History as Deconstruction, History as Reconstruction:
Time and Structure in Critical International Law

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Abstract:
Critical approaches to international law have moved from a structural analysis of international legal argument in the 1980s to a 'turn to history' in the early 2000s. Taking as a starting point the critique of structuralism found in Jacques Derrida's early writing, this article aims to recharacterise the relationship between these two approaches by focusing in on a specific aspect of deconstruction that has been overlooked by international lawyers, namely, the question of time. Analysing how Derrida used time as his entry point for deconstructing structuralist thought, the article applies the same approach to Martti Koskenniemi's *From Apology to Utopia* in order to foreground overlooked dynamics behind international law's turn to history.

Keywords:
Deconstruction; structuralism; critical approaches to international law; international legal history; time

1 Introduction

Since their birth, critical approaches to international law have been haunted by the spectre of deconstruction. Were we to look for the origin of this haunting, its grave would be marked out by no more than ten pages in Martti Koskenniemi's *From Apology to Utopia*.[1] In its introduction, Koskenniemi writes that *From Apology to Utopia* 'could...be labelled "deconstructive"', a 'contentious term...[intended here] to refer less to certain metaphysical doctrines than a method, a general outlook towards analysing intellectual operations through which the social world appears to us in the way it does'.[2] But the book goes on to largely disclaim deconstruction's influence, pursuing an avowedly structuralist methodology for the majority of its pages.[3] Deconstruction only then makes its return in the final chapter, where the

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[1] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (originally published 1989; citations are taken from 2nd ed, Cambridge University Press 2005).

[2] *Ibid* 6.

[3] For example, *ibid* 6-7 ('I shall, for the most part, defer the more "radical" consequences which [a deconstructive] outlook might produce in order to remain as close as possible to the style and *problématique* which international lawyers will recognize as theirs.'); *ibid*, 7, fn 2 (noting that '[t]he work of (the early) Michel Foucault is perhaps most evidently relevant to' *From Apology to Utopia*'s approach); and *ibid* 10 (where Koskenniemi is clear he makes 'no claim for [*From Apology to Utopia*] to be *the* deconstructive approach; indeed, I recognize that many "deconstructivists" would not accept it').

indeterminacy of international law is said to make it possible for the international lawyer 'to escape from the frustratingly weak character of legal discourse by extending the range of permissible argumentative styles beyond the points in which it is usually held that legal argument must stop in order to remain "legal"'.[4]

While some scholars were worried that deconstruction would lead international lawyers to 'embrace legal nihilism',[5] most critics noted *From Apology to Utopia* was not actually all that deconstructive.[6] Indeed, in a recent book Jean d'Aspremont has chastised critical international lawyers for failing to realise the 'post-structuralist revolution' that deconstruction promised,[7] not only by wedding themselves to a structuralist understanding of international legal argument in the first place but also reproducing the search for definitive origins through their turn to history.[8] Deconstruction, then, has had an unclear legacy in international law. It appears to have been somewhat of a missed future, something that 'would' – but has not yet – 'have potentially devastating consequences if applied to international law'.[9]

In this article, I want to rethink international law's understanding of deconstruction, in the hopes of illuminating a deconstructive dynamic between early critical approaches to international law and the field's subsequent turn to history. I do so by returning to Jacques

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[4] *Ibid* 542.

[5] Iain Scobbie, 'Review of *Theory and International Law: An Introduction* (British Institute of International and Comparative Law. London: BIICL, 1991). xvi + 121 pp. £18' (1993) 64 British Yearbook of International Law 414, 415.

[6] See variously Anthony Carty, '"Liberalism's Dangerous Supplements": Medieval Ghosts of International Law' (1991) 13 Michigan Journal of International Law 161, 162 (stating that, despite his citations to Derrida, Koskenniemi 'remains above all a structuralist'); Akbar Rasulov, 'Review of Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with New Epilogue)*' (2006) 16 Law and Politics Book Review 583, 584 (writing that the book is 'not a work in postmodern deconstruction, let alone a manifesto of professional nihilism'); Emmanuelle Jouannet, 'Koskenniemi: A Critical Introduction' in Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 2 (writing that *From Apology to Utopia* 'draws…directly on the source of French structuralism' and is 'thus less influenced by the "Derridean" strands of [Critical Legal Studies] so popular in the United States'); Sahib Singh, 'International Legal Positivism and New Approaches to International Law' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014), particularly 295–301; and Akbar Rasulov, '*From Apology to Utopia* and the Inner Life of International law' (2016) 29 Leiden Journal of International Law 641, 642 (writing that '[t]he traditional reputation of [*From Apology to Utopia*] as a work of postmodern legal scholarship…is utterly unjustified').

[7] Jean d'Aspremont, *After Meaning: The Sovereignty of Forms in International Law* (Edward Elgar 2021) 9.

[8] *Ibid* 42 (writing that the historical turn 'confirms the dominance of [the] meaning-centrism of international legal thought and practice' that deconstruction was intended to displace) and 100 (writing that 'most engagements with the history of international law have remained meaning-centric in the sense that they have continued to seek to unearth meaningful stories, meaningful causalities, meaningful continuities and discontinuities, meaningful injustices, meaningful inequalities, and meaningful tragedies from the past').

[9] Singh, 'International Legal Positivism and New Approaches to International Law' (n 6) 297–8. See similarly Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 Leiden Journal of International Law 799, 826 (asking what the 'effect of the poststructuralist intervention in international law' is 'going to be', rather than having already occurred).

Derrida's early work, where deconstruction was first coined, in order to rediscover a dimension of his thought that has been overlooked by international lawyers, namely, a focus on *time*. This early work is relevant as Derrida developed deconstruction in direct opposition to structuralism, characterising deconstruction as an attempt to remain 'alert…to the historical sedimentation of the language which we use'.[10] Indeed, later in his career Derrida would remark that deconstruction grew out from an 'entire complex of criticism that I formulated in respect to structuralism in 1965 or 1966'.[11] Returning to those early works, then, provides a foothold for grasping the specificity of deconstruction and its relationship to structuralist thought.

In order to take structuralism apart, Derrida focused on three points where the structuralist is forced to suppress time in order to conduct their analysis. Beginning with a probing of structuralism's present, the 'now' in which the structure can be comprehended, Derrida unravels how structuralism attempts to 'bracket out' and 'neutralize' time, ultimately leading it to posit a transcendental, timeless 'centre', an unquestioned meaning from which the rest of the structure can be derived and held in place. From here, Derrida shows how this positing of a foundational centre implicitly reintroduces the particular position of the structuralist, rendering the supposedly universal nature of their structure insecure. Ultimately, however, Derrida did not believe we could do away with structure, but rather saw deconstruction as a challenge to existing structures, in order find new ways to think beyond them.

By appreciating Derrida's use of time to deconstruct structuralism, I aim to develop a second argument, where I join critical international law's 'turn to history' to the specific theoretical limits of *From Apology to Utopia*'s structuralist method. To be clear, this is not a claim that the turn to history was consciously 'deconstructive'. Rather, I intend to use Derrida's thought as a route in to exploring why critical international lawyer have found history an attractive field of study in the wake of *From Apology to Utopia*. In Derrida's thinking, the temporal limits of structuralism point to the 'impossibility' of its attempt to totalise meaning.[12] In line with this, I want here to probe not at *From Apology to Utopia*'s 'conditions of possibility' – the context in which it was produced and its position within 'a broader sociology of knowledge production

[10] Richard Macksey and Eugenio Donato (eds), *The Structuralist Controversy: The Languages of Criticism and the Sciences of Man* (Johns Hopkins University Press 1972) 287, quoted in Peter Salmon, *An Event, Perhaps: A Biography of Jacques Derrida* (Verso 2020) 121.
[11] Florian Rötzer, 'Jacques Derrida' in Florian Rötzer, *Conversations with French Philosophers* (Gary E Aylesworth tr, Humanities Press 1995) 45.
[12] Jacques Derrida, 'Structure, Sign, and Play in the Discourse of the Human Sciences' in Jacques Derrida, *Writing and Difference* (Alan Bass tr, Routledge 2009) 365.

particular to late twentieth century legal academia'[13] – but rather its conditions of *impossibility*, the limits of its approach which have served as the casting off point for critical histories of international law.

