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# 1

## Situating Contingency in the Path of International Law

Ingo Venzke\*

### I. Introduction

The present volume asks a question that is deceptive in its simplicity: Could international law have been otherwise? In other words, what are past possibilities, if any, for a different law? The path of law was long understood as expressing a natural plan, given fate or divine fiat. The mark of enlightened modernity was then to no longer see the world, and the law in it, as so predetermined that contingency was just puzzling.<sup>1</sup> The ramifications of this move were tremendous across theory and practice. The individual became the focal point of legitimate order and the master of a now disenchanting, freer world. Ridden with contradictions, enlightened modernity evoked anxieties about how to bear the weight of one's choices, if not of the whole world. The newfound freedom triggered a longing for guidance and explanation within this world of possibility, for foundations that were now evasive.<sup>2</sup> Still, today there is hardly a serious account left that would consider the path of international law to be necessary and that would refute the possibility of a different law altogether.

If that is so, then thinking through how international law could have been otherwise should not be too hard, neither in theory nor in practice. In our original conference pitch, Kevin Jon Heller and I claimed that 'international law's past . . . is ripe with possibilities that have been forgotten.' We wanted to reveal and remember them. We did not, however, want to engage in stories of miracle counterfactuals, hypothetical changes that are withdrawn from worldly constraints. We set out in search of plausible possibilities that arose within given circumstances. Many chapters in the volume now meet precisely that ambition, retrieving contingency from the margins of collective memory.

For none of the contributions has this been an easy task, nor should it have been. Behind every possibility of the past stands a reason why the law developed as it did after all.<sup>3</sup> The search for contingency appeals to opposing critical sensibilities of wanting to show possibilities of the past and wanting to reveal the determining forces that compel the law down

\* Email: i.venzke@uva.nl. I am truly grateful to all the participants of the conference 'Contingency in the Course of International Law: How International Law Could Have Been', University of Amsterdam, 14–16 June 2018 for the spirited discussions and all their input.

<sup>1</sup> Niklas Luhmann, *Kontingenz und Recht* (Suhrkamp 2013) 36; Nicholas Onuf, "Tainted by Contingency" Retelling the Story of International Law' in Nicholas Onuf (ed), *International Legal Theory: Essays and Engagements 1966–2006* (Routledge 2002) 359, 374.

<sup>2</sup> See Theodor W Adorno and Max Horkheimer, *Dialectic of Enlightenment* (John Cumming tr, Verso 1997).

<sup>3</sup> Compare Tedeschi, in the present volume, noting that '[t]he more we look for it, the more contingency slips away'.

one path rather than another.<sup>4</sup> Many chapters encounter tensions when they want to recover past possibilities without downplaying patterns of determination and domination. While those warring critical sensibilities may point in different directions, both are crucial to keeping inquiries on the terrain of contingency, situated precisely between necessity on one side and chance on the other. Only with a keen sense of why things turned out the way they did is it possible to argue about how they could plausibly have turned out differently.

The present search for contingency in international law, as I see it, is motivated in the first instance by a refusal to resign to the present state of affairs, to accept ‘all ... senseless wretchedness [as] an unchangeable force of nature, a fate beyond man’s control’, as Max Horkheimer put.<sup>5</sup> In the second instance, it is motivated by the hope that recovering possibilities of the past facilitates change in the present for a different future.<sup>6</sup> Situating contingency in the course of international law counters dynamics that depict law’s course as next to necessary. Those dynamics rationalise in hindsight and preach with foresight. They understand the past not out of its own possibilities but as a prequel to the present, and the present in light of the future to come. When they flatten law’s history and iron out contingencies, the law appears to be next to necessary and progressive change is deemed undesirable and impossible anyway.

‘If there is a sense of reality, there must also be a sense of possibility’,<sup>7</sup> Musil claimed in an early chapter of *The Man Without Qualities*. He immediately continued to write of delicate fools who are so overwhelmed by such a sense of possibility that they daydream with their heads in the clouds—fools, he wrote, that are ‘called idealist by those who wish to praise them.’<sup>8</sup> Those daydreamers ‘cannot comprehend reality or ... in their melancholic condition, avoid it. These are people in whom the lack of a sense of reality is a real deficiency.’<sup>9</sup> But there are also those who keep their feet on the ground and embrace—still with Musil—a ‘conscious utopianism that does not shrink from reality but sees it as a project.’<sup>10</sup> That may well be the core of most critical projects, including the present volume: upholding the possibility of a different law.<sup>11</sup> Recovering contingency in the course of international law wishes to cultivate pockets of freedom that exist within and against a world presently beyond reach.

In this introduction, I will situate contingency on the terrain between necessity and chance. I will also discuss what makes the search for contingency so politically charged and so valuable—its link with human freedom. Ultimately, historical inquiry cannot do without the presumption of contingency, as I will submit in agreement with others (II). Expanding on the agenda behind the present volume as I see it, I will then sketch dynamics that portray

<sup>4</sup> Yemima Ben-Menahem, ‘Historical Necessity and Contingency’ in Aviezer Tucker (ed), *A Companion to the Philosophy of History and Historiography* (Blackwell 2009) 120.

