

International Law and the Rage against Scienticism

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Abstract

In international legal thought and practice, anything that is related to the real or is grounded in the real is given discursive primacy. This discursive primacy is the manifestation of a common scientific hierarchy of discourses inherited from Modernity that accords primacy to discourses about the real and grounded in the real. Anne Orford's International Law and the Politics of History can be read as yet another expression of discontent with such primacy of the real and its scientific methods. With an emphasis on international lawyers' engagements with history, Orford specifically takes issue with the use of contextualist and empirical methods in the study of the history of international law. And, yet, as is argued in this review essay, scienticism leaves no way out for those seeking to contest it: Orford's charge against contextualism and empiricism itself needs to be contextualized and empirically supported.

The numerous interventions of Anne Orford in debates about the history of international law culminated in 2021 with the publication of *International Law and the Politics of History*. Orford's latest opus has already been the object of multiple commentaries and reviews. In this review essay, I do not want to challenge the main claim developed in her book, for I find it uncontroversial. Rather, I want to offer a novel contextualization of Orford's work as I suggest we read it against the backdrop of an ongoing discontent with the modern primacy of the real, which I call scienticism. In the next sections, I also want to shed light on the discursive moves that Orford makes in *International Law and the Politics of History* to build her counter-scientist argument against empiricism and contextualism and especially the role played by facts and contexts in her rebuttal of empiricism and contextualism. In doing so, I ultimately want

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to reflect on the (im)possibility of fully overthrowing the primacy of the real in which international law has long been entrenched.

1 The Scientific Age

We live in a scientific age. Among all the discourses¹ that govern and saturate our thinking – our imagination, our perceptions, our beliefs, our emotions, our loves and our lives – discourses that produce necessities through realities and facts continue to enjoy primacy over those that do not. Said differently, in this scientific age, the real² trumps the narrative, the factual eclipses the literary and the physical overwrites the metaphysical.³ As a result of such discursive hierarchies, those discourses that are deemed not to engage with the real are viewed with suspicion.⁴

Obviously, this state of affairs is not new. The primacy so awarded to discourses about the real can possibly be traced back to the 18th century, which marked the beginning of the scientific age where the real turned into a central mode of thinking and, hence, of ordering.⁵ It is noteworthy that the move into the scientific age proved irresistible from the start.⁶ Even David Hume's famous scepticism towards the possibility of scientific laws about the real⁷ and Immanuel Kant's strong case that we cannot know the real in itself⁸ proved vain and failed to frustrate the elevation of discourses about the real to the pinnacle of the discursive universe.

Since the advent of the scientific age, many existing discourses have come to revamp their methods and self-representations with a view to securing the venerated status of a discourse about the real.⁹ This is not surprising. After all, who would not want to tap into this unrivalled primacy? This is certainly the case of international law, which, as of the 19th century, embraced a self-representation that foregrounds the real both as a foundation and a goal. Later, in the

¹ A discourse is understood here in a rather generic way as referring to any system of meaning and set of connected utterances through which one speaks about the world and human phenomena. On the notion of discourse, see generally H. White, *Tropics of Discourse: Essays in Cultural Criticism* (1978), at 4–5.

² The real refers here to the experience of something as belonging to reality by opposition to belonging to something deemed literary, fictitious, narrative or metaphysical.

³ The invocation of 'nature' as the ultimate truth-claiming criteria is a common feature of those discourses about the real. See generally B. Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (1987), especially at 228–244. On the idea that universities are tools to set a hierarchy between discourses, see M. Foucault, *Il faut défendre la société* (1997), at 163.

⁴ H. White, *The Content of the Form: Narrative Discourse and Historical Representation* (1987), at 57.

⁵ M. Foucault, *Les mots et les choses* (1966), at 89; Foucault, *supra* note 3, at 161–165. Michel Foucault later claimed that determining exactly when discourses about the real became the carrier of a truth is irrelevant. See M. Foucault, *Naissance de la biopolitique* (2004), at 38; see also B. Latour, *Nous n'avons jamais été modernes. Essai d'anthropologie symétrique* (1997), at 24; J. Habermas, *The Philosophical Discourse of Modernity. Twelve Lectures*, translated by F. Lawrence (1987), at 19.

⁶ Foucault notes that the move to the scientific age came with a forgetfulness that discourses about the real were first a philosophical invention. See M. Foucault, *Leçons sur la volonté de savoir* (2011), at 50.

⁷ D. Hume, *A Treatise of Human Nature* (2011; originally published in 1739–1740).

⁸ I. Kant, *Critique of Pure Reason* (1996; originally published in 1781).

⁹ A. MacIntyre, *Three Rival Versions of Moral Inquiry: Encyclopaedia, Genealogy, and Tradition* (1990), at 224.

20th century, international law even sought to consolidate its status by honing its methods in such a way that it functioned and was represented as a scientific discipline.¹⁰ Although the self-representation of international law as a scientific discipline has faltered over the last decades,¹¹ international law has continued, until today, to foreground its engagement with the real, be it in terms of its origin or of its goals.

