WALTER BENJAMIN AND THE RE-IMAGEINATION OF

INTERNATIONAL LAW

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ABSTRACT. Drawing on the work of Walter Benjamin, Harold Bloom, and Theodor Adorno this article proposes the re-imageination of international law as a 'pure means' of representation rather than a means of exercising control over the world.

KEYWORDS. Control; International Law; Representation; Time; Violence; Walter Benjamin.

It's better to invent, to fantasise, to leave open the possibility for action, than to take part in a real action that would *only* satisfy the desires of others, and contribute to one's own entrapment, as a person playing a role.

(Fry 2013, p. 20 – emphasis added).

Debates about what international law is and the method by which it is practiced have become stale. If one person says it is about rules another will emphasise their indeterminacy.[1] Someone might then ask how we can continue to 'do' international law if there is so much indeterminacy and, at this point, we will probably agree on some kind of 'formalism', some sense in which all that matters is that we speak the same language (on the 'culture of formalism' see Koskenniemi 2001, pp. 503-9).

If, however, the conversation starts with the suggestion that international law is a 'process of communication' between the most powerful 'participants' someone will probably ask how this is a normative account of law rather than an apology for power (see Reisman 1981, p. 101, and Higgins 1978, p.15-16; on the 'apologist for power' critique see Schachter 1985, pp. 272-3). Someone else might object that normativity is just code for rules and before long we will be back to talking about the nature of rules. Light and shade might be added to the conversation by asides about the move away from state consent towards a constitutional legal order or the shift from the state to non-state actors (see Klabbers, Peters and Ulfstein 2009; Dunoff and Trachtman 2009), but it seems we have to find some code word or trend – constitutionalism, formalism – to stop or at least contain the debate for fear it might unravel the discipline.

This imagined conversation is a rough sketch of twentieth into early twenty-first century thinking about international law's nature and practice. It tells us something about past efforts to think within and through international law, tracking the transition from a quasi-scientific positivism of rules, state practice, and law-making treaties (Oppenheim 1908), *via* a post-war policy science (Lasswell and McDougal 1992), to a late-twentieth century professional language which, despite its critical origins (Koskenniemi 2005; Kennedy 1987),

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[1] See Koskenniemi (2005, p. 59) on '"ascending"' and '"descending"' styles of legal argument.

is now cautiously embraced in a return to the positivist tradition (d'Aspremont 2011, pp. 27-9). The conversation has become hermetic and self-interested. Overwhelmed by anxieties of control over reality – anxieties about the absence of legal control over the world and the effects of such control as it is able to exercise – international law has retreated into itself to such an extent that Martti Koskenniemi can declare 'international law's objective' to be, among other things, 'always … international law itself' (Koskenniemi 2010, p. 52).

Preservation of the discipline and its semblance of control over the world is the primary objective.[2] Conservative efforts to stabilise the discipline and its method are presented as solutions to its anxieties of control – the International Law Commission's (ILC) work on fragmentation is the most obvious recent example of this (ILC 2006a; 2006b). The belief that international law was breaking apart as it tackled ever more diverse issues through ever more diverse regimes and institutions led the Commission's fragmentation study group to what seems like a platitude: '[i]nternational law is a legal system' (ILC 2006a). The apparent aim was to reassure lawyers that no matter how complex the world had become, no matter how diverse the values, principles, and policies, international law and its method could cope. Questions about the method's impact on the world are absent from the ILC's work; the study is an inquiry into legal method for legal method's sake.[3]

This exemplifies a wider sense of crisis in the discipline. The more international law is confronted with a complex and fragmented reality of competing values and complex choices the more it retreats into conservative self-reassurance. To fully explore questions of

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[2] Benjamin (2004a, p. 239): 'the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself'.

[3] See International Law Commission (2006b, p. 14, para. 14): 'although there are "problems", they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that have arisen in the past'.

nature and method would risk the future of the discipline, so it is (apparently) preferable to avoid such questions and keep on using the 'toolbox'.[4] Only radical projects of re-imageination – projects which see international law anew, which re-image international law – can address the anxieties of control which led to this self-interested, hermetic conversation, reconnecting the discipline with the reality it seeks to control and preventing international law becoming nothing more than an elite club that exists to sustain its members' power and influence.[5] In this article I propose a re-imageination of international law; an abandonment of attempts to control reality through international law in favour of the representation of reality by international law.[6]

Anxieties of control/anxieties of influence

The discipline's anxieties of control – anxieties about international law's control over reality – can, I argue, be traced to an anxiety of influence. The term 'anxiety of influence' is Harold Bloom's and Susan Marks has considered its relevance for international law (Bloom 1997; Marks 2006). For Bloom it signifies the poet's effort to break with her predecessors by

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[4] Ibid (p. 17, para. 20).

[5] See Benjamin (2002, p. 462, N2a,3): 'image is dialectics at a standstill. For while the relation of the present to the past is a purely temporal, continuous one, the relation of what-has-been to the now is dialectical: is not progression but image, suddenly emergent. – Only dialectical images are genuine images (that is, not archaic); and the place where one encounters them is language. Awakening.'; See also Parfitt (2014, p. 297) on 'a revolutionary re-imagining of the discipline' as a means of overcoming international law's Eurocentrism. My use of 're-imag*e*ination', as opposed to 're-imag*i*nation', conveys the distinctly Benjamin character of the approach advocated.

[6] See Benjamin (1998, p. 27): 'It is characteristic of philosophical writing that it must continually confront the question of representation'.

writing something distinctive,[7] with anxiety the result of the virtual impossibility of making that break.[8] For Marks the anxiety of influence in international law concerns state power; international lawyers have a 'fear of irrelevance [and] a fear of relevance' because they are influenced by and influence state power (Marks 2006, p. 347).

What Marks terms anxieties of influence – anxieties about the presence and absence of international law's influence in the world – I term anxieties of control, and this is not simply a difference in terminology. Whilst Marks is concerned with international lawyers' anxiety about their influence on world affairs (2006, p. 340) I am, by contrast, concerned with what international law is and, more specifically, with the notion that international lawyers have to be faithful to disciplinary influences because, as Anne Orford explains, international law is 'the art of making meaning move across time'; 'a discipline in which judges, advocates, scholars and students all look to past texts precisely to discover the nature of present obligations' (Orford 2013, pp. 172, 171). Adopting and adapting the language or concepts of predecessors or, in Orford's terms 'making meaning move across time', is the easiest way to advance an argument *within* a discipline, and this explains the heritage and tradition underpinning the ILC's fragmentation study and Martti Koskenniemi's argument for a 'culture of formalism' (Koskenniemi 2001, pp. 504–9). Whilst Bloom's poets are anxious to escape their disciplinary constraints and reshape poetry (Bloom 1997, p. xxiii),

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[7] Bloom (1997, p. xix): 'great writing is always at work strongly (or weakly) misreading previous writing'; Bloom (1997, p. 5): 'Poetic history … is held to be indistinguishable from poetic influence, since strong poets make that history by misreading one another, so as to clear imaginative space for themselves'.

[8] Marks (2006, p. 346): 'Bloom coined the phrase "anxiety of influence" to refer to the shock felt by poets when they recognize the influence of their precursors in their work, and their despair at ever being able to come up with anything original. At the same time, it refers to the things they do to overcome this sense of belatedness in relation to the tradition to which they belong.'

international lawyers seem anxious to apply predetermined methods and forms. The pressure

to follow the established method – to play a 'role'[9] – seems to outweigh any desire that law's

practitioners may have to speak as themselves. A desire to exercise legal control, with fidelity

to international legal influences as the means of achieving it, forces reality's diversity into

international law's structure; anything that does not fit is chiselled, made to fit, and deprived

of what made it distinctive.[10] Whilst scholars and practitioners engage with events through

established methods and forms – is a conflict 'international' or 'non-international', is an

entity a 'state' – it would be something altogether different to represent the event through

law, prioritising its reality over adherence to legal method and form (see Johns, Joyce and

Pahuja 2011, p. 3).