<sup>5</sup> Max Horkheimer, ‘Traditional and Critical Theory’ in Max Horkheimer, *Critical Theory: Selected Essays* (Continuum 2002) 188, 204. Searching for contingency of course has a history or, better, histories within different disciplines. See in detail Painter, in this volume. While debates about critical legal histories come close, international law is at a different moment, as I have argued on another occasion, see Ingo Venzke, ‘Possibilities of the Past? The Histories of the NIEO and the Travails of Critique’ (2018) 20 *Journal of the History of International Law* 263.

<sup>6</sup> See Nijman, in this volume.

<sup>7</sup> Robert Musil, *The Man Without Qualities* (Sophie Wilkins tr, Vintage 1995) 10.

<sup>8</sup> Musil (n 7) 22.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> Christoph Menke, ‘Die Möglichkeit eines anderen Rechts’ (2014) 62 *Deutsche Zeitschrift für Philosophie* 136. In her seminal article, Susan Marks, too, sees this as ‘a cardinal principle of progressive thought’, Susan Marks, ‘False Contingency’ (2009) 62 *Current Legal Problems* 1, 2. She further agrees that ‘it is quite right to hammer the point that history is a social product, not given but made. For if it is made, it can be remade differently.’

the path of international law as next to necessary (III) to then specify what the practice of searching for contingency might do about those dynamics, and what other potential this practice may hold (IV). One benefit that puts thinking about contingency ahead of much normative theorising is that it also asks why something that may seem desirable has not materialised. That question must guide those on pathways of transformation in their sobering search for change (V). Closely aligned is the question of what would actually have made a difference in the path of international law, and what still can (VI). Often it seems that the law only reflects given conditions—an impression that is frequently unassailable. But there is a risk of undervaluing how the law escapes its determining context (VII). Inquiries into what happened and what else could have happened are two sides of the same coin.<sup>12</sup> It still remains difficult to actually convey a sense of contingency, not in the least due to strictures of narrative style (VIII). In conclusion, I see sites of contingency in the law's contextualisation, the reading of its context, and the rendering of its history (IX).

## II. Contingency situated

Searching for contingency in the path of international law probes what else could plausibly have happened. Whatever actually happened, while possible, did not become necessary only because it happened.<sup>13</sup> What *is* might also *not be*. Likewise, something is not impossible only because it did not happen. Contingency delineates the field of what is possible, bounded by necessity, on one side, and chance on the other.

Occasionally, some authors elide contingency's distinction from chance. Such an elision is more common and easier in the English language than in others, a point to which I shall return.<sup>14</sup> The concept of contingency has also been the target of spats between those who defend spheres of freedom to act differently and others who decry the emphasis on seemingly free-floating actors.<sup>15</sup> I briefly revisit those well-known debates because they clarify what is at stake. The stand-off between Isaiah Berlin and EH Carr remains classic and demonstrative.<sup>16</sup> Their arguments about whether and how to locate contingency in the path of history extend to the reasons and responsibilities for pretty much everything that is right and wrong in the world. These debates also attest to the manner in which the conceptual contours of contingency are shaped and sometimes blurred under the impact of political leanings.

Berlin's *Historical Inevitability*—one of his *Four Essays on Liberty*—argues persuasively in favour of historians' focus on contingency. For him, historical judgement 'consists precisely in the placing of what occurred (or might occur) in the context of what could have happened (or could happen) and in the demarcation of this from what could not.'<sup>17</sup> But his text is also an unpersuasive polemic against Stalinism and a caricature of Marxism, castigating them both for their supposedly 'impersonal and unalterable' view of history.<sup>18</sup> Berlin

<sup>12</sup> See Aviezer Tucker, *Our Knowledge of the Past* (CUP 2004) 226.

<sup>13</sup> Luhmann (n 1) 32–33.

<sup>14</sup> See (n 91).

<sup>15</sup> One of the most notorious targets for that latter critique is Niall Ferguson, *Virtual History: Alternatives and Counterfactuals* (Basic Books 1999).

<sup>16</sup> It is also the point of entry for Marks (n 11) and Allan Megill, 'History's Unresolving Tensions: Reality and Implications' (2019) 23 *Rethinking History* 279.

<sup>17</sup> Isaiah Berlin, 'Historical Inevitability', in *Liberty* (OUP 2002) 94, 121.