2 The Scientific Age and Its Discontent

The scientific age has not thrived entirely unchallenged. Although some mild contestations were heard as early as the 19th century,¹² it is the 20th century that witnessed the most unprecedented challenge to the primacy of discourses about the real. For instance, it has been said that discourses about the real always pre-constitute the real they help give meaning to, and always secure confirmations of their claims by virtue of facts that they have themselves created.¹³ In the same vein, it has been contended that discourses about the real do not do away with the metaphysical and the fabulous¹⁴ and fail to meet their own standard of truth.¹⁵ It has even been alleged that discourses about the real do not allow for thinking.¹⁶ And, yet, the most severe challenge against the primacy of discourses about the real probably came in the form of a repudiation of the distinction between discourses about the real and other discourses.¹⁷ In particular, it has been argued that discourses about the real are as vulnerable and self-referential as other discourses¹⁸ and that what defines a discourse

¹⁰ For some classical exposition of international law as a science, see Oppenheim, 'The Science of International Law: Its Task and Method', 2 *American Journal of International Law (AJIL)* (1908) 313; Ago, 'Science Juridique et Droit International', 90 *Collected Courses* (1956) 851; F. Castberg, *La Méthodologie du droit International Public, Collected Courses of the Hague Academy of International Law*, vol. 43 (1934); A. Somek, 'Legal Science as a Source of Law: A Late Reply by Puchta to Kantorowicz', University of Iowa Legal Studies Research Paper no. 13-7. On the consolidation of this self-representation, see the remarks of Orford, 'Scientific Reason and the Discipline of International Law', 25 *European Journal of International Law* (2014) 369.

¹¹ For a criticism of this self-representation, see Koskenniemi, 'Letter to the Editors of the Symposium', 93 *AJIL* (1999) 351; Crawford, 'International Law as Discipline and Profession', 106 *Proceedings of the American Society of International Law* (2012) 1.

¹² On the contestation of modernity by romanticism, see the essays in T. Pfau and R. Mitchell (eds), *Romanticism and Modernity* (2015); see also M. Löwy and R. Sayre, *Révolution et mélancolie: Le romantisme à contre-courant de la modernité* (2005).

¹³ T. Adorno and M. Horkheimer, *Dialectic of Enlightenment* (1997), at 9; H. Bergson, *La pensée et le mouvant* (2014), at 251; R. Barthes, *Le bruissement de la langue: Essais critiques IV* (1984), at 149; G. Bachelard, *Le nouvel esprit scientifique* (1934), at 9–18.

¹⁴ T. Adorno and M. Horkheimer, *Dialectic of Enlightenment* (1997), at xiv.

¹⁵ J.-E. Lyotard, *La Condition Postmoderne* (1979), at 65.

¹⁶ M. Heidegger, *What Is Called Thinking*, translated by J. Glenn Gray (1976), at 8.

¹⁷ On the idea that scientific modes of inquiries have no distinct superiority over literary ones, even when it comes to engaging with the real, see generally White, *supra* note 1, at 121–122, 142–143; R. Barthes, *L'aventure sémiologique* (1985), at 14.

¹⁸ Lyotard, *supra* note 15, at 11; Barthes, *supra* note 17, at 14. In that regard, it has even been claimed that discourses about the real work are secularized theologies. See Pierre Legendre, *Sur la question dogmatique en Occident: Aspect théoriques* (1999), at 41.

about the real is not its object or its content but, rather, the primacy socially awarded to it.¹⁹

Until recently, international lawyers remained impervious to these contestations and continued to further international law's engagement with the real. In the last two decades, however, a very rich body of scholarship²⁰ has come to question international law's grounding in the real and all the universal patterns of arguments that are derived from it. Mention must particularly be made of the growing acceptance among international lawyers that the real in which they ground international law does not 'reveal' itself to them but, instead, is always mediated and constructed through a wide range of mental, social and cultural pre-discursive categories and intelligibility frameworks, which are themselves part of an ideological system of representation.²¹ Such contestation of the primacy of the real was quickly followed by new scholarly examinations of the ways in which the real is constructed, cognized, captured and perceived.²²

The early contestations of the primacy of the real in international law that have been mentioned in the previous paragraph did not however suffice to seriously jeopardize international law's scientism and, thus, the necessity for international law to speak about the real and be grounded in the real. It could even be argued that these contestations were not only met with resistance but also brought about a reactionary reinforcement. Indeed, nowadays one witnesses new streams of literature that explicitly affirm international law's scientism and that vindicate the primacy of the real in methodological or conceptual terms.²³ To name only a few, such reactionary moves include the promotion of a new legal realism in international law²⁴ or the promotion,

¹⁹ Barthes, *supra* note 13, at 11.

²⁰ For an overview, see Rasulov, 'What Is Critique? Notes towards a Sociology of Disciplinary Heterodoxy in Contemporary International Law', in J. d'Aspremont *et al.* (eds), *International Law as a Profession* (2017) 189, at 207–219.

²¹ On ideology as a system of representation, see Louis Althusser, *For Marx*, translated by B. Brewster (2006). For Paul de Man, the correspondence between linguistic categories and natural reality is what we should construe as the work of ideology. See P. de Man, *The Resistance to Theory* (1986), at 11.

²² See, e.g., M. Hirsch, *Invitation to the Sociology of International Law* (2016); Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher', in Joost Pauwelyn *et al.* (eds), *Informal International Lawmaking* (2012) 200; Bianchi, 'Epistemic Communities', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019) 251; A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (2016), at 7–9, 17–18.