Section 2 begins with an overview of Jacques Derrida's early work on structuralism, to explore how he uses time as an entry point for his deconstructive attack. Section 3 then applies time as a lens for analysing *From Apology to Utopia*, identifying the points in Koskenniemi's argument where its structuralist method forces the same kind of temporal suppressions Derrida identified in structuralism. This provides the framework for Section 4, which turns to consider how the temporal limits of *From Apology to Utopia* have been subsequently taken up in international law's turn to history, demonstrating how international legal history has in important ways responded to and 'deconstructed' these limits to pursue new critical interventions. Section 5 closes with some reflections on how deconstruction helps to resituate the turn to history within contemporary international legal thought.

2 Time, Structure, and Deconstruction

Structuralism was at its peak during the first half of the twentieth century, particularly in France, where it had displaced existentialism as the primary philosophical movement of the 1960s.[14] Oriented by a belief that individual elements of human life – words, texts, symbols, rituals, cultural artifacts – gained their meaning through their differences from one another, structuralists sought to determine the systemic rules which ordered these differences. Underlying this approach was a challenge to the philosophical dominance of the 'subject', the thinking actor in the world. By positing meaning as existing within a conceptual grid, rather than in the intuition of human beings, structuralism removed the subject as the foundation for understanding the world and instead grounded meaning in 'unconscious infrastructures, systems of relations that operate through subjects and work to constitute subjects'.[15]

The roots of structuralism lay in Ferdinand de Saussure's analysis of language. Saussure started from the position that terms within a language gained their meaning only from their difference to other terms. 'Cat' does not gain its meaning from the 'thing' of the cat 'in the world' but rather from its distinction from other linguistic terms (dog, tiger, turtle, chair – other meanings

[13] John Haskell, '*From Apology to Utopia*'s Conditions of Possibility' (2016) 29 Leiden Journal of International law 667, 667.
[14] Jonathan Culler, 'Structuralism' in *Routledge Encyclopedia of Philosophy* (online edn, Routledge 1998) <https://www.rep.routledge.com/articles/thematic/structuralism/v-1>, accessed 22 August 2023.
[15] *Ibid*.

or ‘signifieds’ which are not ‘cat’ – but also cut, cot, hat, chat – phonetic distinctions between different ‘signifiers’).[16] Saussure argued that by looking at the relations between individual utterances – the *parole* of language, in Saussure’s terminology – one could unveil the grammar – the ‘deep-structure’ or *langue* – which allowed these terms to be repeated and recombined into an infinite number of meaningful statements.[17] Accordingly, Saussure argued that languages should not be studied as collections of meaningful utterances, like a dictionary, but rather as a linguistic structure: bodies of rules which order and regulate the production of meaning.[18] Structuralism as a wider school of thought then applied these insights to other phenomena, such as literary texts, social codes, and other aspects of human society, in order to determine similar structural rules which regulated their meaning. Claude Lévi-Strauss’s work in anthropology, for example, analysed societies as systems which functioned according to deeper rules such as the prohibition of incest, a universal social rule which served the function of widening the membership of a clan outside of its own familial gene pool.[19] Similarly, in cultural and literary studies, structuralism was taken up as a way to understand how a text produces its effects on the reader through its relationship to deeper structural rules of genre and form.[20]

It was against this intellectual tradition that Derrida would first make his name. In 1966, Derrida was invited to present at the ‘The Languages of Criticism and the Sciences of Man’ conference at Johns Hopkins University, where he gave a paper entitled ‘Structure, Sign, and Play in the Discourse of the Human Sciences’. Derrida had written about structuralism before, notably in ‘Force and Signification’, first published in the literary review *Critique* in 1963.[21] But little was expected from his intervention at the Baltimore conference: Derrida was only invited at the last minute, as a replacement for Belgian anthropologist Luc de Heusch, on Jean Hyppolite’s suggestion that Derrida ‘would be somebody who would come’.[22] In the aftermath of the conference, however, Derrida’s paper was said to have rendered ‘the entire structuralist project…in doubt, if not dead.’[23]

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[16] Ferdinand de Saussure, *Course in General Linguistics* (Wade Baskin tr, Philosophical Library 1959) 67.
[17] *Ibid* 13–4.
[18] *Ibid* 9.
[19] Claude Lévi-Strauss, *The Elementary Structures of Kinship* (James Harle Bell, John Richard von Sturmer, and Rodney Needham trs, Beacon Press 1971).
[20] Roland Barthes, *Mythologies* (Annette Lavers tr, Noonday Press 1972).
[21] Jacques Derrida, ‘Force et signification’ *Critique* nos 193–94 (June–July 1963), translated and republished as Jacques Derrida, ‘Force and Signification’ in Derrida, *Writing and Difference* (n 12).
[22] Bret McCabe, ‘Structuralism’s Samson’ (Johns Hopkins Magazine, Fall 2012) <https://hub.jhu.edu/magazine/2012/fall/structuralisms-samson/> accessed 8 August 2023.
[23] Salmon, *An Event, Perhaps* (n 10) 3.

In this section, I set out how Derrida uses time as a specific entry point for the deconstruction of structuralism. Three temporal weaknesses are identified by Derrida: structuralism's present or 'now' (Section 2.1); its 'absolute simultaneity' (Section 2.2); and its 'timeless' centre (Section 2.3). From each position, Derrida demonstrates how the reintroduction of time against structuralism renders its analyses indefensible. Stratifying Derrida's argument out in this way will allow us to see, in Section 3, how these three temporal weaknesses are repeated in *From Apology to Utopia*, providing the foothold us to relate the limits of its structuralist method to critical international law's later turn to history.

2.1 The Structuralist Now

Already in its opening line, 'Structure, Sign, and Play in the Discourse of the Human Sciences' places the question of time front and centre. It does so through its consideration of the 'event', the occurrence of something new or unexpected, as a problem for structuralism:

> 'Perhaps something has occurred in the history of the concept of structure that could be called an 'event', if this loaded word did not entail a meaning which it is precisely the function of structural – or structuralist – thought to reduce or to suspect.'[24]

What does Derrida mean here? In Derrida's earlier piece on structuralism, 'Force and Signification', he unpacks the distinctiveness of structuralism through two concepts: 'form' and 'force'. Forms are static. They are fixed meanings, placed in a spatial relationship to one another, with each form securely delimited from the others. Force, on the other hand, is movement: it is the temporal production of meaning as we encounter and work our way through a text. Structuralism, Derrida identifies, privileges form over force. By seeking to identify the deeper rules which hold forms in place, structuralism works through a kind of 'schematization and spatialization', with the text necessarily 'divested of its forces' so that the structuralist can 'glance over the totality of form and meaning' in a single moment.[25] To freeze phenomena in this way, however, requires that the structuralist set aside historical change, in order to posit the complete totality of the structure at the moment of comprehension. For this reason, the structuralist must always impose a 'neutralization of time and history…by putting history in brackets', leaving history outside of the rules of the structure itself.[26]

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[24] Derrida, 'Structure, Sign, and Play' (n 12) 351.
[25] Derrida, 'Force and Signification' (n 21) 4.
[26] Derrida, 'Structure, Sign, and Play' (n 12) 368. This notion of 'bracketing' history stems from Derrida's earlier work on Edmund Husserl: see Salmon, *An Event, Perhaps* (n 10) chapters 4 and 5 for discussion; and Jacques

Recognition of historical change, then, poses a particular problem for the structuralist. When we consider a language, for example, we know that languages change over time – the English of Shakespeare is different to the English in which I am writing today. Between these two points in time, there must have been gradual changes – events – which propelled the development of the language from one form to another. Yet the nature of this event cannot be explained within the structure itself. Instead, the structuralist is left to appeal to unexpected ruptures between structures. At the 'moment' of comprehension, Derrida writes, 'the concepts of chance and discontinuity are indispensable'.[27] The identification of a structure 'always comes about – and this is the very condition of its structural specificity – by a rupture with its past, its origin, and its cause'.[28]

It is at this moment where Derrida identifies structuralism's first weakness. In order to avoid the force of history, the structuralist must impose a separation – between 'Shakespearean' and 'modern' English – which carries within itself a decision as to what these different structures signify: preexisting notions of 'Shakespearean' and 'modern' English predetermine their structural organisation and separation. Crucially, this separation does not come from the structure 'out there', but rather from the structuralist themselves: they must '"set aside all the facts" at the moment when [they wish] to recapture the specificity of the structure'.[29] Accordingly, the supposed neutrality of the structuralist 'now' is rendered false. At the moment in which history is bracketed out, the structuralist imposes their own meaning on the phenomena before them. Reintroducing history against the structure, then, will deconstruct the security of its analysis, demonstrating the partial and subjective nature of its identification.