<sup>18</sup> Berlin (n 17) 155.

warns loudly against the implications of such a view of history as it shifts responsibility from individuals and their action towards the forces that be, and that cannot be changed.<sup>19</sup> EH Carr's powerful retort—*What is History?*—contends that historical developments are ill understood as the product of individual choices that abstract from causal factors at work. 'To say that the Russian revolution was due to the stupidity of Nicholas II or to the genius of Lenin is altogether inadequate', Carr notes.<sup>20</sup> Placing emphasis on individual agency impoverishes historical understanding and misguides assessments of why something happened. Pushing back against Berlin, Carr folds contingency into chance and conflates arguments about what was possible—plausibly so—with counterfactual speculations about what would have happened if only Cleopatra's nose had been shorter.<sup>21</sup>

In my understanding as in that of others, contingency is not only opposed to necessity, but also to the *impossible*—that which was just not possible under given conditions.<sup>22</sup> It is opposed to chance, to the random and arbitrary occurrence of events that would have been impossible were it not for some kind of sudden change of circumstances.<sup>23</sup> Inquiring into the determining forces that bear on all action does not lead towards necessitarian views of history, nor does probing alternative possibilities slide into chance. As Susan Marks noted in her formative article, the verb 'to determine has its roots in the Latin word *terminare*, meaning "to set bounds" to something.'<sup>24</sup> Like Marks, I would see thinking of contingency to be in line with Marx's well-received affirmation that '[m]en make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.'<sup>25</sup> In her chapter in this volume on Arvid Pardo's role in the development of the law of sea, Surabhi Ranganathan is careful to carve out conditions of possibility, placing particular attention to shifts in the discourse and the importance of timing. The same may be said of Ana Delic's narration of the history of international private law through the initiatives of Pasquale Stanislao Mancini, Estanislao Zeballos as well as Tobias Asser, and for Bianca Maganza's history of Common Article 3 to the 1949 Geneva Conventions.<sup>26</sup>

Historiography only makes sense on the presumption of contingency. Without this presumption, all that would otherwise be left to do would be to chronicle events as vindications of the laws of history (for which no plausible theory has survived) or to chronicle them while resigned to the apparent incapacity to learn anything about them.<sup>27</sup> Stronger still, if contingency was not presumed, Samuel Moyn argues in the present volume with the support of Roberto Unger, 'action risks paralysis through the belief that the forces of history are all controlling, a self-fulfilling prophecy that feeds much demobilisation and withdrawal past and present.'<sup>28</sup> And yet, debates similar to those of Berlin and Carr continue to pervade historical inquiries generally, and (international) legal history in particular.<sup>29</sup> Those

<sup>19</sup> *ibid* 121–22. Also see the reading by Marks (n 11) 4.

<sup>20</sup> EH Carr, *What is History?* (Penguin 1982) 120.

<sup>21</sup> *ibid* 98–100; also see at 105, where Carr speaks of 'devotees of chance and contingency in history'.

<sup>22</sup> Luhmann (n 1) 32–33.

<sup>23</sup> In agreement, Marks (n 11) 2 writing that 'things can be, and quite frequently are, contingent without being random, accidental, or arbitrary'.

<sup>24</sup> Marks (n 11) 7.

<sup>25</sup> Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (Progress Publishers 1934) 10.

<sup>26</sup> Ranganathan, Delic, and Maganza, all in this volume.

<sup>27</sup> Megill (n 16) 284. For the chronicler's view of history, see Walter Benjamin, 'Über den Begriff der Geschichte' (1940) in Walter Benjamin, *Gesammelte Schriften* (Suhrkamp 1974) vol 1, 694.

<sup>28</sup> Moyn, in this volume.

<sup>29</sup> Painter, in this volume.

debates are also gendered, economically stratified, and they reflect complex colonial histories, adding further reason to tread carefully.<sup>30</sup>

A key question when putting the search for contingency into practice is deciding exactly when to stop looking for the next underlying reason: that is, late enough so as to not exaggerate possibilities that did not exist, and early enough to not reduce all actions to a necessary expression of their context.<sup>31</sup> This is nothing other than the domain of historiography. Historiography does not stop asking why something happened until it is adequately explained, nor does it deny the possibilities of something different happening. For Reinhart Koselleck inquiries into historical causation are thus anthropologically centred:

The historical facts of the past, as well as those of the future, are possibilities that either have been or can be realized and which preclude compelling necessity. Facts remain contingent, however much they can be grounded; they arise in the space of human freedom.<sup>32</sup>

Such a conception of contingency is, as Umut Özsu writes in his chapter, well at home in a Marxist tradition where it takes that place between necessity and impossibility. Something that is contingent must first of all be possible.<sup>33</sup> It is not a requirement, however, that an outcome was willed by any actor, as Edward James Kolla makes clear in his history of national self-determination after the French Revolution.<sup>34</sup>

### III. Rationalising with hindsight

Later in his book, Musil paraphrases a professor at a quotidian social gathering thus:

He spoke of the path of history. When we look ahead, he said, we see an impenetrable wall. If we look left and right, we see an overwhelming mass of important events without recognizable direction. But looking back, everything, as if by a miracle, has become order and purpose.<sup>35</sup>

The professor's intervention reflects the experience of uncertainty with regard to most things that will happen in the future, however near, and the simultaneous certainty with

<sup>30</sup> Beliefs in the possibility of different action—and possibilities of a different law—are spread much more widely among male elites. See respectively for the emphasis on gender and strata Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377; Marks (n 11) 14, noting that 'to those at the less comfortable end of social relations . . . the patterning of privilege and deprivation will be quite plain'. cf Antony SR Manstead, 'The Psychology of Social Class: How Socioeconomic Status Impacts Thought, Feelings, and Behaviour' (2018) 57 *British Journal of Social Psychology* 267.