²³ I fear that my earlier work on the social foundations of the sources of international law could be read as constituting such a reactionary rehabilitation of the primacy of the real. See J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011). For a move away from that position, see d'Aspremont, 'A Worldly Law in a Legal World', in A. Bianchi and M. Hirsch (eds), *International Law's Invisible Frames* (2021) 110; J. d'Aspremont, *After Meaning: The Sovereignty of International Legal Forms* (2021).

²⁴ See generally Shaffer, 'A New Legal Realism: Method in International Economic Law Scholarship', in C.B. Picker, I. Bunn and D. Arner (eds), *International Economic Law: The State and Future of the Discipline* (2008) 29; Erlanger *et al.*, 'New Legal Realism Symposium: Is It Time for a New Legal Realism?', 2005(2) *Wisconsin Law Review (WLR)* (2005) 335; Macaulay, 'The New Versus the Old Legal Realism: Things Ain't What They Used to Be', 2005(2) *WLR* (2005) 365, at 375; Nourse and Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?', 95 *Cornell Law Review* (2009) 61.

under the banner of a ‘new empirical turn’, of a more organized and systematized use of empirical data to study the practical conditions under which international law is formed and has effects.²⁵ All in all, it is fair to say that, notwithstanding some serious contestations, international law has not decisively moved away from the scientific age. Rather, international law has become a site of confrontation between scientific and counter-scientific forces.

3 Anne Orford’s Counter-scientific Position in Context

If I have taken pains to offer genealogical observations on the consolidation, contestation and reaffirmation of the primacy of the real in international law over the past centuries, it is because such considerations provide the background against which I read Anne Orford’s recent work. Her refutation of empiricism and contextualism, in *International Law and the Politics of History*, forms part of the above-mentioned ongoing confrontation between scientific and counter-scientific forces that respectively support and contest international law’s entrenchment in the scientific age. Indeed, in her new book, Orford takes issue with the contemporary empiricism and contextualism that inform studies of the history of international law offered by a number of international lawyers as well as professional historians whose ambition is to challenge the critical use of the past to de-naturalize the present state of the international legal discourse. Orford offers, in my view, the latest pushback against 21st-century reactionary reaffirmations of the primacy of the real in international law. If the above-mentioned late 20th-century contestation of the primacy of the real can be read as the first generation of scholars suspicious of discourses about the real, *International Law and the Politics of History*, albeit centred on historiographical debates on international law, can be construed as paving the way for a second generation of contestation, one that offers the strongest rebuttal of recent pro-scientific postures.

It is important to recognize that Anne Orford characterizes her work differently. For her, the battle for and against the empiricist and contextualist methods in the study of the history of international law ought rather to be construed as a battle for and against formalism in international law.²⁶ Empiricism and contextualism, in her view, are at the service of a ‘neo-formalist’ approach to international law. For Orford, debates about the past are proxies for the struggles over the nature and meaning of law in the present, as she construes formalism as a strategy of avoiding normative choices that yield to (and rely on) objective findings in order to create cognitive certainty, solid

²⁵ See, e.g., Shaffer and Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, 106 *AJIL* (2012) 1. For an illustration, see Verdier and Voeten, ‘How Does Customary International Law Change? The Case of State Immunity’, 59 *International Studies Quarterly* (2015) 209; see also Holtermann and Madsen, ‘Toleration, Synthesis or Replacement? The “Empirical Turn” and Its Consequences for the Science of International Law’, 29 *Leiden Journal of International Law (LJIL)* (2016) 1001. For a claim about the virtuosity of empirical sensitivity, see Vinuales, ‘On Legal Inquiry’, in D. Alland *et al.* (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (2014) 45, at 72–75.

²⁶ A. Orford, *International Law and the Politics of History* (2021), at 7–8, 71, 285–310.

foundations and unarguable meanings.²⁷ Said yet differently, the fetishization of historical context provides, in her view, a hiding place for neo-formalism.²⁸

I am not convinced by Orford's own contextualization of her work for I do not really find formalism, let alone neo-formalism, a very helpful notion.²⁹ Let me explain this. In my view, any discourse works as a system of meaning organized around forms that constantly and perpetually refer to other forms.³⁰ Said differently, in any discourse, everything is always a matter of forms, and international law is no different.³¹ The charge against formalism – the 'post-realist posture', as Orford likes to call it – is itself articulated through forms that refer to other forms.³² Indeed, Orford's own rebuttal of empiricist and contextualist methods is itself a discourse organized through forms referring to other forms. This is why I do not think it says much to be for or against formalism, as that very claim is itself caught in forms referring to forms. By situating her argument against the backdrop of a battle for and against formalism in international law, Orford ends up under-selling her – otherwise terribly compelling³³ – critique of empiricism and contextualism in the study of the history of international law. Indeed, the critical and epistemological value of her argument seems much more salient if read against the backdrop of the scientific age of international law and its contestations, as I have just depicted them.

