HISTORIOGRAPHY AS CREATIVE CONSTRUCTIVISM? ANNE ORFORD ON THE CRITICISM OF INTERNATIONAL LEGAL SCHOLARSHIP BY CONTEXTUALIST HISTORIANS

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I. INTRODUCTION: HOW DOES THE CRITICISM OF THE CRITICISM "FUNCTION"?

When I was invited to write a few pages on Anne Orford's book *International Law and the Politics of History*, I first intended to concentrate on several of its numerous impressive, or even admirable, aspects. The book is indeed brilliantly written. It represents a most thoughtful and eloquent response to the criticism formulated by contextualist (professional) historians and like-minded international lawyers. They stated that much engagement with the past in international legal scholarship does not meet the professional standards of historical research. Their main criticism, as it appears, is that it is "presentist" (i.e., determined by present purposes) and partial (i.e., not objective).[1] It thereby misuses the past "to tell stories, draw analogies, or bring material from diverse periods into relation,"[2] imposes "some kind of organising scheme"[3] or "hermeneutic template[s]"[4] on past material and thereby leads to the "manipulation of the past for present . . . purposes."[5] The criticism targets "active legal work of making links, choosing analogies, or creating patterns . . . ."[6]

The criticism, which is brought forward in a "tone of certainty" according to Orford,[7] is hard. A strong reaction cannot come as a surprise. When I was reading her book, I was fascinated by her thorough elaboration not only of the premises, arguments, and backgrounds of the historians who formulated the criticism (Samuel Moyn, Isabel Hull, Ian Hunter, Randall Lesaffer, et al.), but also of the premises, arguments, and backgrounds of a number of the authorities to which the critics refer. These authorities had prepared or belonged to the contextualist "Cambridge School . . . ."[8] It is difficult not to be impressed by this part of Orford's book.[9] I also found it extraordinarily interesting how she explains the triggering of what is now

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1. ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 12–13 (2021).
2. *Id.* at 253.
3. *Id.*
4. *Id.* at 218.
5. *Id.* at 81.
6. *Id.* at 252.
7. *Id.* at 92.
8. *See id.* at 94 (describing Lesaffer and Hunter as members of Cambridge School of thought).
9. *See id.* at 93–96 (describing Cambridge School's methodologies and its development as a school of thought).

often called "the turn to history" since the end of the Cold War.[10] Even though I ask myself whether the reification through this formula undervalues previous engagement with the past, I see the particular value of this part of the book in how she exposes the interplay between the post-Cold War constellation, developments within international legal scholarship, and developments within professional history (which turned itself more and more to the international).[11] Finally, to mention another achievement, I was struck by the combination of passionate scientific storytelling, vast knowledge, and devotion to detail. Reading the book was a great pleasure.

However, as the reader of these lines may already have surmised, I also felt unease when I had finished the book. I was asking myself: How does Anne Orford's argument "function," if we look at it with a maximum of distance—if we adopt a bird's eye view? How is she replying to the criticism, if all the detail of her argument is put aside—what are the key elements of her "reply strategy?" To dwell on these questions is probably more interesting than on the achievements. Where we agree needs less debate than where our arguments and intuitions differ. I felt reminded of a sentence by Hegel, who wrote in his *Lectures on the Philosophy of World History* that the "periods of happiness" are the empty pages in world history.[12] I therefore will shed some light on the "elements" of Orford's strategy and how I understand it. I ask how she succeeds in the book—and she does in my view—to effectively attack much of the argument formulated by contextualist historians and like-minded international lawyers. When I shed light on the elements of her strategy, I concentrate on her reply to the criticism of "presentism" and "partiality,"[13] which probably are the key criticisms. After describing the strategy, I will add some remarks on what Anne Orford *is not doing* in the book. It goes without saying that these brief remarks are meant to be "food for thought" and cannot replace a thorough analysis. They cannot do justice to a book like this.