2.2 Absolute Simultaneity

Derrida's notions of 'form' and 'force' help us open up a second temporal weakness in structuralism: its implicit presumption of 'absolute simultaneity'.[30] Because structuralism seeks to avoid studying the meaning of individual phenomena – individual words and sentences in a language, for example – but rather their relations within a broader system, then, for structuralism to hold true to its own tenets, any single set of relations must contain within it the rest of the structure. As Peter Salmon puts it, because '[s]entence x does not just mean the

Derrida, *Speech and Phenomena: And Other Essays on Husserl's Theory of Signs* (David B Allison tr, Northwestern University Press 1973) for the conclusions of this line of thought.

[27] Derrida, 'Structure, Sign, and Play' (n 12) 368.

[28] *Ibid*.

[29] *Ibid* 359.

[30] Derrida, 'Force and Signification' (n 21) 15.

words of sentence x,…[but] also gets its meanings from sentences y and z', the entire structure of relations between these sentences should be visible within each element of its make-up. Accordingly, 'the task of the (structuralist) critic is to make the work "simultaneously present", all its aspects presented as an immediate, punctual, total whole'.[31]

This, Derrida notes, is impossible. No literary work is encountered (or written, for that matter) instantaneously. Rather, it is 'revealed only in successive fragments'.[32] The meaning of a text unfolds to us slowly, through time: word by word, line by line, page by page. Reading is therefore a durational experience, with the length of the text changing how our perception of it unfolds. Moreover, as readers we can impact this duration: we may read a text in a single sitting, or over short bursts during our commute to work, and our ability to hold onto the meaning of a text through its digressions, its turns, its revelations, as well as our own interruptions and lapses in attention, our own changes in time, will change the meaning we recover from the text. Meaning is therefore found 'neither before nor after the act' of reading.[33] Each reader's encounter with the text will be different, with its meaning constituted anew each time.

This temporal instability is difficult for structuralism to digest. In its 'demand for the flat and the horizontal', Derrida identifies that 'what is intolerable for structuralism is indeed the richness implied by the volume, every element of signification that cannot be spread out into the simultaneity of a form'.[34] This leads the structuralist to discount those aspects of a text, such as its duration, that do not fit a static form. But in forcing the text to fit to this simultaneous form, the structuralist implicitly predetermines what is found to be meaningful within the text. Formal relations within a text are held up as conforming to the 'true' intentions of the writer, while others, such as the length of a text and the experience of reading it in time, are reduced 'to the inconsequentiality of accident or dross'.[35] This predetermination, Derrida notes, is precisely what structuralism was supposed to avoid. 'To be a structuralist', Derrida writes, 'is to refuse to relegate everything that is not comprehensible as an ideal type to the status of

[31] Salmon, *An Event, Perhaps* (n 10) 110.
[32] Derrida, 'Force and Signification' (n 21) 28, quoting Jean Rousset, *Forme et Signification : Essais sur les structures littéraires de Corneille à Claudel* (José Corti 1962) xiii.
[33] Derrida, 'Force and Signification' (n 21) 12.
[34] *Ibid* 29.
[35] *Ibid*.

aberrational accident'.[36] The need for absolute simultaneity ends up betraying the universality of the structure.

A helpful illustration of this problem is given by Staffan Carlshamre in his book *Language and Time: An Attempt to Arrest the Thought of Jacques Derrida*.[37] Carlshamre asks us to think of a language stored on a computer – a sort of Wikipedia where every word has its own dictionary definition, and every word in that definition is further hyperlinked to its own definition. We can click through each word on the screen to find out how its definition relates to other definitions. 'They will branch at many points', Carlshamre writes, 'and occasionally lead back to where you started, but, at least as an ideal possibility, you will eventually have mapped the whole structure' of the language.[38] Language, however, does not work this way, precisely because there is no 'shared', single 'memory' in which the language is stored and against which each definition can be checked. Carlshamre provides some examples. First of all, languages crossover with one another, not only between 'natural' languages (say, the shared roots of words in French and English, which would have different valences for multilingual speakers) but also between conceptual systems, such as the different meanings given to 'the state' by lawyers, political scientists, economists, and philosophers. Moreover, Carlshamre asks, is it possible to fix the meaning of a language without also including past systems of language – the sedimentation of Shakespeare in contemporary English, Goethe in contemporary German – the knowledge of which may be unevenly distributed across contemporaneous speakers? Can words have the same valence in the absence of uniform experience?

The second you try to investigate and account for these overlaps, the linguistic system seems to change and transform. 'Even if the system itself is thought to exist in a single moment', Carlsharme writes, '*to gain knowledge of it is a process in time*. And if the semantic effects of the structure involves possible knowledge of it on the part of speakers and hearers, *the duration of the knowledge process casts doubt on the notion of a durationless structure known*.'[39] Even if you could account for all of the overlaps and contingencies described above, you could not create or explain this account instantaneously, shattering the claim of a secure, fixed meaning. Once again, the introduction of time deconstructs the security of the structure.

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[36] *Ibid* 30.
[37] Staffan Carlshamre, *Language and Time: An Attempt to Arrest the Thought of Jacques Derrida* (Acta Universitatis Gothoburgensis 1986).
[38] *Ibid* 14.
[39] *Ibid* 15 [emphasis added].

2.3 The Timeless Centre

How, then, can the structuralist insist that their interpretation still holds if the entire network of meanings cannot be comprehended and traversed at once? The solution, whether acknowledged by the structuralist or not, is to identify a foundational concept – a 'centre' – around which the rest of the structure can be constructed. 'The function of this center', Derrida writes, is:

> 'not only to orient, balance, and organize the structure – one cannot in fact conceive of an unorganized structure – but above all to make sure that the organizing principle of the structure would limit what we might call the *play* of the structure. By orienting and organizing the coherence of the system, the center of a structure permits the play of its elements inside the total form. And even today the notion of a structure lacking any center represents the unthinkable itself.'[40]

'Play', here, is the 'force' Derrida identified before. The only way to limit the infinite play of a language is to define a single term from which every other form can be derived – 'the point at which the substitution of contents, elements, or terms is no longer possible'.[41] But what gives the centre this privileged position? Derrida argues that this act of privileging can only occur if the centre is allowed to '[escape] structurality'.[42] In order to ground the 'now' of the structure, its absolute simultaneity, the structuralist must place one of its concepts outside the reach of the structure, as a timeless and eternal meaning from which all other meanings can be derived.

Here comes deconstruction. The moment that the centre is submitted to analysis, the moment in which its meaning, its origin, its history are investigated, the structure becomes unstable. And thus the rupture of the 'event' with which we began. If something has occurred which cannot be explained or identified within the existing structure, cannot be derived from its centre, then something has fatally challenged – deconstructed – the fixity of the structure. By submitting the centre to time, to history, deconstruction unveils the subjective nature of the structure.

The impossibility of structuralism, however, does not mean that we can do without it. Derrida was clear that deconstruction is not 'an antistructuralism, a poststructuralism, as they often say in the United States' – 'I have never used this word'.[43] We cannot escape structure, just as we cannot escape the metaphysical concepts with which we critique it. As Derrida wrote in 'Sign,

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[40] Derrida, 'Structure, Sign, and Play' (n 12) 352 [emphasis original].
[41] *Ibid*.
[42] *Ibid*.
[43] Rötzer, 'Jacques Derrida' (n 11) 45.