4 Anne Orford's Argument in a Nutshell

To set the stage for my own reading, it is necessary to outline the contents and structure of Orford's *International Law and the Politics of History*: Chapter 1 introduces the volume – its main claims as well as its ambitions – emphasizing that the book seeks to repudiate empiricist and contextualist techniques of scientifically minded international lawyers and professional historians engaging with international law, while also demonstrating that international law and history are already inhabiting one another.³⁴ Chapter 2 situates the turn to history in international law within a broader political, social, economic and institutional context, starting with the transformations that followed the end of the Cold War. Chapter 3 provides a detailed account of the

²⁷ *Ibid.*, at 296.

²⁸ *Ibid.*, at 295.

²⁹ I used to think otherwise. See d'Aspremont, 'Worldly Law', *supra* note 23.

³⁰ By form, I mean to refer to any kind of inscription. These inscriptions can be textual or not. From this perspective, legal forms include not only words, idioms, aphorisms and texts but also images, symbols, gestures, paintings, ceremonies, rituals, stained glass windows and so on. Forms are also in the oral language. On the notion of non-textual inscriptions, see J. Derrida, *Papier Machine* (2001), at 384. See also the remarks of Goodrich, 'Europe in America: Grammatology, Legal Studies, and the Politics of Transmission', 101 *Columbia Law Review* (2001) 2033, especially at 2069–2084. For a choice to limit one's inquiry about forms to textual inscriptions, see d'Aspremont, *After Meaning*, *supra* note 23; see also N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020), at 18–19.

³¹ This is what I have defended in d'Aspremont, *After Meaning*, *supra* note 23.

³² Orford, *supra* note 26, at 6, 294.

³³ See section 5 in this article.

³⁴ Orford, *supra* note 26, at 9–10.

turn to empiricist and contextualist methods in the study of the history of international law, even naming very explicitly both the international lawyers and the professional historians that spearhead(ed) it. Premised on the idea that the proponents of empiricist and contextualist methods in the study of the history of international law draw on (and have been influenced) by the methods of the Cambridge School of contextualist history, Chapter 4 provides an account of four historians associated with that specific approach to history. Chapter 5 seeks to demonstrate that the protagonists of the Cambridge School of contextualist history described in the previous chapter promoted their empiricist and contextualist methods through a very specific – and contestable – account of lawyers, representing them as scholastic metaphysicians and champions of a naïve, but oppressive, foundationalist understanding of law. Chapters 4 and 5 having defined the tools of the proponents of empiricist and contextualist methods in the study of international law as well as the methodological tradition of which they are the heirs and the tales about law that they carry, Chapter 6 provides a direct and forceful refutation of the use of empiricism and contextualism. This strong refutation takes the form of a demonstration that empiricist and contextualist scholars, like anyone else, have their own politics, that they are part of the contestation like anyone and that, in the end, they are as metaphysical as the lawyers they criticize for being metaphysical. Chapter 7 seeks to locate the rise of empiricist and contextualist methods of the history of international law in a more general debate about formalist approaches to international law, arguing that the scientistic forces at work in the promotion of empiricism and contextualism can be understood as vindicating a neo-formalism of sorts. The chapter also offers insights on Orford's own a-empirical and a-contextual take on the study of the history of international law.

5 Anne Orford's Uncontestable Argument

If one reads Orford's book as a new contestation of the primacy of the real in international law, as I have suggested we do,³⁵ the thrust of her argument can probably be found in Chapter 6 where she launches her attack against the empiricist and contextualist methods in the study of international law, as she described them in Chapter 3. Drawing on some carefully chosen examples of empiricist and contextualist accounts of the history of international law, she shows that empiricism and contextualism cannot enable the production of impartial, value-free, objective and verifiable interpretations and accounts of past texts, events, concepts and practices.³⁶ As Orford convincingly argues, the mere association of an action, an event, a person, a concept or a text with international law already presupposes a certain normative understanding of international law, for one cannot assume that there is a stable object called 'international law' whose history is simply there to be elucidated and provided.³⁷ In that sense, she contends, any historian of international law

³⁵ See section 3 in this article.

³⁶ Orford, *supra* note 26, at 255.

³⁷ *Ibid.*, at 256, 257.

is always caught in the contestation over what international law is and does in the world.³⁸ No historical method can accordingly save us from the political character of international legal interpretation.³⁹ In other words, empiricist and contextualist histories are always absorbed by the struggles over the past, present and future of international law.⁴⁰

Orford's charge against the possibility to produce impartial, value-free, objective and verifiable interpretations and accounts of past texts, events, concepts and practices is amplified in Chapter 7 where she claims that the resort to empiricism and contextualism works as a form of 'method laundering', whereby 'partisan legal approaches to interpreting the past are repackaged and presented as empiricist historical methods'.⁴¹ In Orford's view, 'what is laundered back into law through history are substantive or methodological arguments that began as partisan positions in legal struggles'.⁴² Ultimately, she claims, '[t]he language of facts of truth is no longer a trump card', for 'there is no authority to which we can appeal and no method that will establish that our account of facts or our version of truth is the correct one'.⁴³

I can only agree with this rebuttal of empiricism and contextualism in the study of the history of international law.⁴⁴ Indeed, advocating the use of empiricist and contextualist historical techniques with a view to producing impartial, value-free, objective and verifiable interpretations and accounts of past texts, events, concepts and practices is like postulating that there is something like a neutral state of the language through which history is written⁴⁵ and that there can be an outside of international law that is constituted independently of international law's forms and thought categories. But the science of history, like any science, knows no safe place.⁴⁶ The past is always formless and has no meaning other than what is given to it in the present through the forms mobilized in the present.⁴⁷ Said differently, the past lacks narrative form, order and sequence, and it is the function of historical narratives to provide the

³⁸ *Ibid.*, at 284.