My aim, in this article, is to challenge the conception of international law as 'a

discipline … which … look[s] to past texts' (Orford 2013, p. 171). The re-imageined

international law I advocate is no longer a set of forms or methods, no longer a 'culture of

formalism' or 'the art of making meaning move across time' but, to borrow Walter

Benjamin's term, an 'idea' – something constantly remade by every attempt to represent

present reality (Benjamin 1998, p. 34), a 'pure means' of representation (Benjamin 2004a, p.

245), a means of presenting an image of what is, what was, and what should be to an

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[9] See the opening Fry quotation; see also Adorno (2007, p. 281): 'the role, the heteronomy prescribed by autonomy, is the latest objective form of an unhappy consciousness'.

[10] Adorno (2007, p. 309): 'In law the formal principle of equivalence becomes the norm; everyone is treated alike … For the sake of an unbroken systematic, the legal norms cut short what is not covered … The total legal realm is one of definitions. Its systematic forbids the admission of anything that eludes their closed circle … These bounds, ideological in themselves, turn into real violence as they are sanctioned by law as the socially controlling authority'.

audience.[11] For international law to pursue representation rather than control international lawyers need to acquire the poet's anxiety and write texts that re-imageine legal practice as something unlimited by 'past texts'. If the representation of reality demands it we can and we must adopt the poets' techniques – 'strong misreading', '"misprision"', the 'deliberate and wilful misinterpretation' of past influences (Bloom 1997, pp. xxiii, xiii) – in the process of re-presenting an 'idea' of international law represented and imageined in past influences.[12]

International legal thinking's prioritisation of tradition and formalism over expression and representation is a product of the connection between influence and control. Fidelity to past influences offers access to control because the discipline refuses to recognise arguments which do not use the established methods and forms as legal arguments; although Martti Koskenniemi and David Kennedy highlight international law's indeterminacy they, nevertheless, articulate international law as a 'rhetoric' or 'language' that must be employed by legal practitioners (Koskenniemi 2001, in particular pp. 497-501; Koskenniemi 2005; Kennedy 1987). And yet international law's anxieties of control undermine the orthodoxy of fidelity to past influences over engagement with and representation of present reality. That orthodoxy collapses when international legal practice's difficulty in exercising control – something I will consider shortly – is recognised.

The violence inherent in the conception of international law as a means to the end of control over reality cannot be overcome by re-imageination because violence is inherent in any form of practice.[13] But, by emphasising the central role of the individual, and by denying

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[11] See Benjamin (1998, p. 119) on 'the onlooker': 'He learns how, on the stage, a space which belongs to an inner world of feeling and bears no relationship to the cosmos, situations are compellingly presented to him.'

[12] See Benjamin quotation in n. 5 above.

[13] Benjamin (2004a, p. 247): 'Since, however, every conceivable solution to human problems, not to speak of deliverance from the confines of all the world-historical conditions of existence obtaining hitherto, remains

the possibility of ascribing responsibility for the representation and its effect to a pre-determined method, representational practice compels the individual to confront the violence of her practice. By abolishing the idea that there is a method or form to be followed the violence of legal practice is resituated from method or form to the individual and the representation she creates.[14] In representational practice it is for the individual to define and redefine a radically open 'idea' of international law which no longer serves as a means to an end, a means of control exercised by some over others. Re-imageination disperses law's violence, removing the possibility of playing the 'role' of the lawyer, by abandoning the notion that there are particular forms or methods which only lawyers understand. We are all international lawyers because representation is all there is – there is no defined form, method, or 'role'.[15]

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impossible if violence is totally excluded in principle, the question necessarily arises as to what kinds of violence exist other than all those envisaged by legal theory.' On means-ends thinking and law's violence see Benjamin (2004a, p. 236), and the discussion below at nn. 46-49.

[14] See Jenkins (2005, p. 252) on 'a self-effacing mode of practice'; See also Jenkins (2012, p. 178) on the notion of 'a law that forces nothing on those who receive it' and, on Jenkins (2012), see my article (Nicholson 2014).

[15] See Benjamin (2005a, pp. 771-2): '[T]he conventional distinction between author and public ... begins … to disappear … the reader is at all times ready to become a writer – that is, a describer, or even a prescriber'; Knox (2011, p. 46): 'in a sense, we are all lawyers'; Feyerabend (2010, xxvii): 'non-experts often know more than experts *and should therefore be consulted*, and … prophets of truth (including those who use arguments) more often than not are carried along by a vision that clashes with the very events the vision is supposed to be exploring.'; Charlesworth (2002, p. 391): 'An international law of everyday life would require a methodology to consider the perspectives of non-elite groups'; Anghie (2004, p. 318): 'I continue to hope … that international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power.'

It is in its response to the need for scholars and practitioners to take responsibility for international law's violence that my argument departs from Anne Orford's, Martti Koskenniemi's, and David Kennedy's work. Responsibility entails re-imageination because international law's current violence is caused by its fidelity to past influences, by the legal requirement that the present be controlled by the past. Orford rejects this view: 'the legacy of political theology turns out to be found not in the heroic decision that transcends the felt obligations and loyalties to worldly institutions, but in our responsibility for those institutions themselves' (Orford 2013, p. 197).[16] Whilst Kennedy acknowledges that 'in some way the international legal profession has often made the very things it claims to care most about less likely' and, as such, 'is part of the problem' (Kennedy 1999-2000, p. 456), he advocates continued legal control by lawyers: 'we have discretion, we have choice. In a word, we rule' (Kennedy 2006-7, p. 644). I am calling for what Orford rejects, for the transcendence of 'felt obligations and loyalties', for the transcendence of Koskenniemi's international legal 'culture',[17] for something beyond Kennedy's model of legal control by lawyers. Benjamin's insistence that 'the law's interest in a monopoly of violence … is explained … by the intention of preserving the law itself' speaks to the insistence that international law's 'culture', form, and rule are to be preserved as we reflect on its violence (Benjamin 2004a, p. 239); it is only by risking the discipline, by abandoning 'the intention of preserving the law itself', that we can truly address international law's violence.

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[16] Parfitt (2014, p. 304): '[the] contextualist approach [advocated by Anne Orford] … is … in danger of throwing the baby out with the bathwater and, in particular, of abandoning its commitment to emancipatory change'. At pp. 305-6 Parfitt concludes that there is no such abandonment in Orford's work.

[17] Parfitt (2014, pp. 304-5) reads Benjamin, through Tomlins (2012), in a way that indicates continuity between Benjamin's thought and Orford's conceptualisation of international law as 'the art of making meaning move across time' (Orford, 2013, p.172).

In *The Riddle of All Constitutions* Susan Marks calls for a 'scholarship … addressed openly, and indeed insistently, to life' (Marks 2000, p. 145), and my re-imageination argument is in sympathy with that call. Marks notes that the aim of 'critical knowledge … should be to transform unequal power relations', 'trad[ing] on the reflextivity of modern life, the awareness that knowledge feeds back into action' (2000, p. 137). Although this transformation of 'power relations' is desirable, it is constrained by reality:

I believe it is quite right to hammer the point that history is a social product, not given but made. For if it has been made, then it can be remade differently. This is surely a cardinal principle of all progressive thought, and the work of drawing out its multifarious implications is as urgent as it is endless. The worry I want to explore … is that we may be undertaking this work in a way which causes us to neglect the equally important progressive point that possibilities are framed by circumstances. While current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures … things can be, and quite frequently are, contingent without being random, accidental, or arbitrary. (Marks 2009, p. 2).

We need to focus on '"why" questions' because 'it is the investigation of causal relations that pushes open the compass and exposes to analysis the full range of (intentional and non-intentional) factors affecting social processes' (Marks 2009, p. 15). Marks, in common with China Miéville, is ultimately concerned with 'systematic theory in the study of international law' because 'without systematic theory we are left with no way of understanding the constraints that condition international law's transformative potential' (Marks 2007, p. 209).