<sup>31</sup> cf Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 *Temple International and Comparative Law Journal* 215.

<sup>32</sup> Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004) 127. cf Carr (n 20) at 95, who makes the analogy between historical determination and causes of a crime: 'It would not, I feel sure, occur to any of those engaged in investigating the causes of crime to suppose that this committed them to a denial of the moral responsibility of the criminal.' It should be noted that different disciplines have good reasons to set up contingency differently. Also see HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon 1985).

<sup>33</sup> Özsu, in this volume, making that argument with particular reference to Marx's account of the struggle over the hours of the working day—the outcome was contingent, within bounds.

<sup>34</sup> Kolla, in this volume.

<sup>35</sup> Musil (n 7) 182.

which the past tends to be explained.<sup>36</sup> There is a deeply human longing for reasons in a world that is contingent.<sup>37</sup> As Hannah Arendt noted, people find reasons ‘in order to get rid of contingency and unexpectedness.’<sup>38</sup>

Granted, we really are smarter after the fact, but much less so than we think. The bias of hindsight and the rush to explain what has happened cloud ex post judgments and exaggerate assessments of likelihood. Baruch Fischhoff placed his pioneering work on hindsight bias squarely within discussions about historical methodology, subscribing to the view espoused by the historian Georges Florovsky:

[t]he tendency toward determinism is somehow implied in the method of retrospection itself. In retrospect, we seem to perceive the logic of the events which unfold themselves in a regular or linear fashion according to a recognizable pattern with an alleged inner necessity. So that we get the impression that it really could not have happened otherwise.<sup>39</sup>

Fischhoff drew attention to psychological dynamics working towards what he called ‘creeping determinism.’<sup>40</sup> In a similar fashion, Richard Evans more recently warned that, in the end, historians ‘pile up causes until events are overdetermined, that is, they have so many causes that if one did not operate, the others would and the event in question would still have occurred.’<sup>41</sup>

In the specific domain of law, while certain dynamics sustain the appearance of necessity, other opportunities may arise to challenge that appearance.<sup>42</sup> Roberto Unger has famously blamed ‘rationalizing legal analysis’ as a mode of argument that creates ‘false necessities.’<sup>43</sup> That mode of analysis continues to pervade many accounts of legal developments, especially those developments of the law that are carried along in the practice of adjudication. Similarly, many accounts are outright functionalist as though legal developments were a necessary response to societal changes—as if economic globalisation itself fatefully determined international investment law, for instance. Some functional explanations, especially those relating to an analysis of underlying political economies, can claim considerable plausibility, but they also efface alternative possibilities, including those alternatives that might have opened up through different understandings of the ‘given’ circumstances and the challenges they present. Facts do not speak for themselves.<sup>44</sup>

<sup>36</sup> Richard Ned Lebow, *Forbidden Fruit: Counterfactuals and International Relations* (Princeton University Press 2010).

<sup>37</sup> See already Adorno and Horkheimer (n 2).

<sup>38</sup> Hannah Arendt, interviewed by Roger Errera in October 1978, excerpts published in *The New York Review of Books* (New York, 26 October 1978) 18.

<sup>39</sup> Georges Florovsky, ‘The Study of the Past’ quoted in Baruch Fischhoff, ‘Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty’ (1975) 1 *Journal of Experimental Psychology: Human Perception and Performance* 288, 288.

<sup>40</sup> Fischhoff (n 39) 288.

<sup>41</sup> Richard J Evans, *Altered Pasts: Counterfactuals in History* (Little, Brown 2014) 82.

<sup>42</sup> See Ingo Venzke, ‘Cracking the Frame? On the Prospects of Change in a World of Struggle’ (2016) 27 *European Journal of International Law* 831.

<sup>43</sup> Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996) 36; Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Verso 2001); cf Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997) 18.

<sup>44</sup> Section VII in this chapter.

Moreover, other views on the course of international law see it as bending towards a singular, just future.<sup>45</sup> In legal practice, finally, the past is used instrumentally and unabashedly to support claims in the present.<sup>46</sup> The operation of the law thrives on hindsight. In contradistinction, the search for contingency heads in the very opposite direction, trying to unsettle certainty about law's path and to make it more malleable. In the following two sections I will first deal with beliefs in the changeability of the law (IV) and then discuss how change might occur—and what the practice of situating contingency in the path of international law might engender in this regard (V).