³⁹ *Ibid.*, at 285.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, at 286.

⁴² *Ibid.*, at 296.

⁴³ *Ibid.*, at 320.

⁴⁴ I have had the chance to develop this position elsewhere. See d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination', 7 *London Review of International Law* (2019) 89; see also J. d'Aspremont, *The Critical Attitude and the History of International Law* (2019); d'Aspremont, 'Worldly Law', *supra* note 23.

⁴⁵ Barthes, *supra* note 13, at 17.

⁴⁶ Barthes, *supra* note 17, at 14; Lyotard, *supra* note 15, at 65. On the idea that history knows no method, let alone a scientific method, see P. Veyne, *Comment on écrit l'histoire* (1971), at 10, 97.

⁴⁷ White, 'The Question of Narrative in Contemporary Historical Theory', 23(1) *History and Theory* (1984) 1, at 26–57; see also Roth, 'Foreword: "All You've Got Is History"', in H. White, *Metahistory: The Historical Imagination in the 19th-Century Europe* (2014) xv; Southgate, 'Postmodernism', in A. Tucker (ed.), *A Companion to the Philosophy of History and Historiography* (2011) 540, at 548; see contra P. Ricoeur, *Time and Narrative* (1983). For a criticism of this position, see H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), at 13–14.

formless past with meaning-giving form in (and for) the present.⁴⁸ And, like Orford, I strongly believe that the meaning-giving form that is so given to the past in the present always remains the production of a discourse that is saturated with ideologies⁴⁹ and agendas⁵⁰ while depending on the intelligibility frameworks, cognitive repertoires and methods available to the user of the discourse.⁵¹ In fact, to me, this seems hard to challenge. So let's be serious! How could we possibly claim that facts from the past could be interpreted and reconstituted in the present other than through our intelligibility frameworks, our cognitive repertoires, our ideologies, our agendas and so on?⁵² Likewise, how can we possibly contend that causalities between past facts themselves or between past and presents facts can be objectively established?⁵³ In the same vein, how can we possibly believe that the context exists independently from the very text whose content it is supposed to elucidate?⁵⁴ Like Orford, I strongly believe that there is no fact or context that any international lawyer immersed in the study of the history of international law can draw on, for such fact or context is never external to the discourse and the contestations inhabiting the latter.

As I am in full agreement with Orford's forceful refutation of the empiricist and contextualist methods in the study of the history of international law, I feel that the substantive position that she vindicates in her book does not warrant further observations here. What I find more fascinating is one of the discursive moves she makes through the chapters of *International Law and the Politics of History* as she builds her compelling argument against empiricism and contextualism. This is the object of the next section.

6 An Empiricist and Contextualist Rebuttal of Empiricism and Contextualism

I argue that Orford's way of objecting against the reactionary reaffirmation of the primacy of the real in debates on the history of international law is intriguing because it vindicates what it purports to criticize: Orford's charges against empiricism

⁴⁸ Southgate, 'Postmodernism', in Tucker, *supra* note 47, 541; see also E.H.H Carr, *What Is History?* (2nd edn, 1987), at 25.

⁴⁹ Barthes, 'Le discours de l'histoire', 6(4) *Social Science Information* (1967) 63, at 73; K. Jenkins, *On 'What Is History': From Carr and Elton to Rorty and White* (1995), at 20–22.

⁵⁰ Jenkins, *supra* note 49, at 20–22. On the idea that the work of intelligence is always self-interested, see H. Bergson, *La pensée et le mouvant* (2014), at 229.

⁵¹ On the idea that methods are always performative, see John Law, *After Method: Mess in Social Science Research* (2004), at 143.

⁵² Foucault, *supra* note 5, at 11; P. Legendre, *Sur la question dogmatique en Occident: Aspect théoriques* (1999), at 42.

⁵³ M. Foucault, *L'archéologie du savoir* (1969), at 34; M. Foucault, *Dits et Ecrits* (2001), at 607, 824; P. Ricoeur, *Histoire et vérité* (1955), at 33–34; Veyne, *supra* note 46, at 195.

⁵⁴ On Derrida's famous claim that there is nothing outside the text. J. Derrida, *De la Grammatologie* (1967), at 225–226; see also the remarks in G. Bennington, *Jacques Derrida* (1991), at 83; P. Salmon, *An Event Perhaps* (2020), at 143. With an emphasis on legal studies, see the remarks of Legrand, 'Foreign Law: Understanding Understanding', 6 *Journal of Comparative Law* (2011) 67, at 80.

and contextualism perpetuate some of the very empiricist and contextualist moves that she vehemently seeks to repudiate. In fact, in reading *International Law and the Politics of History*, I was struck by how Orford's charge against empiricism and contextualism mobilizes both facts and context – that is, the key elements of a discourse about the real. These two dimensions of Orford's counter-scientistic claim must be examined in turn.