A few remarks on the broader context of Orford's book are necessary in advance. The book is part of a clash of ideas on methodology formulated by representatives of two disciplines, which both engage with the past of international law—historians (and like-minded international legal scholars) and international legal scholars.[14] To put it simply: the parties of the debate either claim a bigger share of the definition power over how certain international legal work should "function" (contextualist historians), or they defend their present share (criticized international legal scholars).[15] At first sight, it might come as a certain surprise that non-legal

10. *See id.* at 18–99 (identifying key events—including breakup of Soviet Union—that shaped period referred to as "turn to history").

11. *See id.* (describing political events shaping turn to history and relating it to international legal scholarship and development).

12. GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY 79 (Maurice Cowling et al. eds., 1975).

13. *See, e.g.*, ORFORD, *supra* note 1, at 179–81 (explaining that to understand international legal knowledge reflection on past legal norms is required).

14. *See, e.g.*, *id.* at 8 (identifying clash between different methods used by historians and international lawyers to discuss historical international law).

15. *See, e.g.*, *id.* at 178–79 (outlining critiques of contextualist methodologies on international

professionals succeed in creating so much pressure on international lawyers and their methodology that one of their most eminent representatives replies with a book of 320 pages. There is a reason for this: the criticism touches on the sensitive question of what counts as a permissible legal argument in international legal scholarship (when it engages with the past). In domestic law, it is hardly conceivable that historians would be capable of creating similar pressure on, say, lawyers dealing with succession law. In the international sphere, the situation for lawyers is different: international legal scholars depend more than their domestic counterparts on other disciplines to understand *their own field*. It is not clear what international law exactly "is." What it "is" depends on the conception (of international law) one is working with. That in turn depends on one's own choice. These choices have an influence on whom we treat as subjects of international law, what we regard as sources, etc. One of my favorite passages in the book is: "[f]or many international lawyers, the conventional account of customary international law is an embarrassment for a field that imagines itself as professional, rigorous, and scientific."[16] We need other disciplines—philosophy, sociology, history, political science—to understand what we do as legal scholars. When scholars from these other disciplines realize our dependence, they may arrive at the idea that they could try to conquer new territory—with their own disciplinary knowledge and professional language, of course. In my view, Orford's book is an energetic, passionate defense against such an attempt—but possibly also a nervous and indignant one.

II. ELEMENT I: POINTING TO SELF-CONTRADICTIONS IN THE ARGUMENT

The first element of Orford's response to the critique—that engagement with international legal scholarship involves presentism and partiality—is to point to self-contradictions in the argument by contextualist historians.[17] She does not use the term, but a substantive part of her argument against the criticism of presentism and partiality boils down to this point.[18] With regard to presentism, she spends much energy on demonstrating the critics' own present stakes, interests, and purposes.[19] She pays particular attention to Samuel Moyn,[20] probably her favorite target. With his *The Last Utopia: Human Rights in History*,[21] Moyn has published a counter-narrative to the dominant understanding of the 1948 Universal Declaration of Human Rights[22] as the beginning of the modern progress history of international human rights. Moyn claims the credibility of a historian who is strictly contextualist

legal scholarship).

16. *Id.* at 242.

17. *See id.* at 5–17 (discussing argument that lawyers should accept help from historians to ground arguments in truthfulness).

18. *Id.*

19. *See id.* at 18–19 (exploring political stakes involved when international legal scholars began to look to history).

20. *See id.* at 27–28 (discussing Moyn's contradictory views of U.S. expansionism and neoliberalism during 1990s).

21. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 5 (2010) [hereinafter MOYN, THE LAST UTOPIA].

22. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

when he approaches the subject.[23] He criticizes the use of human rights history in international legal scholarship "to confirm their inevitable rise rather than register the choices that were made and the accidents that happen."[24] He attacks conventional engagement in this field as a kind of "church history" that treats the basic cause (i.e., the church, human rights) as a "saving truth."[25]