The key constraint limiting 'international law's transformative potential' is its anxiety of influence, its anxiety to be faithful to its 'past texts'. I do not identify that constraint to understand it as a material factor that explains 'why' international law is as it is, although it can certainly be approached in that way. My aim is to explore the idea of an international law not constrained by its anxiety of influence. In contrast with Marks' materialist concern to

understand 'why' international law is as it is, I take the relatively idealist position that it is possible to think and write an international law that transcends its current anxiety of influence into being.

The possibility of this approach is, paradoxically, demonstrated by the current material reality of a discipline that defines itself through its 'past texts'. Re-imageination of the discipline depends on how we choose to write about the nature and theory of the discipline now because today's texts are tomorrow's 'past texts'. In this sense the anxiety of influence is more than the key constraint limiting the possibility of change; it is the key to the re-imageination of the discipline. In contrast with 'systematic theory', re-imageination uses the core of international law's current material reality – its anxiety of influence, its anxiety to be faithful to its 'past texts' – not as a constraining 'context' '*within*' which change occurs but as the 'context' *out of which* change occurs; the base from which to take an idealistic leap into the future.[18] Re-imageination insists that we can make international law into something different from its current material reality by writing that something different into being. Whilst writing it into being will not bring it into being as a material reality – and, in that sense, I agree with Marks that 'the meaning of emancipation is not a matter of scholarly *fiat* but a process of social struggle' (Marks 2000, p. 137) – writing is the necessary first step to living it.

In arguing that what international law is can be changed through writing, through scholarship, I depart from the more purely materialistic perspective of China Miéville, Robert Knox, Paavo Kotiaho, Bill Bowring and, as set out above, Susan Marks, who maintain that

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[18] See Parfitt (2014, p. 297) for a similar point: 'if "doctrine" can be understood as the space in which international history is transformed, or "imaged", into international *legal* history … then it would seem that doctrine is where the process of revolutionary *re*-imagination and *re*-ordering must begin.'

international law has a particular, material form and that the possibility of pursuing emancipatory change through international law is limited by that form (see Miéville 2005; Knox 2009; Kotiaho 2012; Bowring 2011). Re-imageination maintains that Benjamin's materialistic idealism offers a distinctive form of practice – an allegorical-representational practice – focussed on the capacity of the practitioner to re-constitute the material of reality, its 'fragments', in 'constellations' (Benjamin 1998, pp. 28-9, 34).[19]

The past must defer to the creative potential of the present because 'every second of time [could be] … the strait gate through which the Messiah might enter' (Benjamin 1999, p. 255), through which fundamental, emancipatory change might be achieved.[20] We need a theory of international law that makes this deferral of past to present possible because what might, on one view, look like past 'progress' can equally be seen as a continuing and violent

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[19] See Benjamin quotation in n 5 above; On historical materialist method see Benjamin (1999, p. 254): 'A historical materialist cannot do without the notion of a present which is not a transition, but in which time stands still and has come to a stop. For this notion defines the present in which he himself is writing history … The historical materialist … remains in control of his powers, man enough to blast open the continuum of history.' The anachronistic, gendered language of this passage is to be regretted. I read it as an affirmation of the capacity of individual, materialistic-idealistic practice to disturb established, historical patterns. On the tension between idealism and materialism in Benjamin see Buck-Morss (1991, pp. 173-177), who treats Benjamin as a critic of idealism and allegory as an idealistic form of practice, and Pensky (1993, pp. 148-150) who, *contra* Buck-Morss, treats Benjamin as a cautious advocate of a materialistic-idealism and Benjamin's work on allegory as the expression of that idealism. On the basis outlined in the latter sections of this article, I prefer Pensky's view and read Benjamin as a theorist and advocate of allegory as a mode of practice which is the expression, *per* Pensky (1993, p. 150), of 'a fragile, productive critical subjectivity'.

[20] See Sontag (1983, p. 104): 'What is important now is to recover our senses. We must learn to *see* more, to *hear* more, to *feel* more.'

'catastrophe'.[21] Conceptualising international law as 'the art of making meaning move across time' perpetuates the violence that it encourages us to take responsibility for (Orford 2013, p. 172). In place of responsibility for and reflection on violence, we need to inquire into 'violence itself as a principle' by asking whether there is any justification for international law's inherent violence (Benjamin 2004a, p. 236, and see Morgan 2007, p. 49 on Benjamin's desire to 'examine violence "as a principle"'). To be clear, I am not arguing against inquiry into and explanation of international law's current material reality and its responsibility for violence and injustice. I am arguing that beyond such explanatory projects there is a need for an alternative image of international law and its practice which disperses and democratises its power and violence, taking it from lawyers and handing it to everyone. This is an image of international law as a 'pure means' of representation (Benjamin 2004a, p. 245), a means of contesting current inequalities and injustices rather than a means of 'mov[ing]' inequalities and injustices 'across time' (Orford 2013, p. 172).

The purpose of this article is, then, to argue for re-imageination through a critique (outlined in the next two sections) of the way international law '[makes] meaning move

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[21] Benjamin (1999, p. 249): 'A Klee painting named 'Angelus Novus' shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are open, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned towards the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress'; Benjamin (2002, p. 473, N9a, 1): 'The concept of progress must be grounded in the idea of catastrophe. That things are "status quo" *is* the catastrophe.'

across time', violently forcing the present to fit into the structure of the past.[22] My argument depends on its ability to make its 'meaning move across time', on the future influence of this (past) text's argument for the prioritisation of an ever-unfolding present over an ever-retreating past and, as such, my argument is a paradox.

The absence of control

In this section I consider examples of the difficulty, if not impossibility, of controlling the world through international law, sketching a tendency to reassert existing methods or forms where the absence of legal control is detected in order to conserve those methods or forms.[23] International legal practice is, as I hope to illustrate in this section, 'guilty of *petitio principii*', of 'begging the question' of its capacity to control reality (Horkheimer 2004, p. 52).[24] It satisfies itself that it has 'dealt with' a particular reality through an unproven and unprovable insistence that its methods and forms can deal with it.

Take the recent practice of the UN Security Council as an illustration. With the end of the Cold War, and particularly in light of the Council's response to Iraq's invasion of Kuwait in 1990, the international legal mood was optimistic with the Council cast as the embodiment of a robust, unified international legal order. The Rwandan conflict of the early 1990s shifted

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[22] See Adorno quotation in n. 10 above.

[23] See Orford (2004, p. 444): 'one of the traditional strategies by which international lawyers respond to [a] … pervading crisis of authority [is] … through an attempt to reassert control or mastery'.

[24] See Horkheimer (2004, p. 52): 'the positivists reiterate that science proceeds by observation and describe circumstantially how it functions ... they will say that it is not their concern to justify or prove the principle of verification – that they merely want to talk scientific [or legal] sense … [but] in refusing to verify their own principle – that no statement is meaningful unless verified – they are guilty of *petitio principii*, begging the question.'

the mood back towards doubt and NATO's Kosovo intervention proved divisive. The
controversy surrounding the 2003 invasion of Iraq did nothing to restore faith in the Council
but multilateralism seemed resurgent with the 2011 response to widespread loss of life in
Libya. Perhaps it is too soon to reach a verdict on the Council's engagement with the
situations in Syria and Ukraine but it seems that faith in the Council's, and by extension
international law's, ability to control conflict ebbs and flows like the tide.

A focus on control, with optimism or pessimism *en vogue* depending on whether the
Council is or is not perceived to be 'dealing' with a particular conflict, masks the
complexities of controlling conflict. International law deals with any particular situation by
forcing its realities into a legal structure. The discipline prefers to focus on the Security
Council, on established methods and existing institutions, rather than on the situation and its
realities. It sees the world through its media, its lenses – the Council, the relevant treaty, a
particular legal concept. Patrick Cockburn, recounting his experience of reporting on the
Syrian conflict, notes the 'striking divergence between the way the Syrian war is seen in
Beirut … and what actually appears to be happening on the ground inside Syria', recalling the
disbelief of friends in Beirut who preferred the international media's story of violence and
conflict to his account of the ease with which he was able to move around the country
(Cockburn 2013, p. 3). International law trusts its media, its lenses, in the same way that the
friends in Beirut trust their televisions and newspapers, preferring and re-asserting familiar
structures when faced with unfamiliar representations.