First, in her attack against empiricism and contextualism, Orford espouses an empiricist posture. The empiricism of Orford's argument is reflected in the care she takes to evidence her charge against works criticized for resorting to empiricist and contextualist methods. Indeed, as noted above, Chapter 3 offers a detailed and well-referenced account of those scholarly studies that rest on empiricist and contextualist methods in the study of the history of international law. Drawing on a systematic and extensive referencing of those works, the chapter seeks to establish the actuality, materiality and factuality of the empiricist and contextualist discourses with which *International Law and the Politics of History* takes issue. But her thorough critique of empiricist and contextualist discourses is itself deeply empiricist, using citations and tracing arguments all along.

Such an empiricist move is not limited to Chapter 3. Throughout the book, Orford continuously and explicitly names the empiricists and contextualists and quotes from their work. In the same vein, the book resorts to case studies to establish the actuality, materiality and factuality of the argumentative practice that she is scrutinizing and repudiating.⁵⁵ Surely, *International Law and the Politics of History* can be commended for documenting thoroughly and convincingly the turn to empiricism and contextualism in international legal scholarship. And, yet, in doing so, the book embraces an empiricist posture, one by virtue of which the actuality, materiality and factuality of the literature under scrutiny is systematically evidenced.

Second, contextualism is not absent from Orford's charge against empiricist and contextualist methods in the study of the history of international law either. It notably informs her efforts to understand the background to the empiricist and contextualist works with which she takes issue. For instance, Chapter 4 performs a very contextual function as it seeks to provide an account of four historians associated with (and spearheading) an empiricist and contextualist approach to history. The same goes for Chapter 5, which aims at elucidating some of the presuppositions that the historians examined in Chapter 4 have built on, especially their projection of an image of lawyers as scholastic metaphysicians and champions of a naïve, but oppressive, foundationalist understanding of law. What is Orford's account of these theorists of history, and of the images of lawyers on which their work is premised, if not contextual material against which the empiricist and contextualist studies of the history of international law must be read and evaluated?

Orford's contextualist move, as sketched out in the previous paragraph, calls for two further observations. The first concerns her treatment of some of her fellow historians

⁵⁵ See, e.g., Orford, *supra* note 26, at 257–283.

of international law. It is submitted here that Orford's own embrace of contextualism may explain why, throughout *International Law and the Politics of History*, she spares from her criticisms – and proves lenient to – one of the leading figures in the contextualist study of the history of international law – namely, Martti Koskenniemi. At first reading, it may prove surprising that Orford does not engage with Koskenniemi's well-known contextualism, an approach that she did not balk at criticizing in her earlier work.⁵⁶ It is true that Koskenniemi himself came to nuance his earlier contextualist sensibility.⁵⁷ Yet Orford does not even mention Koskenniemi's temporary 'flirt' with contextualist methods. There are surely many reasons why Orford does not revert to her earlier controversy with Koskenniemi on questions of contextualism, and it would be of no avail to speculate about them here. That said, I felt that, perhaps, Orford felt she should spare Koskenniemi's contextualism because she herself embraces it in her charge against the empiricist and contextualist methods of others. My inkling about this possibility is reinforced by the extent to which, at the very end of *International Law and the Politics of History*, Orford comes to see merit in a type of individual-centred histories that come to terms with the inevitable partisanship of any engagement with the history of international law – that is, a kind of contextualism that is very reminiscent of Koskenniemi's engagement with the history of international law.⁵⁸ She particularly contends that, if we accept that a vision of the history of international law is always partisan and political, 'the methods developed by the contextualist intellectual history tradition embody a political and normative content that may be useful for international lawyers in certain situations', adding that '[c]ontextualist historiography offers us a vision of politics focused on the individual'.⁵⁹ That type of contextualist and individual-centred history *à la* Koskenniemi, she claims, 'produces accounts that reveal the individualist projects behind any visions of politics or history that present as collective, universalist, or idealistic'.⁶⁰ It must be emphasized, however, that Orford explicitly acknowledges that her sympathy for a contextualism *à la* Koskenniemi comes at a price. According to Orford, upholding such partisan and individual-based contextualism requires:

abandoning the axioms of contextualist historiography and instead championing teleological accounts, producing universal histories, creating connections or exploring constellations between present and past, arguing that contingency is overrated, reclaiming the *longue durée*

⁵⁶ See Orford, 'International Law and the Limits of History', in W. Werner *et al.* (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2015) 297, especially at 301–306. Anne Orford sees pleas in favour of a more rigorous contextualism as well as the necessity to use historical protocols as being conducive to conservatism. See also Orford, 'On International Legal Method', 1 *London Review of International Law* (2013) 166, at 170–177.

⁵⁷ See Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', 27 *Temple International and Comparative Law Journal* (2013) 215, at 229–232.

⁵⁸ See more recently M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021). See the remarks of d'Aspremont, 'Legal Imagination and the Thinking of the Impossible', 35 *LJIL* (forthcoming 2022).

⁵⁹ Orford, *supra* note 26, at 316.