His own approach, in contrast, allegedly concentrates on choices and accidents.[26] Orford takes relish in pointing to his own present stakes and purposes during several phases of his professional life when he was addressing the topic of human rights history.[27] In an early stage of his career, when he was working at the White House for Bill Clinton's national security advisor, he helped defend NATO's intervention in Kosovo in an op-ed.[28] He called the intervention "a just and necessary war" and wrote that minority rights and freedom were presented as the "powerful forces for progress" in history.[29] The engagement with the past here was determined by a pressing present need. In a later stage of his career, Moyn's position changed radically.[30] Meanwhile, he called his earlier engagement with human rights an (overcome) "romance" with the idea of a human rights-driven foreign policy, and he formulated the above-mentioned criticisms of the "celebratory attitude" in the engagement of international legal scholarship with the past of human rights.[31] He was now writing in the context of the "war on terror."[32] His present stake was to make sense of what was going on in the United States, and in the factions within the government in particular. His history of human rights now became what the United States had wanted human rights to be,[33] and he regarded the attention to human rights history now as "a proxy for a burning political debate" (in the United States) over which role international law should play in the "war on terror."[34] The present, according to Orford, is everywhere in Moyn's argument.[35]

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23. *See* MOYN, THE LAST UTOPIA, *supra* note 21, at 1–10 (describing historians' mindsets when approaching international human rights topics).

24. *Id.* at 5.

25. *Id.* at 6.

26. *See* ORFORD, *supra* note 1, at 264–65 (discussing Moyn's claim that human rights emerged from a social movement in the form of NGOs and from U.S. foreign policy).

27. *See id.* at 27 (describing Moyn's role in justifying NATO measures).

28. *See id.* at 27–28 (discussing Moyn's op-ed "A Just and Necessary War"); *see also* William Jefferson Clinton, *A Just and Necessary War*, N.Y. Times, May, 23, 1999, at 17 (discussing the reasons why United States' presence in Kosovo is necessary).

29. *See* CLINTON, *supra* note 28, at 17 (defending the United States intervention in Kosovo).

30. *See* ORFORD, *supra* note 1, at 27 (discussing Moyn's critiques towards international lawyers and human rights activists for their involvement with U.S. expansionism during the 1990s).

31. *See* MOYN, THE LAST UTOPIA, *supra* note 21, at 5 (discussing historians' attitude toward emergence and progress of human rights).

32. *See* ORFORD, *supra* note 1, at 27–28 (describing Moyn's contribution to op-eds published under President Clinton).

33. *See id.* at 264 (describing Moyn's history of using human rights as an endorsement of U.S. efforts to spread liberal democracy during the War on Terror).

34. Samuel Moyn, *Martti Koskenniemi and Historiography of International Law in the Age of the War on Terror*, *in* THE LAW OF INTERNATIONAL LAWYERS: READING KOSKENNIEMI 340, 340 (Wouter Werner et al. eds., 2017).

35. *See* ORFORD, *supra* note 1, at 26–30 (describing Moyn's critiques on international lawyers

Earlier historians, who are referred to as authorities by present contextualist historians, also receive particular attention in Orford's book.[36] She demonstrates that their allegedly neutral and contextual histories had strong present stakes and purposes. Herbert Butterfield, for example, known for his book *The Whig Interpretation of History*, strongly criticized the dominating liberal narratives of progress of his time.[37] He regarded them as naïve "ratification if not glorification of the present"[38] and propagated that the great lessons of history can only be "learned in detail."[39] Orford sheds light on the connections between this view and Butterfield's political views.[40] He was part of a conservative theological milieu that rejected dominating rationalism and supported—during the Second World War—the Vichy regime.[41] Quentin Skinner, probably the most prominent representative of the "Cambridge School," is discussed by Orford too.[42] Skinner argued against the use of history as "ersatz philosophy."[43] He suggested a method of writing history (in his case, history of political ideas) which studied the specific history of each agent, of the situation in which he used an idea, and of the specific intentions.[44] His present stakes were defined by the situation in the (late) 1960s.[45] His method, according to Orford, was a reaction to the then fashionable use of the past to transform the present by emphasizing the "forces" of history (as its transformers).[46] The method, as Orford's argument runs, is a move against those who want to change the present society.[47] Any engagement with the past of international law—this is the point she wants to make—unavoidably is presentist, and contextualist criticism of presentism accordingly is self-contradictory.[48]

The criticism of partiality is also thoroughly deconstructed. Again, Orford shows that the critics do not meet their own standards of impartiality.[49] She exposes this—I have to say, in a brilliant and entertaining way—*inter alia* with the example

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and human rights activists after U.S. expansion and neoliberalism).