#### IV. Reality as a project

I have suggested that upholding the belief in the possibility of a different law may well be the core of most critical projects, not to shrink from reality, but to take reality itself as a project, as Musil put it.<sup>47</sup> What might sustain such a belief, and why is it important? First and foremost, the hope that the law, and the world at large, might in principle be different is foundational to understandings of agency. Even those critiques of international law that portray it as a relentless tool of imperialism tend to be followed by cries for reform, as Mohsen al Attar points out in his chapter.<sup>48</sup> If nothing can change, why bother? There needs to be some *hope* in the changeability of conditions as a precondition for self-determined action, as Theodor W Adorno noted.<sup>49</sup> Such a hope does not need to be grounded in certainty, nor should it wane into wishful thinking.<sup>50</sup> In her history of human rights in the present volume, Kathryn McNeilly approaches hope that way, as a 'latent force with politically transformative potential in the context of restrictive power relations.'<sup>51</sup> Even those who keep their feet firmly on the ground must realise that whatever is (im)possible also depends on dreams and aspirations, as McNeilly also suggests. That is the conscious, grounded hope expressed in the slightly worn slogan of the 1960s: 'Be realistic and demand the impossible.' One need not be an idealistic fool to acknowledge that shifting hopes for whatever *should be* influences what *can be*, and vice versa. Necessity and (im)possibility are modalities unconnected to any object, formed instead through practices, experiences, and expectations.<sup>52</sup>

While introductory lessons of political philosophy teach that something *should not be* only because it *is*, first pages of social psychology teach that assessments of what is bound to be the case (necessary) and what is desirable (just) are in fact closely aligned—whenever one changes, the other follows suit swiftly.<sup>53</sup> Georg Jellinek wrote of the

<sup>45</sup> For a critical appraisal see Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Asser 2010); cf Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 117.

<sup>46</sup> Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166; David Kennedy, 'Primitive Legal Scholarship' (1986) 27 *Harvard International Law Journal* 1.

<sup>47</sup> See above notes 10–11 and accompanying texts.

<sup>48</sup> Al Attar, in this volume.

<sup>49</sup> Theodor W Adorno, *Minima Moralia: Reflections from Damaged Life* (EFN Jephcott tr, Verso 1974) 97–98 (s 61). See in further detail, Tilo Wesche, *Adorno: Eine Einführung* (Reclam 2018) 187–95.

<sup>50</sup> Adorno (n 49).

<sup>51</sup> McNeilly, in this volume.

<sup>52</sup> Luhmann (n 1) 44; cf Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press 1973) 283.

<sup>53</sup> Vicky M Wilkins and Jeffrey B Wenger, 'Belief in a Just World and Attitudes Toward Affirmative Action' (2014) 42 *Policy Studies Journal* 325.



normative force of the factual in that vein, basing the origins of positive law and legal obligation on the human tendency to infer norms from recurring events.<sup>54</sup> More recent social psychological research confirms peoples' strong desire to live in a world that is in principle just, and that this is a world in which things appear to happen for a reason—hence the human inclination to explain, and in fact also justify, whatever has happened.<sup>55</sup> The longing for reasons—both causal and normative—even increases when certain conditions otherwise seem all too brutal. Rather than leading to increased contestation by the disadvantaged, glaring levels of inequality within societies have often evoked stronger justifications of the root conditions. Even those who drew (or rather: were dealt) the short straw may find it easier to blame themselves than the system whose structure and levers lie beyond reach.<sup>56</sup> Exposing contingencies in the law, and the ways in which the law partakes in shaping unjust outcomes, might challenge acceptance that the current situation is desirable and unchangeable.

This leads me to a still more principled argument on how to think about the pursuit of progressive change in a non-naïve fashion and the role that the search for contingency can play in this regard. In the wake of Marx, a theory of justice must aim at a *political* understanding of the economic conditions in order to oppose their appearance as natural and necessary—'a fate beyond man's control'.<sup>57</sup> Those conditions, for Marx, must first be made transparent, and most of his travails were dedicated to precisely that purpose. A critical theory of justice starts with a radical realism about the conditions of exploitation and injustice before attempting to strategise about their transformation.<sup>58</sup>

How that transformation might happen is of course the golden question. One common approach would be to postulate normative demands to which reality should simply adjust without further ado. That is clearly not the approach of critical theory, whose agenda would at the very least include the question of why such demands have not yet been met, a question which tends to be quite revealing. Nicholas Mulder and Boyd van Dijk, for instance, ask in their chapter why it took so long for starvation to become a war crime, exposing British and US resistance against such a norm.<sup>59</sup> Matthias Goldmann, in turn, shows how an overly narrow conception of human rights made them of little use in countering austerity policies imposed by the International Financial Institutions.<sup>60</sup>

<sup>54</sup> Georg Jellinek, *Allgemeine Staatslehre* (Wissenschaftliche Buchgesellschaft 1960) 337–40. See in further detail Nicoletta Bersier-Ladavac, Christoph Bezemek, and Frederick Schauer (eds), *The Normative Force of the Factual: Legal Philosophy Between Is and Ought* (Springer 2019).

<sup>55</sup> John T Jost, 'A Quarter Century of System Justification Theory: Questions, Answers, Criticisms, and Societal Applications' (2019) 58 *British Journal of Social Psychology* 263; Gary Blasi and John T Jost, 'System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice' (2012) 94 *Ideology, Psychology, and Law* 1119.

<sup>56</sup> John T Jost and others, 'Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced System Justification among the Disadvantaged' (2003) 33 *European Journal of Social Psychology* 13.

<sup>57</sup> Rainer Forst, 'Gerechtigkeit nach Marx' in Rainer Forst, *Normativität und Macht* (Suhrkamp 2015) 171–85.