Structure, and Play', '[t]here is no sense in doing without the concepts of metaphysics in order to shake metaphysics. We have no language – no syntax and no lexicon – which is foreign to this history'.[44] The question, instead, should be to interrogate why particular structures are taken, to 'make apparent the noncritical privilege naively granted' to certain concepts by structuralism, in order to propose new ways to think beyond them.[45]

3 Deconstructing From Apology to Utopia

Having set out the importance of time for deconstruction, we can return to *From Apology to Utopia*. As already noted, structuralist analysis is front and centre for most of the book, with 'international legal arguments, doctrines, and "schools"' studied as 'a kind of *parole* which refers back to an underlying set of assumptions, capable of being explicated as the *langue* or "deep-structure" of the law'.[46] 'What is relevant', Koskenniemi tells us, 'is not so much what arguments happen to be chosen at some particular time or in some particular dispute but what *rules* govern the production of arguments and the linking of arguments together in such a familiar and conventionally acceptable way'.[47]

Following Derrida, this section identifies three temporal suppressions in Koskenniemi's argument. First is the present, the 'now' of *From Apology to Utopia*'s international legal argument, which Koskenniemi grounds in the anxious experience of the 'modern' international lawyer (Section 3.1). This experience, as we shall see, offers a partial view on what international law 'is', summing together a vast swathe of approaches across history while excluding other forms of international law which do not fit Koskenniemi's structure. The second temporal suppression then comes in the treatment of the indeterminacy of international legal argument, which allows for the simultaneous availability of any argument in response to any legal question (Section 3.2). Here, Koskenniemi's privileging of indeterminacy leads him to overlook the specificity of the application of law within historical specific institutional settings – something his later turn to 'structural bias' would acknowledge. And finally there is the timeless centre of Koskenniemi's analysis, liberalism, from which the rest of the structure of international legal argument is derived (Section 3.3). Here, Koskenniemi's focus on liberalism ends up grounding but also delimiting his critical project, asking international lawyers to work critically within liberalism, rather than seeking to end its dominance over

[44] Derrida, 'Structure, Sign, and Play' (n 12) 354.
[45] Derrida, 'Force and Signification' (n 21) 22.
[46] Koskenniemi, *From Apology to Utopia* (n 1) 8.
[47] *Ibid* [emphasis original].

international legal thought. In each case, I aim to show how *From Apology to Utopia* brackets time of its analysis, which Section 4 will then argue has opened the space for international law's subsequent turn to history in the twenty-first century.

3.1 The 'Present' of Modern International Law

As a practitioner of international law himself, Koskenniemi positioned *From Apology to Utopia* as an attempt to describe international law 'as close as possible to the style and *problématique* which international lawyers will recognize as theirs'.[48] From this internal perspective, Koskenniemi identifies a core anxiety which grounds the experience of the contemporary discipline: namely, an anxiety to keep international law separate from politics. In its modern conception, international law is meant to have a function distinct from other ways of conceptualising international relations. Yet this distinction consistently fails to hold. 'In the practice of States and international organizations' international legal doctrines 'are every day overridden by informal, political practices, agreements and understandings', or at best followed only because these international norms are 'politically useful' rather than 'as a result of the "legal" character of the outcomes or the methods whereby they were received'.[49]

What is the root of this failure? Koskenniemi identifies it as a failure of doctrine – or, more precisely, a failure in what the international lawyer expects from doctrine. Since the nineteenth century, international lawyers have developed increasingly technical methods for giving international law an identity distinct from other ways of thinking about the international space: legal obligations are determined according to the legally correct interpretation of treaties, for example, or through the sophisticated determination of rules of customary international law. When pushed, however, these doctrines fail to provide a clear answer from within themselves. An argument grounded on state consent is open to the criticism that it does not reflect any real legal obligation but simply covers and 'apologises' for a particular state's interest, just as an argument for the just allocation of resources seems utopian, ungrounded in the reality of what states have actually consented to. Further, both arguments can be flipped against each other: the prioritisation of states' rights can be criticised as the utopian protection of an idealised state actor, just as a universal vision of justice can be unmasked as reflecting the particular interests of powerful actors. Faced with this recurring conundrum, professional international lawyers 'soon develop a feeling of *déjà-vu*' as they work within their discipline: 'conflicting views are

[48] *Ibid* 7.
[49] *Ibid* 3.

constantly presented as "correct" normative outcomes', with doctrine proving incapable of resolving between them.[50]

The only way to escape this trap seems to be a retreat into 'theory'. Yet this was precisely what doctrine was supposed to save the international lawyer from. Because international law is fighting to separate itself from politics, any potential retreat into political, ethical, or sociological analyses of international law will inspire in the discipline a fear that its 'specific methodology and subject-matter [will] vanish altogether'.[51] To an international lawyer, engaging in theory seems to risk engaging, 'on his *own* assumptions, with something other than law', losing international law's specific foothold on the international space.[52] In any event, theory fails in the end to offer any better answer than doctrine. Rebranding state consent as 'positivism', or the just allocation of resources as 'natural law', merely reproduces the same unending conflicts encountered in legal doctrine 'at a higher level of abstraction'.[53]

Koskenniemi characterises this anxiety as historically specific. Early writers on international law – Vitoria, Suarez, Grotius – wrote very differently about international law. They saw no problem mixing the utopian with the apologetic, relying on the authority of a wide range of theological and secular sources and writing in a style in which 'the concrete and the abstract, description and prescription were not distinguished from each other'.[54] But this era has now passed. Once international law became professionalised in the nineteenth century, international lawyers began to 'worry about its scientific character', developing modern doctrines on law's method and sources in order to delimit international law '*vis-a-vis* morality (too abstract) and diplomacy (too concrete).'[55] And once the expectations placed on these doctrines failed to provide international law with its intended separation from these other disciplines, the anxieties of the 'modern' international lawyer were born.

For the purposes of *From Apology to Utopia*'s structuralism, it is this 'professional identity' which forms the temporal present, the 'now', of Koskenniemi's analysis. Just as Derrida identified, Koskenniemi's structuralist pursuit of the 'deep-structure' of international legal argument ends up bracketing history out of its analysis, concentrating all international law since the nineteenth century within a single 'modern' era and foreclosing any other way of

[50] *Ibid*.
[51] *Ibid* 1.
[52] *Ibid* 2 [emphasis original].
[53] *Ibid*.
[54] *Ibid* 1, and see generally *ibid*, 95-106.
[55] *Ibid* 123-4.

understanding or experiencing international law outside of this modern anxiety. Indeed, Koskenniemi himself notes that *From Apology to Utopia* 'oversimplifies what international law is about', leaving out of its study 'themes relating to war, human rights and international organization'.[56] Koskenniemi justifies this exclusion on the basis that 'most conventional understandings [of international law] clearly treat them as supplementary to the main body, or derivative from it'.[57] But then Koskenniemi shows his cards: *From Apology to Utopia* is only 'interested in this conventional, mainstream understanding of the law', leading it to set these issues aside as they so obviously conflict with the mainstream understanding of what is significant in international law'.[58] Here, then, we see how Koskenniemi's 'now' works to exclude a whole area of international law, not only from the apology/utopia analysis of the book, but also from its understanding of the development of different doctrines within 'modern' international law. Sovereignty, sources, and custom have all been frozen in the nineteenth century, untouched by the areas of law which Koskenniemi has excluded. In this move, we see how *From Apology to Utopia*'s structuralism embeds a certain understanding of international law. It is the 'modern international lawyer' who is expected to recognise the structuralist account *From Apology to Utopia* puts forth, and it is that presumed recognition which delimits and disciplines what that lawyer will consider to be 'modern' international law.