36. *See id.* at 13 (summarizing her exploration of influential scholars' work).

37. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1931).

38. *Id.* at v.

39. *Id.* at 21.

40. *See* ORFORD, *supra* note 1, at 122–23 (describing Butterfield's socialization within anti-liberal circles and acceptance of an invitation to visit Hitler's Germany in 1938—though his Nazi sympathies are debated).

41. *Id.* at 123.

42. *See id.* at 135–39 (introducing Skinner as scholastic lawyer whose aim was to establish canons of good historical method).

43. *See* Quentin Skinner, *Hobbes's "Leviathan,"* 7 HIST. J. 321, 333 (1964) (stating that there is danger in treating study of intellectual history as "ersatz philosophy").

44. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 49 (1969).

45. *See* ORFORD, *supra* note 1, at 136–38 (detailing situational context of Skinner's writing in late 1960s amid student rebellions and radical new interpretations of English history).

46. *See id.* at 137 (noting that for Skinner and many of his contemporaries, study of the past was intertwined with transformation of the present).

47. *See id.* at 118 (highlighting that critical historical analysis is all too frequently motivated by presentist concerns).

48. *Id.*

49. *See id.* at 259.

of the book *Rage for Order: The British Empire and the Origins of International Law 1800–1850* by contextualist historians Lauren Benton and Lisa Ford.[50] These two authors present their work as an objective correction of the distortions of the past produced by international lawyers.[51] The conception of international law they use, however, is not objective at all, Orford argues, but partial and political. Benton and Ford treat "diffuse phenomena as nongovernmental networks and administrative procedures" as the relevant material for engaging in the history of international law.[52] This is, Orford convincingly writes, a specific conception of international law advocated by a group of scholars who describe their approach as the "Global Administrative Law Project"—Anne-Marie Slaughter, Benedict Kingsbury, Nico Krisch, et al.[53] Their approach is a conception with a strong emphasis on the managerial dimension of international law, which downplays consent and democracy.[54] Accordingly, and unavoidably, it is highly political and partisan.[55] Accounts of contextualist historians, she writes, are "necessarily as partisan and political as those produced by the most pragmatic of lawyers."[56] Engaging in the history of international law means explicitly or implicitly employing a contestable (as politically never neutral) conception of international law.[57] It depends on the choice of the conception what counts as sources, who is a subject, etc.[58] So, there are contradictions all the way down in the argument of the critics. The effect of the thorough analysis by Orford is that the criticism appears, at best, as not being very coherent.[59]

III. ELEMENT II: PLAYING THE LAWYER'S "PROFESSIONALITY CARD"

The second element of the strategy can be described as "playing the professionality card too." Much of Orford's argument[60] boils down to a lack-of-expertise-about-law-argument: the criticism is misled, it goes, as contextualist historians do not properly understand how international law—and law in general—

50. *Id.* at 257; LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850 (2017).

51. *See* BENTON & FORD, *supra* note 50, at 7 (describing how international lawyers have been unable to adequately capture nature of British law in the empire).

52. *Id.* at 190.

53. ORFORD, *supra* note 1, at 259.

54. *See id.* at 261 (underscoring how skeptics of the project were concerned about its lack of any focus on questions of consent, status, democracy, and agency).

55. *See id.* at 260 (describing how current international institutions are effectively enforcement mechanisms for laws of more powerful nation states).

56. *Id.* at 255.

57. *See id.* at 257 (describing how taking a position on international law requires taking a position in the present debate).

58. *See id.* at 256 (explaining that scholars make political determinations when choosing sources of evidence).

59. *See id.* at 257–84 (analyzing three historical accounts and how each scholar's political choices affected their writings, illustrating that scholars were not impartial forces in present debate).