The discipline creates a series of connections between Iraq (1990), Rwanda, Kosovo,
Iraq (2003), Libya and Syria, each a placeholder in a 'sequence of events like the beads of a

rosary' (Benjamin 1999, p. 255).[25] Kosovo becomes the Rambouillet Accords and the NATO response. Every conflict is a 'situation' to be controlled by the contents of the international legal 'toolbox'.[26] If control is perceived to be absent the call is for more, or more effective, legal control through established processes and methods, not more direct engagement with and representation of the particularity of a particular reality. The critical question is one of emphasis; do we start with past influences, with pre-determined methods, existing institutions and 'past texts', or with an attempt to engage with the present reality of a situation?

The tendency to re-emphasise and re-enforce the pre-established where legal control is perceived as absent or weak permeates the International Court of Justice's (ICJ) resolution of the *Pulp Mills* case (ICJ 2010a). The dispute concerned the construction of pulp mills – facilities for the manufacturing of wood products – on the Uruguayan side of the River Uruguay which separates Uruguay and Argentina. The court found Uruguay in breach of obligations of consultation and negotiation between the two countries (para. 149). Argentina argued that this breach meant that Uruguay had to dismantle the mill that had been built but the court disagreed, insisting that 'its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina' (para. 269-270). The court refused to explore the possibility of rethinking ideas of time and proof in a way consistent with the precautionary character of the obligations in question (para. 79; see also the dissenting view of Judges Al-Khasawneh and Simma, ICJ 2010b, para. 27), choosing

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[25] See also Koller (2012, pp. 99-105) on international law's 'journey' along a 'line of progress', and Johns, Joyce, and Pahuja (2011, p. 2) on 'stringing events together into evolutionary narratives' and international laws 'collective disciplinary past'.

[26] See text to n. 4 above.

to conserve the existing legal structure rather than the river by re-asserting established legal influences and methods (see Payne 2011).[27]

Claims against Argentina arising out of the devaluation of its currency in 2002 raise questions about international law's ability to address financial crises.[28] Despite the fact that these claims, brought through the International Centre for Settlement of Investment Disputes (ICSID), involve the same legal issues and basic facts, they have not been dealt with consistently. The discipline's response to the contradictory decisions in these cases offers further evidence of its tendency to see realities only through established forms and methods.

CMS v Argentina and *LG&E v Argentina* concerned the effect of Argentina's currency devaluation on US corporations with stakes in Argentina's gas industry (ICSID 2005; 2007a). The corporations claimed Argentina's conduct violated the United States / Argentina bilateral investment treaty (2005, paras. 68-73 and 84-90; 2007a, paras. 54-65), and Argentina relied on a defence of necessity (2005, paras. 213 and 304-8; 2007a, paras. 201-3). In *CMS* the tribunal rejected the defence on the basis that the government had contributed to the crisis and because devaluation was not the 'only way' to deal with it (2005, paras. 323-4, 329). In *LG&E*, however, the tribunal accepted the necessity defence because there was 'no serious evidence … that Argentina contributed to the crisis resulting in the state of necessity' and because 'an economic recovery package was the only means to respond to the crisis' (2007a, para. 257). Argentina tried to have the *CMS* ruling annulled but the

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[27] See, in particular, Judge Greenwood (ICJ 2010c, para.29): 'Court and tribunals are necessarily required to focus for most of the time upon the events of the past … the Court has concluded that Uruguay's conduct to date has violated its substantive obligations and that the declaration of a procedural breach is the only remedy which it is appropriate for the court to grant.'

[28] I am grateful to Professor Martti Koskenniemi for his suggestion that I consider these ICSID claims. See Waibel (2007) for background.

annulment committee held that, although there were 'errors and lacunas in the [*CMS*] Award', there was no 'manifest excess of powers' (ICSID 2007b, para. 136); that is, although the law had been applied incorrectly, an incorrect application of the law is no ground for annulment in ICSID proceedings. For Michael Waibel '[t]he split [between the two decisions] further undermines legal certainty and fuels concerns about the legitimacy of investment treaty arbitration' (Waibel 2007, p. 647), whilst, for William Burke-White 'this problematic jurisprudence presents a serious challenge to the legitimacy of the BIT regime and the ICSID system more generally' (Burke-White 2008, p. 202).

Waibel suggests a focus on 'the defence of lack of payment capacity' in place of an emphasis on necessity and argues that '[with] the required methodological tools and … expert assistance, ICSID tribunals could determine a country's budget constraint' and 'combine extensive investor protection with due concern for genuine financial distress' (Waibel 2007, p. 648). The aim is, apparently, to achieve more effective control with refashioned 'tools'. The idea that the contradictory outcomes in *CMS* and *LG&E* might reflect the intractable and uncontrollable nature of a financial crisis on this scale, that past influences and current structures might not fit events, is as anathema to Waibel's thinking as it is to the discipline in general.[29]

This determination to see control as achievable and crises as manageable through fidelity to past influences forms the basis of the international legal response to global environmental degradation. The Stockholm Declaration confidently declares that 'through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life

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[29] See Charlesworth (2002, p. 391): 'Through regarding 'crises' as its bread and butter and the engine of progressive development of international law, international law becomes simply a source of justification for the status quo.'

in an environment more in keeping with human needs and hope … [and that] man must use knowledge to build, in collaboration with nature, a better environment' (UNEP 1972, preamble para. 6). Something of this attempt to 'build' a better global environment is expressed in Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC): 'The ultimate objective of this Convention … is to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (UN 1992). Consistent with this objective, the Kyoto Protocol to the UNFCCC commits developed states to a reduction of their overall emissions to five per cent below 1990 levels in the period 2008 to 2012 (UN 1997, Article 3(1)).

The first Kyoto commitment period (2008 – 2012) has now ended and negotiations on the future of the UNFCCC and the Protocol continue. Tensions between developed and developing states continue to dominate negotiations and it is difficult to be confident that a comprehensive agreement will be achieved. Against this background, the influence of the Stockholm control / build model of global environmental governance seems to be in jeopardy, raising questions as to whether the complexity of the UNFCCC's architecture is deflecting attention from the basic question of whether global legal control over the climate is achievable. And yet scholarship continues to see the warming of the climate through a UNFCCC lens, re-asserting the adequacy and legitimacy of existing methods because of an anxiety that their influence may be fading.[30] The discipline's anxieties of influence become more affective the more the present seems to break through and challenge 'past texts'.

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[30] See French and Rajamani (2013, p. 460): 'how often, and how far, does climate change *legal* literature truly ever question the underlying purpose of the climate change regime; to posit any form of heresy as to its long-term normative sustainability? ... most work rarely questions the purpose and value of the overarching regime

Our imageinations need to be freed from the constraints of thinking about climate change through the structures of the Stockholm Declaration and the UNFCCC. An anxiety of influence, linked to anxieties of control, prevents international legal thinking playing a creative role in imageining the future. If we stand back from the desire to control, if we strive to cast off our anxiety of influence, if we explore the possibilities of representing the world through law, of engaging with the realities which law sees only through the lens of its 'past texts', forms, methods and institutions, we can work towards the re-imageination of international law as a creative site of self-expression; a law which strives to represent and respond to present reality rather than violently chiselling reality to fit a pre-determined structure.[31]

The presence of control

International law's anxieties of control, as discussed above, concern both the absence of legal control and the effects of such control as international law is able to exercise; 'a fear of irrelevance [and] … a fear of relevance' (Marks 2006, p. 347). Where legal control is absent, where gaps and flaws are apparent, processes and institutions protect existing methods and influences by re-asserting them. Where legal control is present, where there are no perceived gaps, established methods and influences are applied without reflection;[32] law denies

itself', and see p. 461: 'The present diplomatic negotiations … are a process that we feel compelled, as both commentators and participants, to *believe* to be heading somewhere.'

[31] See Adorno quotation in n. 10 above.