⁶⁰ *Ibid.*, at 317.

perspective, embracing the use of history as a morality tale, thinking of human beings as collective (political or geological) agents rather than innovative individuals, or abandoning a relentlessly negative form of critique.⁶¹

Whilst I appreciate that Orford recognizes her sympathy for a contextualism *à la* Koskenniemi, I continue to feel that the latter is given a rather favourable treatment throughout *International Law and the Politics of History*.

Leaving Koskenniemi aside, the second observation on Orford's contextualism amounts to a clarification. I am mindful that, when noting the extent to which Orford's rebuttal of empiricism and contextualism in the history of international law is itself empirical and contextualist, I might be read as accusing her of a performative contradiction – that is, as embracing the very approach that she seeks to challenge. This charge is well known in philosophical circles. It is a charge that is often raised by modernists against critical theorists.⁶² I want to stress very explicitly here that this is not a charge I wish to make against Orford's argument. Indeed, it would be odd for me to level the charge of a performative contradiction against Orford, for I have just been making the very same empiricist and contextualist move in the present review of her work – namely, extensively referencing the discourse with a view to establishing its actuality, materiality and factuality while offering what I deem to be a broader and more relevant background – that is, the rage against scienticism – against which I suggest to read Orford's work.⁶³ Surely, Orford's *International Law and the Politics of History* as much as the present review essay are both caught in an empiricist and contextualist move: both seek to situate and establish the actuality, materiality and factuality of the discourse they scrutinize. And, yet, while both Orford and I are guilty of empiricism and contextualism, neither Orford nor I can meaningfully be accused of engaging in a performative contradiction. This is so because empiricism and contextualism are not only methods to give primacy to the real but also the dominant genre in the international legal literature. This is a point that the final section of this essay will now substantiate.

7 Empiricism and Contextualism as an Inescapable Genre

It is submitted in this final section that, while there are compelling reasons to keep empiricist and contextualist methods at bay, empiricism and contextualism cannot be fully escaped since they constitute the dominant genre in the international legal literature. By genre, I mean a style of writing, of constructing arguments and of narrating

⁶¹ *Ibid.*, at 319 (footnotes omitted).

⁶² J. Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, translated by F. Lawrence (1987), at 185–186, 279; see also MacIntyre, *supra* note 9, at 55–56. On the rebuttal of that objection and the idea that being part of what it scrutinizes is the very condition of critique, see White, *supra* note 1, at 142–143, 252–253; P. Ricoeur, *La mémoire, l'histoire, l'oubli* (2000), at 399; Lyotard, *supra* note 15, at 107; J. Derrida, *L'écriture et la différence* (1967), at 46; E. Said, *The World, the Text, and the Critic* (1983), at 26; Foucault, *supra* note 5, at 12; Foucault, *supra* note 5, at 37.

⁶³ See section 3 in this article.

stories. Irrespective of debates about methods, empiricism and contextualism in my view are constitutive of a literary genre, one that dominates the way in which international lawyers write about international law. In that sense, Anne Orford (and me, for that purpose) can very well reject categorically empiricism and contextualism as a mode of engagement with the history of international law. However, we are unable to emancipate ourselves from the dominant empiricist and contextualist style of writing practised in international law, a style that we are bound to espouse, even to articulate a claim against empiricism and contextualism as a method. In concluding this review essay, I want to offer some reflections on the extent to which the critique of empiricism and contextualism is itself inextricably caught by empiricism and contextualism, thereby wondering whether the international lawyer can ever fully move beyond the scientific age in which international law has been entrenched since the 19th century.

The empiricist and contextualist genre in which Orford and I are caught can be summarized as follows. It is a style of writing that requires that any claim about law, literature, practice or the world be evidenced through a specific type of referencing. There is hardly a piece of literature on international law that can evade this requirement. It suffices to mention here the inescapable necessity in the literature to establish the actuality, materiality and factuality of anything one engages with in a piece of international legal literature through a well-coded system of footnotes and bibliographical references.⁶⁴ In that regard, footnoting and referencing can be viewed as a manifestation of a very empirical style. Likewise, such a genre requires one's claims to be systematically situated and contextualized against the backdrop of the state of the law, of the literature, of the practice or of the world as they have been evidenced and traced. In fact, situating one's central argument is the expression of a very contextualist style. In the end, which international lawyer writing in the English language would not feel the necessity to evidence what she engages with and to contextualize her main claim?

The foregoing means that international lawyers are left with a dominant style that commands constant evidencing and contextualizing, condemning international lawyers to be perpetual empiricists and contextualists. This is no joyful state of affairs for anyone unhappy with the literary genre currently dominating the international legal literature. For someone like me who feels that the dominant genre of the international legal literature is repressive and detrimental to thinking, this is a very disheartening finding.⁶⁵ But is the dominant empiricist and contextualist style of writing practised in the international legal literature necessarily inescapable? After all, literary genres can be made or unmade, and it should be possible to revamp the dominant writing

⁶⁴ Vincent Genin recounts how Lieber (who had fought in the Prussian army against Napoleon's troops at Waterloo in 1815) contributed to the import of the German system of referencing to US law schools. See V. Genin, *Le laboratoire belge du droit international: Une communauté épistémique et internationale de juristes (1869–1914)* (2018), at 55–56. For a famous charge against referencing practices in the US legal academia, see Rodell, 'Goodbye to Law Reviews', 23 *Virginia Law Review* (1936) 38.