60. *See id.* at 207 (explaining that card-carrying historians are amateurs in law and correlatively lawyers have an expert understanding of law but amateur understanding of history).

functions.[61] Contextualist historians argue that lawyers are amateurs in history, and Orford replies: but you are amateurs in law! With regard to the criticism of presentism, Orford essentially writes that a legal text (from the past or present) never just has one context.[62] Law holds together "different ideas about time."[63] When legal scholars engage with the past, it is the nature of law that they can either advocate the historical meaning "known to all" or the meaning "that was specific to the context in which the two parties were negotiating."[64] In order to understand how law functions, it is necessary to grasp both the way it relates to an "identifiable social context" *and* the way "it gestures beyond that context to chains of references that are constructed."[65] There is never just one meaning and there are many ways of engaging with the past. Orford compares the functioning of law with the functioning of art.[66] Art, too, is both the material object and an object with the functioning of a relic.[67]

The criticism of partiality is fended off with the "professional" argument that the critics do not properly understand the relationship between law and partiality. Orford writes as a critical international scholar. The classic "crits" argument is that there exists no objective law—and accordingly no objective engagement with the past of the law.[68] For Anne Orford, who regularly refers to American legal realism in the book, the cardinal topic of law is the unavoidable partisan and political character of any legal argument.[69] International legal argument is either universalist/utopian (holding up values, common interests, etc.) or apologist/practical (referring to positive practice, consent)—law is not found but made in the process of argumentation. The work of the lawyer mainly consists of "generalizing and abstracting."[70] Interpretative work means moving between varying levels of abstraction;[71] it is "creative and political work."[72] With respect to the constructive element of this work, she writes that "[u]nderstanding the movement between *grand ideological visions* and routine techniques of interpretation is central to grasping the work that international lawyers do."[73]

61. *See id.* at 187 (commenting that lawyers generally view contextualist historians as legal amateurs who do not understand law nor have the responsibilities of lawyers).

62. *See id.* at 155 (observing that context is an artificial construct, as is tradition).

63. *Id.* at 155.

64. *Id.*

65. *Id.* at 156.

66. *See id.* at 155 (explaining that meaning of law and art may be understood as having historical context rooted in a period of time or as having roots in a tradition over long period or periods of time).

67. *See id.* at 154 (explaining that a piece of artwork may function as both physical object and representation of another time and place).

68. *See id.* at 5–6 (describing legal realist movement and advent of term "hermeneutics of suspicion" and questioning supposed formal positivism of law).

69. *Id.* at 252.

70. *See id.* at 256 ("That work of generalisation and abstraction is creative and political work – '[t]o see a pattern is to make a pattern'.").

71. *Id.* at 250.

72. *Id.* at 256.

73. *Id.* at 281 (emphasis added).

Accordingly, history or histories of international law are creative and political work, too. Accepting Orford's reasoning means that the criticism of partiality dissolves in the conception of law she works with. All writing on international law, she even writes, quoting Philip Allot, "must be intrinsically polemical."[74] She regards the relationship of the lawyer to truth as an indirect one, because lawyers operate "in the register of proof and probability."[75] This is the "nature of the game": the necessity to bring forward either universal/utopian or apologist/practice arguments.[76] The criticism of partiality and one-sidedness seems to leave her untouched. Rather, she defends the critical conception of law in which not only the idea of objectivity of law *per se*, but even the idea of a potential of neutrality is discarded *ab initio*.[77] I will come back to this point later. My point here is this: as contextualist historians have played the professionalism card against lawyers engaging with history, Orford plays the professionalism card in return against historians engaging with law. They do not really know what they do when they engage with law. There is a striking reciprocity in the argument.

IV. ELEMENT III: OCCUPYING FAVORABLE LANGUAGE

I would like to add a few words on what I perceive as a third key element of the rejection strategy. It operates outside the core argument. It does not concern the analytical dimension, but the psychological aspect of the debate that hinges on the use of a certain language to some extent. The terminology in which Anne Orford presents the debate has consequences for the perception of the discourse participants and their intentions—and indirectly of their arguments. Her own argument (and the argument of like-minded scholars) is labelled as "critical" and "realist."[78] The terms are used with and without quotation marks.[79] The opponents in the debate are "*revisionist* intellectual historians of international law,"[80] who want to "*impose* a particular empiricist *style* of historical research in international law."[81] The labels I am interested in for this side are "revisionist," "impose," and "style."