<sup>58</sup> See Theodor W Adorno, *Negative Dialektik* (Suhrkamp 2003) 29, 354.

<sup>59</sup> Mulder and van Dijk, in this volume.

<sup>60</sup> Goldmann, in this volume.

## V. Pathways of transformation

The agenda that I see behind the search for contingencies in the path of international law forms part of a critical tradition devoted to the high-flying aim of emancipatory politics. The search for contingencies involves taking the gamble that at least occasionally such contingencies will be revealed, and that their exposure is important to critical theory's aim, be it in a marginal and mediated fashion. How so? I see two main pathways of transformation. They are rooted in idealism and materialism, where idealism's gist is still best captured, albeit crudely, in Hegel's famous dictum that 'once the realm of imagination has been revolutionised, reality will not withstand',<sup>61</sup> and materialism is captured in Marx's equally crude and famous retort that 'philosophers have only interpreted the world, in various ways. The point, however, is to change it.'<sup>62</sup> While it has clearly been a central aim of critical legal thought to transcend this distinction, its success on this count is debatable.<sup>63</sup> In any event, both pathways continue to offer direction for transformation.

The first pathway connects to constraints that arise from how action in the present is held captive by dominant knowledge, consciousness, and imagination. This notably includes knowledge about the modalities of past developments, their (im)possibilities. The project of revealing contingency places itself at a distance from the present in order to denaturalise and critique it. It thus enlarges the present sense of possibility, hoping to open up a different future, as Janne Nijman elaborates in her chapter. The task has purpose because this just 'cannot be how the world was meant to be', as she puts it with reference to Philip Allott.<sup>64</sup> And it is an important task not the least because 'once [collectively] desired effects fail to happen and refuse to come into the world, the fact that they were originally counted on is likely to be not only forgotten but actively repressed'.<sup>65</sup>

The necessity and (im)possibility of certain developments depend on the observer and the history she writes out of an entangled present—histories that can open up and close down the realm of possibility.<sup>66</sup> As Emma Stone Mackinnon notes in her chapter on the legacy of the Algerian Revolution, 'contingency arises in the question of how the past will be remembered and made relevant for the future, and in which intellectual legacies will be carried forward and which will be left behind'.<sup>67</sup>

Kevin Crow likewise illustrates how perceptions of possibility are shaped through shifting discursive structures, in his case with regard to the 1955 Bandung Conference and

<sup>61</sup> GWF Hegel, *Briefe von und an Hegel, Band 1: 1785 bis 1812* (Johannes Hoffmeister ed, Meinert 1952) 253, 'ist das Reich der Vorstellung revolutioniert, so hält die Wirklichkeit nicht aus' (my translation).

<sup>62</sup> Karl Marx, 'Theses on Feuerbach' in Karl Marx, *Selected Writings* (Lawrence H Simon ed, Hackett 1994) 98, 101 (Thesis XI).

<sup>63</sup> See David Trubek, 'Where the Action is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 609. Trubek also pointed out that critical legal theory has remained vague in its account of how change should happen.

<sup>64</sup> Nijman, in this volume, with reference to 'Review Essay Symposium: Philip Allott's *Eunomia* and *The Health of Nations*: Thinking Another World: "This Cannot Be How the World Was Meant to Be"' (2005) 16 *European Journal of International Law* 255.

<sup>65</sup> Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* (Princeton University Press 1977) 131; also quoted in Fuad Zarbiyev, 'A Genealogy of Textualism in Treaty Interpretation' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 251, 267.

<sup>66</sup> dos Reis, in this volume, on the contingency of the observer.

<sup>67</sup> Mackinnon, in this volume. cf Christopher Tomlins, 'How Autonomous is Law?' (2007) 3 *Annual Review of Law and Social Science* 45, carving out the implicit assumption of relating law's autonomy to societal context, and suggesting to instead relate it to both justice and, notably, memory.

its reception in major English-language newspapers like *The Times*. ‘Much of Bandung’s contingency’, Crow writes in his chapter, ‘does not rest on the event itself, but on how the event was used by future actors.’<sup>68</sup> A lot of recent historical work has been motivated precisely by that ambition, wanting to account for alternatives that are suppressed in the forgetful conceptions that operate in the past and present.<sup>69</sup> Many chapters take aim at such dominant, hegemonic visions that overshadow alternative possibilities, also targeting more general modes of thought. Justin Desautels-Stein draws attention to underlying structures that shape thinking about sovereignty—the analogy to property, for example.<sup>70</sup> And Frédéric Mégret focuses on the regime of border control, drawing out the ‘epistemological limitations that concretely bound our legal imaginations’ and recalling that ‘freedom of movement was once the default assumption in international law.’<sup>71</sup>