3.2 The Simultaneous Availability of International Legal Arguments

From here, we can turn to the second stage of Koskenniemi's argument. As already noted, *From Apology to Utopia* argues that international law remains fundamentally indeterminate because of the structure of its argumentation. 'Lawyers' law is constantly lapsing either into what seems like factual description or political prescription', Koskenniemi writes, with 'each argument…constantly vulnerable to justifiable counter-arguments'.[59] This leads Koskenniemi to his now (in)famous conclusion that that international law is 'singularly useless as a means for justifying or criticizing international behaviour' – '[t]he choice of solution [to any international legal problem] is dependent on an ultimately arbitrary choice to stop the criticisms at one point instead of another'.[60] The problem is not limited to the legal solution chosen either. Indeterminacy also infects the very identification of international legal problems to be solved. Any claim to their being a legal problem to be adjudicated, as opposed to a non-justiciable

[56] *Ibid* 14.
[57] *Ibid*.
[58] *Ibid* 14-5.
[59] *Ibid* 16.
[60] *Ibid* 67.

political problem, will call for a determination of law's authority in that case, returning us again to questions of state consent versus normative justice.[61]

In line with Derrida's analysis of structuralism, we can think of this indeterminacy as a kind of argumentative simultaneity. Because any legal argument can be undone through a counterargument, it always remains open for the international lawyer to find a new counterargument to the conclusions of any legal dispute. In this way, the 'play' of the structure of international legal argument is unending, with all forms of international legal argument remaining theoretically open to the international lawyer at all times.

In practice, of course, this is not how international law works. As Akbar Rasulov has memorably put the problem:

> '[*From Apology to Utopia*]'s implicit metaphor that the international legal argument was essentially like a coin (there is always another side to a coin and neither side is any more 'privileged' than the other) was certainly immensely progressive….But every metaphor has a limited service area. Perhaps, it is time now to begin acknowledging – in order to sponsor even more critical legal inquiries – that the international legal argument almost never works like a coin; that it acts more like a buttered toast: released in a free fall, it may flip over several times, but it will almost always land the same side down. (And the question must then become: why?) Any suggestion that 'that is just what toasts do' would give toasts "way too much credit".'[62]

Koskenniemi's later work has focused precisely on this question of how legal problems are identified and solved in fairly determinate (or predictable, at least) ways. His answer lies in the 'structural biases' of different international institutions and tribunals.[63] While international legal argument remains fundamentally indeterminate, Koskenniemi's later work has turned to acknowledge how different institutions will regularly construct and answer legal problems according to their own institutional rationales. A human rights court will decide a dispute in a different way to a trade panel deliberating on the same subject matter, because the former operates according to a logic where human rights are valued over and above trade and economics. These institutional biases remain indeterminate, to be sure – the meaning of 'human

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[61] *Ibid* 24–58.

[62] Rasulov, 'Review of Martti Koskenniemi, *From Apology to Utopia*' (n 6) 589, quoting Duncan Kennedy, 'A Semiotics of Critique' (2001) 22 *Cardozo Law Review* 1147, 1185.

[63] Martti Koskenniemi, 'The Politics of International Law—20 Years Later' (2009) 20 European Journal of International Law 7; and Martti Koskenniemi, 'Epilogue' in Koskenniemi, *From Apology to Utopia* (n 1) 600–15.

rights' and their relationship to 'trade and economics' remains as theoretically open to the contestation and endless counterargument which *From Apology to Utopia* sets out.[64] Nevertheless, acknowledgment of the institutional specificity of these biases introduces a sense of historical movement which *From Apology to Utopia*'s structuralism would be unable to digest. As Koskenniemi himself reflected in the Epilogue to the 2005 republication of *From Apology to Utopia*:

> 'If international law is indeterminate, then there is no limit to the extent it can be used to justify (and of course, to criticize) existing practices. If there is a structural bias, then *international law is already complicit in the actual system of distribution of material and spiritual values in the world*. From this perspective, the task for lawyers would no longer be to seek to expand the scope of the law so as to grasp the dangers of politics but *to widen the opportunity of political contestation of an always already legalized world*.'[65]

This is a telling reflection. Where *From Apology to Utopia* had set out the open-ended nature of international legal argument *in theory*, 'structural bias' acknowledges that legal argument is carried out in historically-specific institutional contexts, reflecting a world which is 'always already legalized'. Understanding how a certain legal regime came into being, then – the expectations and material realities which shape its biases, the actors who are and are not able to reshape these biases, and the connections between these biases and the ongoing injustice of the international system – reintroduces the force of history, accordingly breaking down the supposedly free play of *From Apology to Utopia*'s indeterminacy.

3.3 The Liberal Centre of International Law

This leads us to *From Apology to Utopia*'s final temporal suppression: international law's liberal centre. Koskenniemi notes that few, if any, international lawyers would identify as having a liberal theory of politics. Indeed, Koskenniemi notes that liberalism can be difficult to spot: 'it does not accept for itself the status of a grand political theory', claiming to be 'unpolitical' or 'even hostile to politics'.[66] Yet its presumptions control 'normative argument within international law'.[67] The second one enters into a debate around international law, 'one

[64] For a clear illustration, see the analysis of the jurisdictional battle over the MOX Plant case in Martti Koskenniemi, 'International law: Constitutionalism, Managerialism, and the Ethos of Legal Education' (2007) 1 European Journal of Legal Studies 1.
[65] Koskenniemi, 'Epilogue' (n 63) 614–5 [emphasis added].
[66] Koskenniemi, *From Apology to Utopia* (n 1) 5.
[67] *Ibid*.

is bound to accept an international legal liberalism. Self-determination, independence, consent and, most notably, the idea of the Rule of Law, are all liberal themes. They create distinctly liberal problems[.]'[68] Just as domestic lawyers have relied on liberal principles to structure the relationship between the individual and society, '[i]nternational order exists to protect the freedom and to enhance the purposes of individual States'.[69]

Liberalism, Koskenniemi tells us, is grounded in 'what seem like mutually opposing demands for individual freedom and social order'.[70] Its response to this conflict is an attempt at 'reconciliation, or paradox: to preserve freedom, order must be created to restrict it'.[71] In one direction, there is what Koskenniemi identifies as 'an ascending, individualistic argument: social order is ultimately legitimate only insofar as it provides for individual freedom'.[72] This is met by a second, 'descending, communitarian argument: individual freedom can be preserved only if there is a normatively compelling social order'.[73] The two are then reconciled in 'the Rule of Law: a legitimate social order is one which is objective, one that consists of formally neutral and objectively ascertainable rules, created in a process of popular legislation'.[74] Yet the reconciliation ultimately fails. Because any ascending argument can be criticised as neglecting its descending opponent, liberalism exists in a constant state of incoherence, incapable of resolving any issue conclusively. Taking its foundation from this liberal paradigm, international law repeats its incoherence, consequently finding its theoretical and doctrinal justifications unable to offer any conclusive answer.

This liberal paradigm is, Koskenniemi acknowledges, historically contingent.[75] Nevertheless, for its analysis to hold, *From Apology to Utopia* must exclude any historical investigation into this contingency. 'In discussing the transition from early to classical doctrine', Koskenniemi tells us explicitly that his 'concern is less historical than structural':

> 'I shall not look for the causes for the emergence of the classical doctrine in any political, economic or other 'factual' developments. My intention is to operate vertical

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[68] *Ibid*.
[69] *Ibid* 93.
[70] *Ibid* 71.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid* 10, fn 8, noting that the liberal centre is not a 'transcendental signifier' but only a '*routine* of legal argument', a 'historically contingent phenomenon which does not provide such overriding force as to be capable to squeeze all argument within itself' [emphasis original].

