greek nor in other contemporary translations.<sup>14</sup> By so doing, Grotius suggests that law is the only answer to the religious problem of fate that was dividing Europe into a cruel war: law and legal obligation thus become the 'legal *proprium*' of humanity – what makes humans different from animals.<sup>15</sup> On the other

<sup>11</sup> H. Blom and L. Winkel (eds), *Grotius and the Stoa* (2004), at 7.

<sup>12</sup> I have discussed some examples of Grotius' citation practice, and its application to the identification of customary laws of war, in Iurlaro, 'Grotius, Dio Chrysostom and the Invention of Cutsom', 39 *Grotiana* (2018), at 30–40.

<sup>13</sup> See Grotius' famous chapter on punishment. H. Grotius, *De iure belli ac pacis* (*The Rights of War and Peace*), edited and introduced by R. Tuck (2005 [1625/1631]), at 949.

<sup>14</sup> Allegedly, the word '*autoexiouston*' comes from the Aristotelian commentator Alexander of Aphrodisias, whose famous *De fato* Grotius translated from a manuscript of the Bibliothèque Royal during his time as an ambassador in Paris. Such translation is included in his posthumous *Philosophorum sententiae de fato* (1648). Grotius uses the expression 'free *sui iuris*' for the first time in his *De iure praedae*. H. Grotius, *Commentary on the Law of Prize and Booty* (2006), at 33.

<sup>15</sup> Koskenniemi, *supra* note 4, at 35.

hand, in his account, freedom of commerce, as granted by natural law, coexisted with faith in the absolute enforceability of punishment, if some basic, symmetrical rules were violated; such faith relied on an extremely fluid definition of what amounted to sovereign power and on the prerogatives that a sovereign entity might enjoy (although Grotius changes his position over time on the question of who is entitled to the right to punish).

To conclude, I think one of Grotius' most important lessons is one that I would define as intellectual and historical realism. In his constant effort to shape the world he lived in, he reacted to contemporary problems by providing his readers with a laboratory of ideas from and (often unapologetic) manipulations of Western sources. This activity was profoundly inspired by a strong faith that justice manifests itself in history. But, while we find ourselves wanting to deconstruct the symbolic value of these sources – to make them more 'global' and inclusive – we are still stuck with all of the traditions they imply and canons they perpetuate. One might be tempted to fight narratives with facts; pragmatic-oriented statements about a certain state of affairs, however, which is considered objective, are nothing but a certain type of narrative. Rather, reflecting on the normative power of historiographic practices provides us with valuable tools to problematize the relationship between authority and violence. If history is not always as just as Gentili and Grotius deemed it to be, we are nonetheless convinced, or even tricked, by its authority. Whereas violence can be triggered by indifference,<sup>16</sup> which is seen by the perpetrator as the ultimate challenge to humiliate the victim, authority simply does not work that way. It has to trigger something in us, as we know from the experience of life-long, unreasonable yelling at our parents. For authority to work, you have to believe in the system of values it represents. But, since authority can become violent, and historical authority makes no exception to this, this leaves us with the responsibility of what narratives should we create for this world, implying a moral judgment on their value that is often problematic to acknowledge.

Koskenniemi, thus, concludes that managerialist approaches to relevant issues of international law have taken those issues from the realm of political contestation and made individuals more vulnerable victims rather than real actors of international law.<sup>17</sup> Is that, ironically, one of the many Grotian traditions of international law – namely, the collapse of subjective rights into capitalism, with no certainty or inevitability whatsoever of the enforceability of punishment? Is the Weberian ethics of Protestant predestination one of the many other myths of the neo-liberal order – constructed to suggest inevitability, where there are, rather, only free wills shaping the international legal order?

<sup>16</sup> There is a wonderful page in Tara Westover's memoir *Educated* where she describes her abusive brother Shawn precisely in these terms: '[T]hen I was able to tell myself, without lying, that it didn't affect me, that *he* didn't affect me, because nothing affected me. I didn't understand how morbidly right I was. How I had hollowed myself out. For all my obsessing over the consequences of that night, I had misunderstood the vital truth: that its not affecting me, that *was* its effect.' Westover, *supra* note 1, at 111 (emphasis in original).

<sup>17</sup> Koskenniemi, *supra* note 4, at 18, 52.