But few authors—and none in the present volume—would argue that merely raising awareness is enough to do the job, let alone that writing history on its own could enact social change. Too many are the constraints working on any actor. It is also clear that actors may not be constrained by ignorance but instead may act against their better judgement.<sup>72</sup> Working on awareness, in short, may be beside the point. Stronger still, as Fleur Johns demonstrates in her contribution, upholding beliefs in the possibilities of making the world differently may facilitate the conservative and stabilising forces that work in the meantime. Such beliefs may end up obscuring the underlying dynamics guaranteeing that the haves come out ahead.<sup>73</sup> Geoff Gordon warns in a similar fashion in his chapter that ‘the normative affirmation that it could have been otherwise upholds material commitment to the actually-existing distribution of goods that it supports.’<sup>74</sup> He suspects moreover that the agenda behind the search for contingency resuscitates an enlightenment conception of the subject who can simply act on the world. And Johns draws attention to all the ‘stuff around the world’, that prescribes quite physically what can and cannot be done.<sup>75</sup> One might add to this the toll of the enlightened subject’s action on the natural world, that endangers the bare conditions of life.<sup>76</sup>

Those points are well taken. Whether the recovery of contingency is a valuable practice depends on the reasons that obstruct a better reality. For the idealist, it is enough that at least occasionally those reasons include the suppression of alternatives that render the present all too natural, necessary, and just. For the materialist, it is the monolithic reality that a

<sup>68</sup> Crow, in this volume.

<sup>69</sup> cf Stefan-Ludwig Hoffmann, ‘Human Rights and History’ (2016) 232 *Past & Present* 279, 307; Christopher Tomlins, ‘“Be Operational, or Disappear”: Thoughts on a Present Discontent’ (2016) 12 *Annual Review in Law and Social Science* 1, 2 arguing that ‘[l]egal history fulfills its responsibility by undertaking a dual task, of recovery and rejection—the recovery of memory and right, the rejection of regimes of interpellation’.

<sup>70</sup> Desautels-Stein, in this volume.

<sup>71</sup> Mégret, in this volume.

<sup>72</sup> Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 *Modern Law Review* 57, 75, ‘So the point is not to clear up delusions, but to bring out the effects of action, including action “against better knowledge”, with reference to Peter Sloterdijk, *Critique of Cynical Reason* (University of Minnesota Press 1988) 5.’

<sup>73</sup> Johns, in this volume.

<sup>74</sup> Gordon, in this volume.

<sup>75</sup> Johns, in this volume.

<sup>76</sup> Anna Grear, ‘Towards “Climate Justice”? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy’ (2014) 5 *Journal of Human Rights and the Environment* 103.

recovery of contingency may discard, instead showing cracks and contradictions that, too, may support a hope in the changeability of conditions.<sup>77</sup>

## VI. *Plus ça change*

I now turn from the agenda underpinning the search for contingency, and from how such a search might possibly make a difference in the present for a different future, to questions that arise when conducting such a search in practice. The current section focuses on what might actually have bent the path of international law in a different direction. The analytic difficulties in particular concern time-frames and the distance one takes from the law. The following sections then pursue the question of where to locate contingency inside and outside the law (VII) and how to convey such contingency narratively (VIII).

Several authors in the volume note that the law may have looked differently for a moment, only for it to then regain its tracks: *plus ça change, plus c'est la même chose*. Josef Ostránský argues in his chapter that it was like a decision pulled out of thin air to protect foreign investors' legitimate expectations as part of the guarantee of fair and equitable treatment.<sup>78</sup> The leading precedent making that claim was soon contradicted and, overall, there is nothing necessary about these legal developments, according to Ostránský. He argues further, however, that if investors' interests had not been accommodated in this way—as part of the guarantee of fair and equitable treatment—they would nonetheless have been accommodated by other means.<sup>79</sup> Even if the law had been a bit different, its effects would have been the same. Silvia Steininger and Jochen von Bernstorff argue similarly in their chapter on the extension of human rights protections to corporations. '[T]he transformation of corporate interests into human rights was a contingent development', they show with emphasis on three critical junctions. But the pattern fits all too well with the increasing dominance of neo-liberalism since the 1980s.<sup>80</sup>

The effects of what appears like a plausible alternative fade in the *longue durée*. Kathryn Greenman highlights in her chapter how Latin American countries successfully resisted the codification of state responsibility for the treatment of aliens in the 1930s and that international law developed to affirm such responsibility regardless. As long as resistance fails to break through 'international law's structural biases and fails to work against fragmentation, it is unlikely to effect change', Greenman notes.<sup>81</sup> While the UN Convention of the Law of the Sea (UNCLOS) is often hailed as a lasting legacy of the New International Economic Order (NIEO), Alex Oude Elferink notes that much of that legacy was undone by the implementation agreement concerning the relevant Part XI of the Convention. He also carefully argues that little would have changed even without such an agreement.<sup>82</sup>

It may further be the case that plausible alternatives initially welcomed would have produced undesirable consequences down the line. In an earlier piece on counterfactual

<sup>77</sup> cf Ingo Venzke, 'The Practice of Interpretation in International Law: Strategies of Critique' in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP forthcoming).

<sup>78</sup> Ostránský, in this volume.

<sup>79</sup> *ibid.*

<sup>80</sup> Steininger and von Bernstorff, in this volume.

<sup>81</sup> Greenman, in this volume.