> cuts into these two structures of thought so as to demonstrate what was taken as given and what was held as problematic within them.'[76]

The liberal centre is then, as Derrida predicted, placed outside of time. This explains why, in the book's final chapter, Koskenniemi's critical project works only to find a renewed commitment within liberalism. Aware of the liberal indeterminacy of its concepts, the inability to find a single 'correct' answer, international lawyers are told to commit themselves to 'a structure of open political conflict and constant institutional revision', rather than 'a commitment which seeks to realize given principles or ready-made social arrangements'.[77] Such a commitment, we are reassured, 'positively *excludes imperialism and totalitarianism*', but otherwise 'makes no pretension to offer principles of the good life which would be valid in a global way.'[78] This change in commitment does not challenge or change modern international law – the 'now' of the structure – but only submits the international lawyer to work within the liberal constraints of his or her time, rather than to challenge or end it. Indeed, with the centre in place, the international lawyer should now feel liberated. Now fully aware of the impossibility of finding a definitive answer to international legal problems, the international lawyer can find 'a renewed sense of his particular task in the constant struggle for the procuring and distribution of spiritual and economic values'.[79] Any answer outside of liberalism would return us to the anxiety we began with: it would collapse into politics, and betray the specificity of the international legal discipline from which the whole project of *From Apology to Utopia* began.

Above, I have tried to show how *From Apology to Utopia*'s structuralism works to supress time from its analysis. By focusing in on these temporal suppressions, and following Derrida's lead, we can see how each betrays the imposition of a particular meaning on international law, one which excludes other historically-contingent meanings which would not fit its analysis. This does not mean that Koskenniemi's analysis is incorrect. *From Apology to Utopia* has rightfully be hailed as a classic, helping reorient critical interventions in international law since its publication. But the vulnerabilities in its structuralist approach have also left questions open for subsequent scholarship to probe – as Section 4 will now explore.

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[76] *Ibid* 72. See also *ibid* 73, fn 6, where Koskenniemi explicitly connects his approach to the structuralist approach of Michel Foucault's *The Archaeology of Knowledge* (A M Sheridan Smith tr, Routledge 1985).
[77] Koskenniemi, *From Apology to Utopia* (n 1) 556.
[78] *Ibid* [emphasis original].
[79] *Ibid*.

4 History as Deconstruction

From Apology to Utopia was hugely influential on the discipline, helping open up the space for new critiques against international law's supposed rationality. In the twenty-first century, however, critical international lawyers have all but abandoned *From Apology to Utopia*'s style, taking up history instead as the terrain for their interventions. Why? Koskenniemi would reflect on this shift himself in 2013:

> 'I think reasons for this turn to history are obvious. The dramatic increase in the 1980s and 1990s of international legal institutions and recourse to legal vocabularies in international policy created expectations about the spread of the 'rule of law' and the pacific settlement of international disputes that failed to be met by the beginning of the new millennium….We see today, I think, a backlash grown out of disappointment that reflects on the plausibility of the inherited narratives….[W]hat seems needed is a better understanding of how we have come to where we are now – a fuller and a more realistic account of the history of international law and institutions.'[80]

This narrative was widespread, with certain themes – globalisation, the end of the Cold War, the rise of global governance institutions, the War on Terror – repeated across the field as the catalyst for the turn to history.[81] Yet on their own they does not seem sufficient to explain the need for history. Why could these challenges not be responded to within the existing framework of liberal argument? Why did we need to move past structuralism, and why did we need to do so by looking to the past specifically?

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[80] Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 Temple International and Comparative Law Journal 215, 216.

[81] For other examples, see among many others Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History, and International Law* (Brill 2006) 29 (writing that, 'some fifteen years after the Cold War and in these uncertain days of the "War on Terror"', international lawyers have turned to history to 'question the fundamentals of international law'); Emmanuelle Tourme Jouannet and Anne Peters, 'The Journal of the History of International Law: A Forum for New Research' (2014) 16 Journal of the History of International Law 1, 2 (identifying in the 'end of the Cold War and the spread of globalization' the catalyst for 'a passionate and impassioned debate as to whether or not we had entered into a new era of post-Westphalian international law, forcing everyone to look to the past of international law to understand what it had been and whether it really had changed'; Ignacio De La Rasilla Del Moral, 'The Shifting Origins of International Law' (2015) 28 Leiden Journal of International Law 419, 421 (identifying challenges to state-centrism as the push for international lawyers 'to revisit their narrative assumptions and methodological approaches to the history of the discipline'); Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 298 (where the War on Terror and other conflicts are said to have unsettled 'celebratory histories of international law as a profession self-evidently working collectively in the interests of a common humanity and universal values').

In what follows, I aim to situate the critical turn to history as a 'deconstructive' response to the temporal limits of structuralism. I do so by connecting the three temporal suppressions in *From Apology to Utopia* to three approaches taken within the contemporary turn to history within critical international law, demonstrating how the critical import of the turn to history grows out from the limits of *From Apology to Utopia*'s structuralist approach. In Martti Koskenniemi's *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, we find a challenge to the separation of 'classical' and 'modern' international law through its identification of distinct projects in the 'modern' era.[82] In Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law*, we then find a history of the concrete application of international law, with the discovery that – despite its formal indeterminacy – international law in practice has operated in a consistent direction across its history.[83] Finally, in Ntina Tzouvala's *Capitalism as Civilization: A History of International Law*, we find a challenge to *From Apology to Utopia*'s liberal centre, instead deriving the structure of international legal argument from the concept of capitalist exploitation.[84] Through this analysis, I want to make visible the connections between *From Apology to Utopia*'s structuralist approach and the reasons critical international lawyers have turned to history to fill its gaps. In so doing, the aim is to bring into focus how time has been able to refigure critical engagements with international law over the past two decades, prompting an appreciation of the turn to history not (or not *only*) as a reflection of external events like the War on Terror but also the internal limits of previous critical interventions.

4.1 The International Lawyer in Time

From Apology to Utopia's first temporal suppression was the present experience of the modern international lawyer, the 'now' from which *From Apology to Utopia*'s structure was intelligible. Notably, then, one of the first areas of international law to be subjected to historical scrutiny was the professional identity of the international lawyer – an investigation carried out by Koskenniemi himself. Developed from his 1998 Sir Hersch Lauterpacht Memorial Lectures, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* sought to understand the development and ethos of the discipline from the founding of the *Institut de Droit international* in 1873 to the turn to international relations in the 1960s. Inside this period,

[82] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).
[83] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).
[84] Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

which was previously summed together in the 'modern' anxiety of *From Apology to Utopia*, Koskenniemi identifies two distinct 'sensibilities', the 'ideas and practices but also…broader aspects of the political faith, image of self and society, as well as the structural constraints within which international law professionals [lived] and [worked]'.[85] The first was the 'Victorian tradition', beginning in the late nineteenth century. Within this period we saw 'the emergence of a new professional self-awareness and enthusiasm', where international lawyers 'saw themselves as arguing against the egoistic policies of States and in favor of integration, free trade, and the international regulation of many aspects of domestic society, including human rights'.[86] However, this sensibility did not last. By *The Gentle Civilizer*'s endpoint in 1960, Koskenniemi finds a second pragmatic sensibility. Failing to recover from the experience of the Second World War, the 'Victorian reformist sensibility' ceased to 'enlist political enthusiasm or find a theoretically plausible articulation',[87] and so the discipline became 'both depoliticized and marginalized, as graphically illustrated by its absence from the arenas of today's globalization struggles, or turned into a technical instrument for the advancement of the agendas of powerful interests or actors in the world scene'.[88]

In the book's Preface, Koskenniemi describes *The Gentle Civilizer* as an attempt 'to cover the same ground I had done in a book ten years earlier [*From Apology to Utopia*], but from an altogether different perspective'.[89] *From Apology to Utopia* had sought to describe international law 'as a structure of argumentative moves and positions, seeking to provide a complete – even "totalising" – explanation for how international law in its various practical and theoretical modes could simultaneously possess a high degree of formal coherence as well as be substantively indeterminate'.[90] 'But as perceptive critics pointed out', Koskenniemi noted, 'whatever merits that analysis had, its image of the law remained rather static':

> 'Even if it laid the groundwork for describing the production of arguments in a professionally competent international law practice, it fell short of explaining why individual lawyers had come to endorse particular positions or arguments in distinct periods or places. Even if it claimed that all legal practice was a 'politics of law', it did not tell what the 'politics' of international lawyers had been. Like any structural

[85] Koskenniemi, *The Gentle Civilizer of Nations* (n 82) 2.
[86] *Ibid* 3–4.
[87] *Ibid* 4.
[88] *Ibid* 3.
[89] *Ibid* 1.
[90] *Ibid*.