[32] On 'reflection' see Adorno (2007, p. 12): 'Philosophical reflection makes sure of the nonconceptual in the concept'; and see Adorno (2007, p. 365): 'If negative dialectics calls for the self-reflection of thinking, the tangible implication is that if thinking is to be true – if it is to be true today, in any case – it must also be a thinking against itself.'

existence and validity to potential realities by favouring one particular reality.[33] This is caused by an anxiety to be faithful to established legal methods and forms, so all-encompassing that it precludes consciousness of or reflection on the violence that legal practice enacts.

The *Refah Partisi* case, decided by a Chamber of the European Court of Human Rights (ECHR) in 2001 and its Grand Chamber in 2003 (ECHR 2001; ECHR 2003), illustrates this violence. Refah, a political party and constituent element of Turkey's coalition government, was banned by Turkey's Constitutional Court because it opposed the Turkish constitutional principle of secular government and favoured sharia (2003, pp. 12 and 18, paras. 23 and 40). The Chamber and Grand Chamber rejected claims by the party and some of its members that their right to freedom of assembly had been violated, deciding that the decision to ban the party was 'prescribed by law' (2003, pp. 24-28, paras. 52-64; 2001, p. 76, paras. 37-39), made in pursuit of a 'legitimate aim' (2003, p. 28, para. 67; 2001, pp. 76-77, paras. 40-42), and 'necessary in a democratic society' (2003, pp. 28-48, paras. 68-134). The Grand Chamber went further, agreeing with the Chamber that 'sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention' (2003, p. 44, para. 123). It reached this conclusion without detailed analysis of sharia as a legal system or a clear definition of democracy. The value of secular democracy and the importance of avoiding fundamental challenge to the Turkish constitutional order are unreflectively assumed, without consideration of the fact that on some reports Refah was expected to gain 67% of the votes at the next general election (2003, p. 8, para. 11). Seen in this light, the court's approach, far

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[33] See Marks (2006, p. 347): 'when we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved'.

from upholding and safeguarding democracy, can be seen to undermine democracy (Boyle 2004, p. 11).

Having perceived a threat to its pre-conceived, under-defined, secular form of democracy, the court was unwilling to reflect on its influences – and, in particular, its concept of democracy – and consider the possibility that democracy and government based on religious principle may be compatible (Boyle 2004, p. 12-13). This drives the court to unreflectively assert its preferred, vague, secular form of democracy, apparently motivated by a fear that democracy's pluralism may be its undoing: 'the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history' (ECHR 2003, p. 36, para. 99).

A violent and exclusionary control over reality is also apparent in international law's engagement with the environment. International law has, as touched upon in the discussion above, conceptualised the environment as a human environment, a space or thing for human control and occupation, rejecting conceptualisations of the environment as something with value beyond its utility for human beings.[34] This is illustrated in the decisions of the ECHR in *Lopez Ostra* and *Kyrtatos* (ECHR 1995; ECHR 2005; see Boyle 2012, pp. 615, 627). In *Lopez Ostra* the court held that the noise and smell from a waste treatment plant situated twelve metres from the applicant's home violated her right to private and family life (ECHR 1995). In *Kyrtatos* the applicants sought to extend the *Lopez Ostra* line of reasoning, arguing that respect for private and family life meant that Greek public authorities had to protect the natural environment (ECHR 2005). The court rejected that claim because 'the general

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[34] On anthropocentrism in international environmental law see Gillespie (2010, p.118) and Natarajan and Khoday (2014); on international human rights law and the natural environment see Francioni (2010).

deterioration of the environment' did not establish a breach of the right to private and family life, and there was no evidence that damage to wildlife 'was of such a nature as to directly affect [the applicants'] … own rights' (2005, p. 399-400, paras. 52-53).

For the court, private and family life occurs in buildings, in human spaces (see Francioni 2010, p. 51). If pollution or some other disturbance affects private and family life the convention offers protection but that does not extend to *Kyrtatos*-type attempts to use human rights as a means of protecting the natural environment. In *Refah* the court unreflectively denied a socio-political reality that linked religion and governance because it conflicted with the court's vague, under-defined preference for secular democracy and, in *Kyrtatos*, the court denies an understanding of private and family life that includes the natural environment (see ECHR 2005, p. 400, para. 53 and the reference to 'the vicinity of the applicants' house'). In both cases the court violently denies existence and legitimacy to particular forms of social ordering because of an anxiety to be faithful to its established ways of thinking.

Where control is absent, as discussed in the previous section, established methods are re-asserted in order to conserve the method because of an awareness of the disconnect between the method and the reality to which it is applied. Where control is present, where the issue is presented as one calling for the application of established ideas of democracy or private and family life, for example, there is no awareness of a disconnect. The method is not applied to conserve it, as in cases of absence; fidelity to past influences is so strong that the need for reflection on the method's violence does not, apparently, occur to those applying it.

International law's control over and creation of spaces is particularly apparent in the division of the world's oceans into various jurisdictional zones, including the high seas. The widespread loss of high seas biodiversity through overfishing is a perennial problem (Cullis-

Suzuki and Pauly 2010), and efforts by parties to the Convention on Biological Diversity (CBD) might suggest that the cause of the problem is the absence of international legal control over high seas fishing (CBD 1995). It is, however, important to recognise that freedom of the high seas is one of the core principles of the law of the sea (UNCLOS 1982, Article 87). The basic idea, reflected in the United Nations Convention on the Law of the Sea (UNCLOS) and the Straddling Stocks Agreement, that only flag states may exercise jurisdiction over their vessels precludes willing non-flag states from taking action against overfishing (UNCLOS 1982, Articles 116-119; UNCLOS 1995, Articles 18-19). Whilst there is a limited exception in the Straddling Stocks Agreement, permitting member states of regional fisheries management organisations (RFMOs) to board and inspect vessels operating in high-seas areas covered by RFMO agreements (UNCLOS 1995, Article 21; see Birnie, Boyle, and Redgwell 2009, p. 744), international law continues to rely on flag state enforcement and control. International law has created a situation in which high seas fishing and the attendant risks of biodiversity loss are managed through principles of high seas freedom, flag state enforcement, and international cooperation on catch limits through RFMOs. The scale of biodiversity loss in the earth's oceans suggests the need for a re-evaluation of these core principles but, because that would involve the renegotiation of UNCLOS, it is politically unrealistic.

One response to this situation is to accept the anxiety of influence it reflects, expressed in the demand that legal practice limit itself to the interpretation and application of treaty provisions. But perhaps more creative arguments are needed – arguments proposing a limited license for unilateral state action to address pressing environmental threats, an environmental version of the UN Charter's Article 51 right to self-defence (UN 1945), for example. Such arguments are precluded by the existing legal materials, by the anxiety of

influence and the discipline's self-imposed limit which insists that the existing legal materials are *the only* legal materials. We can displace responsibility for continuing biodiversity loss on the high seas onto legal method and form, but we can equally question whether it is possible to imageine models of legal practice that encourage creative, experimental arguments, transcending 'past texts' on the basis of evolving, present realities.

Self-preservation or engagement?

International legal scholars and practitioners can adopt a bunker mentality, unreflectively pursuing the preservation of such power and control over the world as they have or believe they have, ignoring any disconnect between their methods and the realities they seek to control and disregarding the violence inherent in law's unreflective creation of political, environmental, spatial, and social realities. Equally, and in keeping with Orford's, Kennedy's, Koskenniemi's, and Marks' work, they can reflect on and take responsibility for the violence of international law through projects of critique and explanation without taking the more destabilising step of seeking to re-imageine the discipline and its practice.

As an alternative to these two paths, international legal scholars and practitioners can choose to prioritise engagement with present reality. Whilst it may seem like there is no way out of adherence to method, process, and form, no way to cast off the discipline's anxieties of influence and control, the extent to which international law can re-imageine itself by prioritising engagement with and representation of present reality depends on the ambition and open-mindedness of today's thinkers and practitioners. In calling for re-imageination I am asking thinkers and practitioners to prioritise the possibility of what the discipline can represent over certainty about what the discipline is; to prioritise the influence of present reality over deference to 'past texts'.