"Critical" connotes a lot: it means (in the context of Orford's book) being part of a movement as critical theory, but also (as more general connotations of the term) having a sense of subtleties, having an aversion against sweeping explanations, being interested in counter-argument, etc. "Realist" connotes a lot, too: it means working with the premises of legal realism (in the context of this book), but also being resilient against ideologies, having a developed sense of what is going on in the world, etc. "Revisionist"—as a key label for the opponents—connotes meanings hardly any intellectual would like to be associated with: making misstatements about

74. *Id.* at 257.

75. *Id.* at 220.

76. *Id.* at 177.

77. *See id.* at 176–77 (describing legal practice's historical and continued prevalence of adversarialism and rejection of objectivity).

78. *Id.* at 253–55, 281, 292.

79. *Id.*

80. *Id.* at 175 (emphasis added).

81. *Id.* at 10 (emphasis added).

the past, having a "reactionary agenda," etc. "Impose"—in the context of a debate—means dictating something, ignoring other views. The term "style" used in the context of a debate about methodology means what they call method is just something closer to individual preferences than a standard for scientific work. By now, my point should have become clear: none of the contextualist historians would characterize themselves as "revisionist," call their claim an attempt to "impose" something, or describe their method as a mere "style." Presumably they would, however, describe their own thought—in a specific sense—as realist and critical. Part of the debate is the struggle for positively connotated terms and the fending off of negatively connotated language. The effect of such framing through labelling is that one's own argument appears as honest, professional, and subtle, while the opposing argument appears as biased, resentful, and ethically questionable.

V. FINAL REMARK: DOUBTS AND COUNTER-ARGUMENT

As I wrote at the beginning, I find *International Law and the Politics of History* an impressive, thoughtful, eloquent, and frequently even entertaining book. It is meant to be, as I read it, a deconstruction of the argument of the critics. In my view, Anne Orford succeeds in this respect to a large degree. An argument which is self-contradictory (in key elements) suffers from a logical deficit; an argument which does not properly understand the "nature" of international law, suffers from a professionality deficit; and an argument brought forward by revisionist historians (with a reactionary agenda) is suspect and likely to suffer from a legitimacy deficit. I might slightly exaggerate to make my point—but only slightly. In a way, I would say, by arguing the way she did, Orford succeeds in shifting the burden of proof. Now, it is up to the other side to defend itself!

My unease, however, continues to prevail. My intuition is that the core of Orford's book is a very good defense of her understanding of international law—and of her understanding of engagement with the past connected to this understanding of law. But I am not sure whether it really represents an appropriate answer to the unease I see behind the criticism formulated by contextualist historians and like-minded lawyers. To be clear, I subscribe to many of the insights by legal realism and critical theory—about the constant problem of partiality of legal argument, the distributive effects of law, etc.—but I sense that the conclusions drawn from these insights have been pushed too far, not only in this book. Orford's book provides the following line of reasoning: international legal argument is partial; engagement with its past is partial too; and historical work necessarily is "creative" constructivism. Even if we admit that the meaning of law cannot objectively be determined, are these really the conclusions to be drawn? I see too much self-immunization against counter-argument. I have doubts about this way of thinking.

Counter-argument and doubt, however, I believe, are inextricably linked with scientific work. If we cannot entirely escape partiality, at least we can be open to inconvenient counter-arguments and concede doubts. Orford seems to be challenged by the "tone of certainty" used by contextualist historians. In her reply, however, she does not seem to have the slightest problem that there might indeed be a problem with historical arguments in international legal scholarship that are too sweeping. Sam Moyn's approach may be presentist, too. But he nevertheless might be right

with his criticism of highly eclectic writing about human rights history. In my view, the critical approach has led to a kind of self-authorization in the name of "tak[ing] responsibility" (Orford employs the term "responsibility" several times in the book).[82] It has also fueled self-immunization against counter-arguments brought forward by those with a different political agenda. This problem also infects the engagement with the past of international law. I admittedly experience a certain melancholy when I write this. Indeed, I consider the sensitivity of critical international legal theory with respect to partiality and distributive effects of legal arguments as a force of progress—but only as long as it admits doubt about itself. Does it do this enough?

82. *Id.* at 9, 39, 202, 315, 320.