> explanation, it did not situate the lawyers whose work it described within social and political contexts, to give a sense that they were advancing or opposing particular political projects from their position at universities, foreign ministries, or other contexts of professional activity.'[91]

In acknowledging the distinct and contextual positions that can be taken within modern international law, Koskenniemi inherently weakens – deconstructs – the notion of a shared present, the 'now' on which *From Apology to Utopia*'s structure rests. *The Gentle Civilizer* 'constitutes an experiment in departing from the constraints of the structural method in order to infuse the study of international law with a sense of historical motion and political, even personal, struggle'[92] – a distinction which could only be identified once the structuralism of *From Apology to Utopia* was first posited. Indeed, Koskenniemi believed we could learn from the struggles of past international lawyers, as instructive to our own present:

> '[T]he recounting of the story about the 'rise' and 'fall' of international law seemed to me necessary not only because of what it might tell us of the profession as it was then but *what it could say of it as it is now*. I hope that these essays *provide a historical contrast to the state of the discipline today* by highlighting the ways in which international lawyers in the past forty years have failed to use the imaginative opportunities that were available to them, and open horizons beyond academic and political instrumentalization, in favor of worn-out internationalist causes that form the mainstay of today's commitment to international law.'[93]

Consequently, where *From Apology to Utopia* had rendered a sharp break between the past and the present, *The Gentle Civilizer* proposes a central ethic within the profession that was open to different historical configurations and contestations. In so doing, however, the notion of a single present, a 'now', fell away, and with it the fixity of the structure *From Apology to Utopia* had set in place.

4.2 Time in International Law

The second temporal suppression we noted in *From Apology to Utopia* concerned international legal concepts. Koskenniemi gave precedence to the structure which explained the general

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[91] *Ibid* 1–2.
[92] *Ibid* 2.
[93] *Ibid* 5 [citation omitted] [emphasis added].

indeterminacy of international legal argumentation over the specific applications of international legal concepts in history. The turn to history has accordingly spent much time unpicking this presumption, particularly through its analysis of international law's complicity with colonialism.

The key text here is Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law*. Anghie positions his work as part of 'an effort to understand why peoples living in Third World societies continue to be, on the whole, the most disadvantaged and marginalized'.[94] This present disadvantage is exemplified in three ways. The first is in the economic weakness of post-colonial states, both in their ongoing exploitation by multinational corporations and in the refusal of Western states to allow for the legacy of colonialism to be reopened (as exemplified by the blocking of efforts to create a New International Economic Order).[95] The second is in the rearrangement of governance in the Third World by international financial institutions like the WTO, the IMF, the World Bank, but also through the doctrine of international human rights.[96] The third is the opening up of Third World countries to military intervention, particularly through the lens of the War on Terror.[97] In each of these disadvantages Anghie identifies a peculiar weakness in the sovereignty granted to Third World states under international law. For Western states, sovereignty would offer a protection from these kinds of interventions. Yet, while formal decolonisation and the 'acquisition of sovereignty by the Third World was an extraordinarily significant event', "'Third World" sovereignty appeared quite distinctive as compared with the defining Western sovereignty'.[98]

How did Third World sovereignty come to be constructed in this weaker manner? Anghie finds his answer over 400 years in the past, in an early international law text, Francisco de Vitoria's *De Indis Noviter Inventis*, which dealt with the Spanish colonial encounter and the treatment to be afforded to native non-Europeans. Two key ideas are identified in *De Indis Noviter Inventis*. The first is a denial of sovereignty to the native populations on account of their cultural difference. For Vitoria, sovereignty is tied to the ability to wage just war. '[W]ere it otherwise', Vitoria writes, 'even Turks and Saracens might wage just wars against Christians, for they

[94] Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 83) 8.
[95] *Ibid* chapter 4.
[96] *Ibid* chapter 5.
[97] *Ibid* chapter 6.
[98] *Ibid* 2.

think they are thus rendering God service'.[99] Vitoria then applies this test to the native populations and finds that, lacking the (Christian) ability to wage just war, these communities must also be excluded from possessing full sovereignty. As Anghie explains:

> 'Vitoria arrives at his conclusion by first establishing the proposition, the fundamental premise of his argument, that *the Saracens are inherently incapable of waging a just war*. The initial exclusion of the Saracens – and, in this case, by extension, the Indians – then, is fundamental to Vitoria's argument. In essence, only the Christians may engage in a just war; and, given Vitoria's argument that the power to wage war is the prerogative of sovereigns, it follows that the Saracens can never be truly sovereign, that they are at best, partially sovereign because denied the ability to engage in war.'[100]

This denial of sovereignty opens up Vitoria's second argument. 'Since the Indians are by definition incapable of waging a just war', Anghie writes, 'they exist within the Vitorian framework only as violators of the law'.[101] This permitted the use of force by the Spanish against the native populations. Because native populations lacked Christianity, the Spanish settlers must correct this violation by any means necessary in order to bring them into the Christian world. Taken together, Vitoria's arguments meant that '[w]ar is the means by which Indians and their territory are converted into Spaniards and Spanish territory', but equally the means 'by which the Indians thus achieve their full human potential'.[102]

Anghie characterises this double move as centred around a concept of 'cultural difference', the 'idea that fundamental cultural differences divided the European and non-European worlds'.[103] As Anghie's history demonstrates, this 'dynamic of difference':

> 'is self-sustaining and indeed…endless; each act of arrival reveals further horizons, each act of bridging further differences that international law must seek to overcome. It is in this way that international law extends itself horizontally, to encompass the entire

[99] Franciscus de Vitoria, *De Indis et de Ivre Belli Relectiones* (Ernest Nys ed, John Pawley Bate tr, Carnegie Institution of Washington 1917) 173, quoted in Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 83) 26.
[100] Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 83) 26 [emphasis original] [citation omitted].
[101] *Ibid*.
[102] *Ibid* 23.
[103] *Ibid* 3.

> globe and, once this is achieved, vertically, within each society, to ensure the emergence of civilized states.'[104]

For our purposes, what is notable is how Anghie uses history to challenge the purported equality of international law's indeterminacy. *From Apology to Utopia*'s argument rested on a formal indeterminacy between international legal concepts. Any concept could be taken up and reinterpreted to achieve different goals. Yet Anghie shows us that the ability to leverage this language is stacked in favour of the First World. Colonialism was not merely an episode in the past but rather the origin for 'a set of structures that continually repeat themselves', legitimating, enforcing, and reproducing the dynamic of difference between the First and the Third World.[105] To put this in Derridean terms, while the *forms* of international legal argument may be equal, the *force* necessary to navigate across them is highly unequal. As such, Anghie's history calls for an awareness of the limitations which are placed on actors seeking to use international law in the post-colonial era. History still burdens those actors from reshaping it, and as such international law must reckon with its past in order to craft a fairer future, as the book's closing paragraph makes clear:

> '"Know thyself": this is surely one of the foundational principles of Western civilization (although it transpires that Buddhist teachings also assert the fundamental importance of self-knowledge). But if we do not understand the character of this discipline, then, of course, we cannot possibly bring about any change within it. This book attempts to clarify one aspect of the history of the discipline in the hope of illuminating its operations sufficiently to enable us to assess its results against our sense of justice; and in so doing, empower us to make, rather than simply replicate, history.'[106]

4.3 International Law in Time

The final temporal suppression in *From Apology to Utopia* was its liberal centre, the concept which grounds its oscillation between apology and utopia. And here, again, history has sought to frame its intervention against *From Apology to Utopia*'s limits. Ntina Tzouvala's *Capitalism as Civilization: A History of International Law* begins from a similar premise to Anghie's. In her telling, international law has historically been constituted since at least the last quarter of

[104] *Ibid* 4.
[105] *Ibid* 3.
[106] *Ibid* 320.