My argument necessarily implies that there is no such thing as an international lawyer – no such 'role' – because in a representational international law everyone, regardless of training, is an international lawyer.[35] I am calling for the de-professionalisation of international law through what might be characterised as an anti-method (see Feyerabend 2010), and I accept the ambiguities and uncertainties of disciplinary definition, method, professional and scholarly identity that this entails.

Allegorical-representational practice

My argument for a representational international law is based on Walter Benjamin's and, to a lesser extent, Theodor Adorno's work.[36] Benjamin and Adorno argue against knowledge, control, and structure as the cornerstones of practice, presenting an alternative practice, inspired by art and aesthetics, that prioritises engagement with and representation of reality – or, in Adorno's terms, '[t]he primacy of the object' – over knowledge of reality (Adorno 2005a, p. 265).[37] For Benjamin and Adorno attempts to capture and contain reality in

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[35] See n 15.

[36] On the Benjaminian practice of legal history see Tomlins (2012). Tomlins, in my view, misreads Benjamin in claiming that a central concept in Benjamin's thought - the 'dialectical image' – whilst '[sensitive] to the fragmentary nature of what is apprehended … [holds] the possibility of completing the comprehension of truth content by critique, by theory, render[ing] it an antidote to indeterminacy and complexity' – Tomlins (2012, p. 57) – overlooking the importance of the 'idea', as a frame situated in practice and remade through practice and failing to appreciate the nature of the dialectical image, not as an 'antidote to indeterminacy and complexity', but, *via* an allegorical method, as the most truthful, real account of reality.

[37] Adorno (2005a, p. 265): 'The primacy of the object must be respected by praxis'; Benjamin (1998, p. 30): 'Again and again the statement that the object of knowledge is not identical with the truth will prove itself to be one of the profoundest intentions of philosophy in its original form, the Platonic theory of ideas'; Benjamin (1998, p. 28): 'Inasmuch as it is determined by [the] concept of system, philosophy is in danger of

methods of thought and practice that are unreflectively applied despite their failure to connect with the reality they claim to capture leads to 'method tak[ing] the place of what it ought to make known' (Adorno 2007, p. 314).[38]

Benjamin and Adorno's critique of post-Enlightenment thought and practice has a particular application to international law. Its anxiety of influence, its desire to be faithful to its past, together with its anxieties of control, drive the discipline to apply methods which ignore their incompatibility with the reality at issue because of a desire to preserve the method – see, for example, the *Pulp Mills* case discussed above – or the unreflective application of methods which violently deny existence to particular realities or forms of life because they are not the realities or forms of life recognised in 'past texts' – see the discussion of *Kyrtatos* and *Refah Partisi* above, for example. The result, to quote Herbert Marcuse, is

a pattern of *one-dimensional thought and behavior* in which ideas, aspirations, and objectives that, by their content, transcend the established universe of discourse and action are either repelled or reduced to terms of this universe … [and] redefined by the rationality of the given system and of its quantitative extension. (Marcuse 1991, p. 14)

accommodating itself to a syncretism which weaves a spider's web between separate kinds of knowledge in an attempt to ensnare the truth as if it were something which came flying in from outside.'

[38] See Benjamin (1998, p.162-5), rejecting a symbolic concept of language and its attempt to contain reality in favour of allegory - and on that rejection see Finkelde (2009, p. 60); Benjamin (2005b, p.718): 'The symbol is definable as a sign by means of which no similarity can appear'; see also Benjamin (1998, p. 27): 'It is characteristic of philosophical writing that it must continually confront the question of representation … The more clearly mathematics demonstrate that the total elimination of the problem of representation … is the sign of genuine knowledge, the more conclusively does it reveal its renunciation of that area of truth towards which language is directed.'

Benjamin and Adorno offer allegorical-representational practice not as a cure for the violence of a method-obsessed practice that constantly defers to past influences, but in an effort to make practice more faithful to present reality (see Benjamin 1998, p. 159-235, advocating allegory as a form of practice). Practice is a clouded lens, a medium through which we try to see reality, not an immediate means of access to and control over reality (on mediate and immediate see Benjamin 2004b). Allegorical-representational practice is not non-violent but conscious of its violence and, therefore, committed to the perpetual re-representation of an ever-unfolding reality.[39] The right, truthful, perfect representation cannot be achieved because something will always be missing, misrepresented, ignored,[40] and, for this reason, the critique of existing representations through re-representation is not a means to an end but an end in itself, a 'pure means' (Benjamin 2004a, p. 245).

In allegorical-representational practice the conventional distinction between practice and critique therefore collapses – practice is critique and critique is practice.[41] There is no escape from the violence of practice just as there is no escape from practice; no way to do nothing and no way to do something which is not violent.[42] We can only engage in a practice

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[39] See Benjamin (2004b, p. 74) on 'imperfect' language; Adorno (2004, p.184): 'The comportment of artworks reflects the violence and domination of empirical reality by more than analogy. The closure of artworks, as the unity of their multiplicity, directly transfers the nature-dominating comportment to something remote from its reality.'

[40] See Adorno (2005b, p. 50): 'The whole is the false'; see also Adorno and Horkheimer (2011, p. 71): '[t]rue thought is thought that has no wish to insist on being in the right'.

[41] See Marks (2007, p. 208): 'there can be no expectation that [international law] … will one day be placed beyond ideology or made ideology-proof … The work of critique is never done.'

[42] Benjamin (2004a, p. 247): 'every conceivable solution to human problems, not to speak of deliverance from the confines of all the world-historical conditions of existence obtaining hitherto, remains impossible if violence is totally excluded in principle'.

which accepts its subordination to present reality, for the inaccessibility of a perfect truth or stable representation of an ever changing, diverse reality necessitates a 'rhythm of transience' in practice (Butler 2006, p. 216); a practice defined by the effort to represent an unrepresentable reality through the constant re-representation of the 'idea' of international law.

Whilst method-obsessed practice involves engagement with reality through a pre-formed method, allegorical-representational practice involves 'constellations' of 'fragments' (Benjamin 1998, pp. 28-9, 34).[43] The current conflict in Syria is seen as a 'conflict', with the associations with previous 'conflicts' that implies, to be 'dealt with' as a 'peace and security' issue by the Security Council. A pre-formed structure and form are imposed on and dominate the situation. Allegorical-representational practice seeks to invert this, allowing structure and form to emerge out of the situation.[44] In allegorical-representational practice there is no set of texts or concepts which the practitioner must use; the responsibility for constellating texts, concepts, aspects or fragments of reality to be included in or excluded from the representation rests with the practitioner. Everything ever written or created by anyone, anywhere and everything that exists or has ever existed is a potential fragment to be included in or excluded from the representation. The allegorical-representational practitioner must 'immerse himself in the real in order to dislodge its objective interpretation' (Hanssen 1995, p. 828), for 'truth-

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[43] Benjamin (1998, pp. 28-9): 'Just as mosaics preserve their majesty despite their fragmentation into capricious particles, so philosophical contemplation is not lacking in momentum … The value of fragments of thought is all the greater the less direct their relationship to the underlying idea, and the brilliance of the representation depends as much on this value as the brilliance of the mosaic does on the quality of the glass paste'.

[44] Adorno (2004, p. 187): 'Form is … conceived as something superimposed, subjectively dictated, whereas it is substantial only when it does no violence to what is formed and emerges from it.'

content is only to be grasped through immersion in the most minute details of subject-matter'
(Benjamin 1998, p. 29).

There is a tension between my argument for a Benjaminian, allegorical-representational legal practice and the standard interpretation of Benjamin's 'Critique of Violence' (Benjamin 2004a), his best known reflection on law and legal practice, as an 'anti-law' text (see Žižek 2009, pp. 151-173; Hanssen 1997; Honneth 2009; Mack 2000, p. 108). Whilst, as will be apparent from the discussion above, I embrace Benjamin's critique of law's violence and its obsession with its own preservation,[45] taking the 'Critique' as the foundation for my argument, the text in my view points towards a re-imageined, allegorical-representational legal practice (for similar interpretations of the 'Critique' see Benjamin – that is, *Andrew* Benjamin – 2011, p. 293; Abbott 2008, pp. 80, 88; Butler 2006).