⁶⁵ I have elaborated on my deep concern with the dominant literary genre practised in international law on various occasions. See d'Aspremont, 'Destination: The Wasteland of Academic Overproduction', Part 1 and Part 2, *EJIL: Talk!* (3 February 2020); see also d'Aspremont, 'Wording in International Law', 25 *IJIL* (2012) 575. More recently, see d'Aspremont, *After Meaning*, *supra* note 23, at 116–118.

style in international law if we deem it necessary to fully escape empiricism and contextualism. Would it not suffice to rebel against the main gatekeepers that enforce the above-mentioned writing style – namely, the publishers and their associates, the journals (including that in which this review essay is included) and their editors, the PhD supervisors and all those who silence or exercise any form of repression against those not practising this dominant empiricist and contextualist genre?

I fear that it would not suffice to rebel against these gatekeepers or to create new platforms or spaces where a non-empiricist and non-contextualist genre can be practised. In fact, it is not only a simple question of social convention and contingency. I submit that international law's empiricist and contextualist genre is also more deeply rooted in a mode of representation of the real that has been generalized far beyond the international legal field. Indeed, the scientific age has generally promoted a mode of representation of the real that transcends the real from its representation⁶⁶ in a way that allows the real and its representation to secure confirmation in one another.⁶⁷ More precisely, in the scientific age, any representation of the real claims to be only a representation and yet claims that the real it represents is actual, material and factual. As a result, the real always finds its actuality, materiality and factuality confirmed in its representation, and its representation always finds itself grounded in the real whose actuality, materiality and factuality it has just confirmed.⁶⁸ In the scientific age, it is precisely because the real and its representation so often work together in this way that discourses – like international law – that portray themselves as being about the real are commonly designated by the same term as that which designates the real that they are all about.⁶⁹ The point I am making here is that the dominant empiricist and contextualist style of writing found in the international legal literature is one of the many manifestations of this specific mode of representation of the real. In fact, the continuous evidencing of the actuality, materiality and factuality of the law, the scholarship, the practice and, more generally, the world in which any international legal claim is grounded as well as the situating of that international legal claim in that very actuality, materiality and factuality is what allows the international legal

⁶⁶ See generally Foucault, *supra* note 5, at 14, 58; see also Latour, *supra* note 5, at 24; E. Levinas, *Altérité et transcendance* (1995), at 17. This is not to say that dualism is unknown from pre-modern thought. Previously, the distinction between the body and the spirit brought about an important mode of dualistic thinking. See Le Goff, 'L'homme médiéval', in J. Le Goff (ed.), *L'Homme médiéval* (1989) 15.

⁶⁷ T. Mitchell, *Questions of Modernity* (2000) 17; T. Mitchell, *Colonising Egypt* (1991), at xiii; J. Law, *After Method: Mess in Social Science Research* (2004), at 32–37; T. Mitchell, *Questions of Modernity* (2000), at 17–18; Latour, *supra* note 5, at 57; see also B. Latour, *La fabrique du droit: Une ethnographie du Conseil d'Etat* (2004), at 235; G. Steiner, *Errata: An Examined Life* (1997), at 88. Jacques Derrida, for his part, has spoken about the formidable 'simulacrum effect' of language. See J. Derrida, *The Beast and the Sovereign*, vol. 1 (2011), at 289. For the claim that modern science is based on the output of facts that it has created itself, see H. Bergson, *La pensée et le mouvant* (2014), at 251; G. Bachelard, *Le nouvel esprit scientifique* (1934), at 5–18.

⁶⁸ I have examined elsewhere some of these other manifestations in international law of this modern mode of representation. See J. d'Aspremont, *The Discourse on Customary International Law* (2021), at 106–11; see also d'Aspremont, 'Worldly Law', *supra* note 23.

⁶⁹ J. Derrida, *The Beast and the Sovereign*, vol. 2 (2011), at 129.

discourse to always confirm the real that it represents, which it is all about and in which it is grounded.

This entrenchment of empiricism and contextualism in the very mode of representation governing discourses about the real in the scientific age reveals the deep cynicism of the latter. Having favoured discourses about the real, the scientific age goes as far as turning the primacy of the real into a mode of representation that, in turn, has made it a style of writing. This is why I have come to think that the dominant empiricist and contextualist genre practised in the international legal literature constitutes a genre that cannot be simply unmade or marginalized and that fighting the gatekeepers of the dominant academic genre of the field will not suffice to discard a genre that is rooted in the very mode of representation that governs the scientific age as a whole. Ironically, this grim finding should make us appreciate even more what Anne Orford does in *International Law and the Politics of History*. In fact, if the scientific age is as cynical as I claim it is and goes as far as dictating styles of writing, there are even more reasons to follow Orford in her campaign against the primacy of the real when engaging with international law.⁷⁰

⁷⁰ The claim I am making here limits itself to the discursive primacy of the real that is witnessed in humanities but does not entail any acceptance or approval of the contemporary attempts by climate change deniers, climate change profiteers, anti-vaccine hysterics, post-truth delinquents, institutional vandals and all the self-declared and self-taught Twitter experts to vandalize and discredit sciences themselves.