the nineteenth century around '[t]he idea that the non-European world was civilisationally inferior and that the influx of (Western) capital would remedy these shortcomings'.[107] However, for Tzouvala civilization is not merely a concept within international law but rather 'a mode of international legal argumentation', a 'pattern of argument [that] establishes a link between the degree of international legal personality that political communities are recognised as having and their internal governance structure, or, to be more precise, their conformity with the basic tenets of capitalist modernity'.[108] Cast in this light, 'civilization' is never amenable to 'conclusive definition' but instead causes 'arguments resting implicitly or explicitly on the "standard of civilisation" [to] oscillate between two seemingly contradictory positions':

> 'I refer to the former pole of this oscillation as 'the logic of biology', a mode of argumentation that erects unsurpassable barriers against non-Western communities acquiring equal rights and obligations under international law based on some purportedly immutable difference between 'the West and the rest'. Simultaneously, what I understand to be 'the logic of improvement' offers a prospect of inclusion that has, however, been firmly conditional upon capitalist transformation.'[109]

The overtones with *From Apology to Utopia* are evident. *From Apology to Utopia*, Tzouvala argues, privileged indeterminacy at the expense of a material understanding of law's operation. 'If the law was wholly indeterminate, fluid and contingent', Tzouvala writes, 'it was impossible to argue that it "did" anything, that it somehow constituted, or even influenced relations of domination, exclusion or exploitation'.[110] Returning to a less postmodern structuralism 'enables us to embed legal analysis into broader considerations about the synergies between our discipline and global patterns of profoundly unequal distribution of wealth, power and pleasure'.[111]

Accordingly, she seeks to replace international law's liberal centre with another foundation: capitalism. The 'argumentative conundrum' of civilisation 'only becomes possible, plausible and even necessary in the context of imperialism as a specifically capitalist phenomenon',[112] and to mistake this for a liberal indeterminacy 'only became possible and plausible within a context of capitalist triumphalism that rendered systematic critiques of the capitalist *status quo*

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[107] Tzouvala, *Capitalism as Civilisation* (n 84) 1.
[108] *Ibid* 2.
[109] *Ibid*.
[110] *Ibid* 6.
[111] *Ibid*.
[112] *Ibid* 2.

implausible, if not unthinkable'.[113] By identifying the centre of international law as capitalist rather than liberal, Tzouvala seeks to engage a set of Marxist approaches and critiques which offer a roadmap to resist capitalism. And notably, these strategies of resistance place international law – and international lawyers[114] – in a very different position. International law may well be internally indeterminate, but that indeterminacy rests on a bias towards the 'standard of civilization' which 'registers, reshapes and reproduces the contradictions of global capitalism as a system of production and circulation'.[115] 'If this is true', Tzouvala writes:

> 'then we ought to rethink Koskenniemi's distinction between international law's indeterminacy, which inhabits the discipline's deep structure, and the field's structural biases, which are seen as the product of the operation of concrete institutions…Within this spectrum, a number of possible answers to concrete legal questions are discursively and politically possible. In fact, some of these outcomes might be more beneficial (or rather, less detrimental) than others when it comes to exploited and marginalised peoples. However, by making arguments in the register of 'civilisation' one accepts the pro-capitalist and also biology-orientated biases of this particular argumentative structure.'[116]

Understanding the history of international law's central bias towards capitalist domination must reshape our engagement with the future. 'Ours is a time of crises', Tzouvala writes. Following the global financial crash, the 'liberal international order' has come under threat, not only because of its own inability to solve these crises, but also in its challenge from alternative orders which 'offer an even more violent, exploitative and environmentally destructive future than the current configuration'.[117] Yet lawyers should be cautious in their defence of the international legal order as constituted:

> 'My monograph…is animated by a concern that unconditionally defending the status quo will turn out to be either ineffective or outright destructive. Indeed, if I am right to

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[113] *Ibid* 13.
[114] See, for example, *ibid* 41 (identifying international law 'as a specialised language articulated by a particular class of intellectuals, lawyers, within specific institutional structures'); *ibid* 213 (identifying international law's instability as 'fatal for revolutionary projects' but a 'valuable [tool] for reformist ones, especially those advanced by local legal elites and ruling classes'); and *ibid* 216 ('[militating] against the current trend of positioning the figure of the lawyer as an antidote to the failures of the law' and calling instead for a re-orientation of the study of international lawyers that 'takes seriously the class position and ideological function of international lawyers as intellectuals at the intersection between domestic and transnational class configurations').
[115] *Ibid* 215.
[116] *Ibid*.
[117] *Ibid* 19.

> argue that "civilisation" remains a central disciplinary argument and that it is structured around a constant sliding between "improvement" and "biology", then any effort to counter the rise of the far-right without questioning authoritarian neoliberal capitalism will always yield precarious gains.'[118]

Across these three texts, we have seen how the turn to history has sought to contest – deconstruct – the temporal suppressions of *From Apology to Utopia*, in turn presenting new structures for understanding international law. In *The Gentle Civilizer*, the anxiety of the 'modern' international law was replaced with a notion of disciplinary sensibility which not only trouble and nuance our understanding of the identity and disciplinary role of international lawyers, but also suggested a possibility to resurrect older sensibilities within our present – to find inspiration and resources from past generations. In *Imperialism, Sovereignty, and the Making of International Law*, we saw a challenge to the neutral openness of international legal concepts, instead structuring international law as a reproducer of colonial dynamics across history and into our present. Finally, in *Capitalism as Civilization*, we saw a challenge a recharacterisation of international law's central foundation, from liberalism to capitalism, and a call for us to identify new targets and opportunities within its structure.

Each, then, finds the casting off point for their history through an engagement with the temporal limits of *From Apology to Utopia*'s structuralism. This is not to downplay the changes which had occurred in the world by the turn of the twenty-first century: globalisation, the end of the Cold War, and the War on Terror undoubtedly posed new problems for international lawyers – new anxieties which prompted a reflection on how the discipline was understood. But this is precisely what Derrida tried to capture in his focus on time. As we move through time, texts are reread in new ways. By bringing to the fore the relationship between *From Apology to Utopia*'s limits and the new insights found in history, we can find new ways of characterising the development of critical approaches to international law, in order to better understand why lawyers have turned to history in the first place.

5. Restructuring International Law

This article has sought to resituate the critical turn to history as a response to the limits of earlier critical approaches to international law. By focusing on Derrida's development of deconstruction in relation to structuralism, it has demonstrated how history sits in productive tension with the temporal limits of earlier structural analyses of international law. This, it is

[118] *Ibid*.

hoped, will provide the groundwork for further work on understanding how critical approaches have transformed over the past four decades, and will aid in identifying future changes in how critical international law develops beyond the turn to history.

Does this mean that deconstruction was successful in changing international law? Or has it still failed, as Jean d'Aspremont and others have argued, to bring about the necessary revolution it promised?[119] I think this question misses the point of deconstruction. In an interview conducted in the mid-1980s, two decades after his work on structuralism, Derrida was asked about the 'essential interest' of his work, the effort 'to find the "point" in a text whose meaning can't be resolved'. In that gesture, was there an 'interest to open up orders and systems?' Derrida responds that he could answer 'in a simple and classical way,…could say that it is an interest in truth'. But this would not be enough:

> '[B]ecause deconstruction impels us to ask questions of truth, of reason, of meaning, of light, there is a moment in which this questioning of truth is no longer itself under the authority of truth. There is then something like *an examination of this desire for truth*….[T]o have the experience of truth is a kind of frustration. The experience of truth is a very dangerous experience, which has no certainty, no boundaries within which you could say here I am within science and there outside. It contains a risk and an examination.'[120]

The turn to history has served a similar function in its relationship to *From Apology to Utopia*. It has challenged us to reconsider what we exclude when we posit a 'modern' era of international law, what we assume when we claim international law is equally indeterminate in its application across history, and how we flatter ourselves when we wed its failures to liberal contradictions as opposed to capitalist practices. Deconstruction, then, should not be expected to offer us the 'right' answer. It can only push us to ask questions of existing answers, and in so doing ask us to ceaselessly push for a different way forward.

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[119] See n 7, n 8, and accompanying text above.
[120] Rötzer, 'Jacques Derrida' (n 11) 46 [emphasis added].