The 'Critique' focuses on the violence of means-ends thinking, with law as the prime example of society's means-ends use of violence.[46] Whilst he acknowledges the significance of natural law, Benjamin focuses on positive law because natural law, in his view, lacks the ability to adjudicate on violence (Benjamin 2004a, p. 237). He rejects means-ends justifications for violence in search of what Beatrice Hanssen describes as a '"politics of pure"' or '"noninstrumental means"' (Hanssen 1997, pp. 239, 243), questioning the justification for violence through a search for 'a criterion for violence itself as a principle' (Benjamin 2004a, p. 236). Law is relevant to this search because it legitimises power and sanctions the use of force but Benjamin's primary, political concern is with the very existence

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[45] See Benjamin (2004a, p. 239): 'the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself'.

[46] Ibid (p. 236): 'The task of a critique of violence can be summarized as that of expounding its relation to law and justice … it is clear that the most elementary relationship within any legal system is that of ends to means'; see also Honneth (2009, p. 98).

of violence and power (see Honneth 2009, p. 92). His search for '"noninstrumental means"' –
for means which do not violently pursue ends – implies the possibility of a law which does
not involve means-ends rationality or control. This '"noninstrumental"' law emerges out of
the relationship between 'lawmaking violence', 'law-preserving violence', '[m]ythic
violence', and 'divine violence' (Benjamin 2004a, pp. 243, 248, 249-250).

Law brings itself into being by 'fiat' (Butler 2006, p. 202), by a violent and
unjustified 'assumption of power',[47] and depends on violence to validate and sustain its
power.[48] It secures 'a monopoly of violence vis-à-vis individuals' in the interest of
'preserving the law itself' (Benjamin 2004a, p. 239).[49] The relationship between lawmaking
and law-preserving violence is, as Judith Butler points out (Butler 2006, p. 203), connected
with 'mythic violence' which Benjamin defines 'in its archetypal form' as 'a mere
manifestation of the gods' (Benjamin 2004a, p. 248). As neither 'a means to [the gods'] ends'
nor 'a manifestation of their will', mythic violence is 'primarily a manifestation of [the gods']
existence', a 'bloody power over mere life for its own sake' (Benjamin 2004a, p. 248, 250).

Benjamin challenges law's assumption of power over life 'for its own sake' through
the concept of divine violence. Divine violence 'is lethal without spilling blood' (Benjamin
2004a, pp. 249-50), 'expiatory' (2004a, p. 250). For Judith Butler '[d]ivine violence does not
strike at the body or the organic life of the individual, but at the subject who is formed by
law' (Butler 2006, p. 211; see also Abbott 2008, p. 91); it does not kill or harm the human

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[47] Ibid (p. 248): 'at [the] very moment of lawmaking, it specifically establishes as law not an end unalloyed by
violence but one necessarily and intimately bound to it, under the title of power. Lawmaking is powermaking,
assumption of power, and to that extent an immediate manifestation of violence.'

[48] Ibid: 'lawmaking pursues as its end, with violence as the means, *what* is to be established as law'.

[49] See also ibid (p. 239): 'violence, when not in the hands of the law, threatens it not by the ends that it may
pursue but by its mere existence outside the law'.

individual but 'purifies the guilty, not of guilt, but of its immersion in law' (Butler 2006, p. 211). Benjamin illustrates the sense in which it is the 'mere life' under law, and not the human being subjected to that 'mere life', that is killed by divine violence through the story of Korah (Benjamin 2004a, p. 250, making passing reference to Korah, on which see *The Holy Bible* 1769, 'Numbers, Chapter 16'). Korah rebelled against Moses, God's representative on earth, and at Moses' request God caused Korah, his followers and every trace of their existence to be consumed by the mouth of hell (Ginzberg 1911, pp. 298-9). Their souls were not destroyed – they will rise again at the Resurrection – but, through divine violence, they ceased to exist as 'subject[s] … formed by law'; subjects subjected to a heretical, human law that breaks the connection with the divine, with a reality not of their making.[50]

It is important to emphasise that Benjamin is not calling for human acts of divine violence; indeed, he rejects the possibility of such acts (for other views see Žižek 2007; 2009, pp. 151-173; and Derrida 1992, p. 62). This is clear in the concluding passages of the 'Critique' where he notes that 'only mythic violence, not divine, will be recognizable as such with certainty, unless it be in incomparable effects, because the expiatory power of violence is invisible to men', adding '[d]ivine violence … is the sign and seal but never the means of sacred dispatch' (Benjamin 2004a, p. 252; see de Wilde 2006, p. 198). Benjamin is not proposing the end of law or advancing a purely divine alternative to a human, positive law; 'the order of the profane cannot be built up on the idea of the Divine Kingdom' (Benjamin

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[50] Ginzberg (1911, pp. 299-300): 'Not until after the Resurrection will their punishment cease, for even in spite of their grave sin they were not given over to eternal damnation'; Benjamin (2004a, p. 250): 'it is justifiable to call this [divine] violence … annihilating; but it is so only relatively, with regard to goods, right, life, and suchlike, never absolutely, with regard to the soul of the living'.

1978, p. 312; see Butler 2006, pp. 214-216). For Benjamin destruction 'constantly recurs as the condition of positive law and as its necessary limit' (Butler 2006, p. 214), yet positive law maintains legal control by creating and sustaining a 'mere life' under law that denies the possibility of a 'just existence', rejecting the notion that 'in happiness all that is earthly seeks its downfall' (Benjamin 1978, pp. 312-313, quoted in Butler 2006, p. 215).[51] For Butler '[t]his downfall does not happen once, but continues to happen, is part of life itself, and may well constitute precisely what is sacred in life' (Butler 2006, p. 215); indeed, 'the rhythm of transience is recurring and without end' (2006, p. 216). International law denies this 'rhythm of transience' as it '[makes] meaning move across time' (Orford 2013, p. 172).

Benjamin can be read as calling for a concept of law in which 'all is bound to pass away [and] undergo its downfall' (Butler 2006, p. 216). Re-imageined in these terms legal practice becomes an effort to reach for the divine, for reality, in the knowledge that the divine cannot be reached, and law becomes a 'pure means' of re-presentation, a constantly reformed and re-imageined 'idea'. If the 'criterion for violence itself as a principle' is its potential to serve as a 'pure means' of representation (Benjamin 2004a, pp. 236, 245), a 'pure means' of representing an unrepresented 'now',[52] then it is on that basis, and not in order to 'preserv[e] the law itself' (2004a, p. 239), that international law's violence can be justified.

Justifying international law's violence through representation distinguishes my approach from China Miéville's. For Miéville:

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[51] Benjamin (2004a, p. 251): 'The proposition that existence stands higher than a just existence is false and ignominious, if existence is to mean nothing other than mere life'; See Butler (2006, p. 216): 'positive law vanquishes life and its necessary transience, both its suffering and its happiness'.

[52] On 'the now' see Benjamin quotation in n 5 above.

radical change, or even the systematic amelioration of social and international problems, cannot come through law … To fundamentally change the dynamics of the system it would be necessary not to reform the institutions but to *eradicate the forms of law* – which means the fundamental reformulation of the political-economic system of which they are expressions. The project to achieve this is the best hope for global emancipation, and it would mean the end of law (Miéville 2005, p. 318).

International law *is* what exists now, *is* the violent, control-based order, but whatever comes *après le déluge* will not be international law because it will be non-violent. Drawing on Evgeny Pashukanis's work, Miéville concludes that the legal form necessarily implies violence and force – '[l]aw and violence are inextricably linked *as regulators of sovereign claims*' – with the consequence that '"*between equal rights force decides*"' (Miéville 2005, p. 135, quoting Marx).

I agree with Miéville's claim that law necessarily implies violence. My reason for agreeing is not, however, Pashukanis's work but Benjamin's claim that 'every conceivable solution to human problems, not to speak of deliverance from the confines of all the world-historical conditions of existence obtaining hitherto, remains impossible if violence is totally excluded in principle' (Benjamin 2004a, p. 247). If violence and force are not particular facets of law's form but, as Benjamin claims, inherent in the very idea of practice then Miéville's 'end of law' argument, in so far as it associates law with violence, emancipation with the end of law and, by implication, the end of law with the end of violence, implies a theory of non-violent practice. Absent that theory of non-violence – and no such theory is to be found in Miéville's work – the 'end of law' argument looks like a dangerously utopian position that would mask rather than transcend violence, facilitating the practice of violence by those who would deny not only the violence of their practice but the very existence of violence in an 'emancipated', 'post-legal' world.

Miéville's call, through a call for the 'end of law', for an end to the very existence of violence postulates perfect emancipation through total revolution; a heavenly existence of perfect justice and truth. Benjamin, however, insists that such a complete escape from 'mere life' can only be achieved through divine violence and that divine violence cannot be practiced by human hands: '[d]ivine violence … is the sign and seal but never the means of sacred dispatch' (Benjamin 2004a, p. 252); 'the order of the profane cannot be built up on the idea of the Divine Kingdom' (Benjamin 1978, p. 312). Benjamin's argument for inquiry into 'violence itself as a principle' (Benjamin 2004a, p. 236), and forms of legal practice which pursue emancipation whilst acknowledging the violence of the pursuit is, in my view, and for these reasons, preferable to Miéville's 'end of law' argument.

Forming the 'idea': International law as 'pure means'

As a 'pure means' of representation – a means which seeks no end, which pursues nothing more than the presentation of an image of what is, what was, and what should be to an audience – international law is an 'idea' (on the presentation of images to an audience see Benjamin 1998, p. 119).

Benjamin's call for a representational practice, rather than a practice of knowledge and control, centres on the relationship between three key elements: 'phenomena', 'concept', and 'idea' (1998, p. 34). These are the building blocks of a representational thinking and practice in which life and reality are imperfectly represented rather than 'ensnare[d]' (1998, p. 28).[53] The relationship between 'phenomena', 'concept', and 'idea' can be thought of in terms of a ladder rising from the level of what objectively exists up to its representation in thought and language. At the bottom are the phenomena which 'are subordinate to concepts' (1998, p. 33). Phenomena 'participate in the existence of ideas' through the mediation of the

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[53] See Benjamin (1998, p. 28) quote in n 37 above.

concept and concepts represent ideas, but 'phenomena are not incorporated in ideas … not contained in them' (1998, p. 34). Ideas are 'related' to, rather than identical with, phenomena 'in the representation of phenomena' (1998, p. 34). To 'illustrate' the point Benjamin employs 'an analogy': 'Ideas are to objects as constellations are to stars … They do not contribute to the knowledge of phenomena, and in no way can the latter be criteria with which to judge the existence of ideas' (1998, p. 34). Formed out of phenomena, ideas are 'not eternal but historically specific constellations' and 'in constructing ideas it [is] continuously necessary to return to the phenomena themselves' (Buck-Morss 1979, p. 94). Phenomena are subordinated to concepts in the formation of ideas, but ideas are constantly re-represented because of a willingness to adjust and re-make methods, processes, and forms to represent essentially unrepresentable phenomena.

Form comes from or 'emerges' out of 'what is formed' (Adorno 2004, p. 187), out of the phenomena it represents. It is not 'mathematical', 'technical', or predetermined, but 'actually an unfolding of truth', '[a] posited unity' created by the practitioner (Adorno 2004, p. 188-9).[54] Every representation, every legal argument, involves 'a momentary and fragile balance' (Adorno 2004, p. 381), 'not *creatio ex nihilo* but creation out of the created' (Adorno 2004, p. 189);[55] out of the fragments, the phenomena, which include past representations of law's 'idea'. The radically indeterminate legal form, the 'idea', is (re)formed in and by every representation, without any requirement to '[make] meaning move across time' (Orford 2013, p. 172).

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[54] Adorno (2004, p. 188): 'There is absolutely no reducing the concept of form to mathematical relations … Such relations … play a role as technical procedures, yet they are not form itself but rather its vehicle'.

[55] Ibid (p. 189): 'Form secularizes the theological model of the world as an image made in God's likeness, though not as an act of creation but as the objectivation of the human comportment that imitates creation; not *creatio ex nihilo* but creation out of the created.'

Agony and reflection

The practice of international law should involve a 'run' lasting a lifetime through reality.[56] The international lawyer is an 'agonist' (Rang 1994, p. 231),[57] self-consciously and reflectively constructing representations, ever-conscious of their violence. To define international law as a particular method, structure, or 'culture' is to disengage it from reality and grant greater influence to 'past texts' than to present representational efforts.

My argument is ultimately a meta-theory of international law and its practice. Of course some representations will have greater influence than others but, beyond the limits of 'role' or method, the process of constellating fragments to form a representation of reality involves the responsibility of choosing which fragments to include and which to exclude, of choosing how to (mis-)read past influences, of choosing how and whether to re-represent 'past texts'.[58] There is no method to be followed, only the injunction to represent.[59] We must work with fragments because reality is fragmented; there is no 'toolbox' with which to fix it back together.[60] In place of fidelity to past influences we should engage in creative '"misprision"',[61] constellating and (mis)representing past influences and fragments of the

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[56] Rang (1994, p. 231): 'The agonists come running from the door of damnation on the left. They run in unison – through the medium of chaos'.

[57] Ibid: 'The Athenian-Syracusian theater is an agon (cf. the word *agonist*)'.

[58] On (mis-)reading see text to n 12 above.

[59] Benjamin (1998, p. 27): 'It is characteristic of philosophical writing that it must continually confront the question of representation.'

[60] On 'toolbox' see text to n 4 above.

[61] On Bloom and '"misprision"' see text to n 12 above.

present in an effort to create representations of 'the now',[62] locked in a 'restless agon' with reality and the 'idea' of international law (Bloom 2011, p. 88, referring to '[Shakespeare's] restless agon with all of literature').

The obvious objection to my argument is that the re-imageination of international law on the basis of representation rather than control is utopian and unachievable. Allied to this is the objection that the argument is too aesthetic and theoretical and, consequently, insufficiently materialistic or programmatic. These objections mirror the established critiques of Frankfurt School thinking – that it fails to offer a template or structure for practice, that it fails to define the means of achieving a better future (Kolakowski 1978, pp. 341-395; Bottomore 2002; Anderson 1979). These critiques and the aims of a Frankfurt School perspective are bound together in the pursuit of emancipation and by the hope that critical reflection on what is done and how it is done can create a better future. They differ on the question of whether scholarship and thought should define the terms and methods of future thought and practice, identifying the agents of change and the means those agents should employ to achieve specific ends.

The purpose of this article is to present an argument for a (meta-)theoretical approach to international law based on representation rather than control. It does not offer or attempt to offer a method or programme, a complete agenda for international legal practice, a sense of what 'we' should 'do' next. That would be inconsistent with its aim, which is to offer an anti-method that rejects the idea of international legal practice as an elite pursuit. Writing this article is itself an exercise in representation, an exercise in sketching an international law that empowers the non-lawyer by offering a 'pure means' of striving for emancipation from 'mere

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[62] On 'the now' see quotation in n 5 above.

life' under positive law.[63] It proceeds on the basis that thinking and writing about a different international law are the necessary first steps to living it.

If, at the end of this article, international legal practitioners and thinkers – in a sense, 'the elite' – are left with a sense of anxiety about the discipline and its practice, if it moves us / them towards re-presenting or re-image(ining) our / their 'idea' of international law, if, in place of a resolution, message, or programme, it leaves us / them wrestling with the 'agon' of international law and its representation of 'the now', it has achieved its aim 'for its aim is not to carry the reader away and inspire him with enthusiasm … [It] can be counted successful only [if] it forces the reader to pause and reflect' (Benjamin 1998, p. 29).

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[63] See text at around n 50 above.

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