<sup>82</sup> Oude Elferink, in this volume.

histories—which can be broader, more varied than queries into contingency—I have asked what would have happened if the International Court of Justice (ICJ) had accepted its jurisdiction in *South West Africa*. According to John Dugard, this would have ended apartheid about ten to fifteen years earlier, not because a judgment would have worked miracles on South Africa, but because it would have swayed the United States and United Kingdom to no longer prevent the Security Council from taking meaningful action.<sup>83</sup> The judgment would arguably have tipped developments towards economic sanctions, at least earlier than 1986.<sup>84</sup> The assumption is that the Court's judgment on the merits would have condemned South Africa and vindicated the applicants. But that is far from certain. Judge Jessup, who voted in favour of the Court's jurisdiction and followed the applicants' argument to quite some extent, notably denied one of their most crucial substantive claims—that there is an international legal norm prohibiting differential treatment based on group membership (ie, race).<sup>85</sup> Whereas it was indeed unlikely for the Court to decline its jurisdiction in 1966, more would have had to change for a decision on the merits to favour the applicants. If the Court had accepted to exercise its jurisdiction, it is likely that this alternative would have led to an outcome even worse than the fiasco of 1966, namely letting South Africa off the hook on the substance of its claims, not on the technicality of jurisdictional competence.

In her contribution to the present volume, Saïda El Boudouhi works with the tension between thinking about big changes that would certainly have left their mark and the aim to learn something about the law as it is. She notes that it is more productive, but also 'more challenging to imagine "small tweaks or adaptations"' rather than big overhaul.<sup>86</sup> Her focus rests on the ICJ's close decision in *Barcelona Traction* to consider what impact it might have had on the development of international investment law. What if—quite possibly—Belgium's standing had been affirmed? A tweak with some likely repercussions indeed.

Whether a specific change in the law makes a difference for the course of international law is surely related to the pathways of transformation I discussed in the preceding section. It is difficult for any single decision to make more than a dent in the long run. Had the arbitral tribunal in *AAPL v Sri Lanka* not been the first to affirm the foreign investors' standing on the basis of the underlying investment treaty, the next tribunal around the corner would likely have done so.<sup>87</sup> What matters is a change in the structures of discourse that distribute the chances for any claim about the law to succeed—those structures are stabilised by that

<sup>83</sup> Comment made at the symposium, 'A Court for the World? Trust in the ICJ 50 years after South West Africa' (The Hague, 30 November 2016). See in further detail Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 *Asian Journal of International Law* 403.

<sup>84</sup> This is when the Security Council actually took meaningful action, including economic sanctions—a whole forty years after the onset of apartheid and twenty years after the Court's *South West Africa* judgment. See 'The Question of South Africa', UN SC Res 591 (28 November 1986).

<sup>85</sup> *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) (Judgment of 18 July 1966) Dissenting Opinion of Judge Jessup [1966] ICJ Rep 6, 325, [432]-[433]. cf Ingo Venzke, 'The International Court of Justice in the Battle for International Law: Colonial Imprints and Possibilities of Change (1955–75)' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle For International Law* (CUP 2019) 235.

<sup>86</sup> El Boudouhi, in this volume.

<sup>87</sup> There is notably a wide range of determination between rational design and accidental evolution, pace: Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 11. Compare the critique by Ntina Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale' in John D Haskell and Akbar Rasulov (eds), *New Voices and New Perspectives in International Economic Law*, European Yearbook of International Economic Law Special Issue (Springer 2020) 37, 51. Also see Muthucumaraswamy Sornarajah, 'Power and Justice in Foreign Investment Arbitration' (1997) 14 *Journal of International Arbitration* 104.

mix of ideas and material constraints.<sup>88</sup> Quite a few chapters assume that change is unlikely to come from within the law and must instead be sought elsewhere.

## VII. Contingency outside and inside legal practice

It should not be a surprising observation that the law and its development are largely shaped by conditions that the law does not itself control—neither in treaty-making, in the practice of adjudication, nor in other instances. In the search for contingent developments that might have shifted the course of international law, one may well be thrown back onto distributions of power in their material as well as ideational manifestations. It is only fitting that the pathways of transformation also account for developments in the past. So Ostránský is in good company when he concludes that real change in the law is only possible if the underlying political economy were to change. Nor is Amanda Alexander alone with her chapter in the present volume that targets the narratives that tend to be told about international humanitarian law, highlighting those narratives as the constraints that circumscribe the realm of possibility.<sup>89</sup>

Arguments such as those of Ostránský and Alexander, while highly plausible, may however underrate the degree to which the law itself matters in shaping the conditions of which it is part. There is even a risk that responsibility for transformative action dissipates between domains of life and related academic disciplines, between law and politics, for instance. It cannot always be the respective other who should do something to face the recalcitrant reality. It is most alarming—though not uncommon, alas—for legal scholarship to relegate questions of possibility to politics and to the almost mythical, if not deified, choices of sovereign ‘States’ (typically with that capital ‘S’). It is paradoxical, too. Who, if not (international) lawyers, would be better placed to appreciate the degree to which the law structures those choices, through the constraints the law imposes and the possibilities it offers?

One might still say, as Hegel did in English translation, that international law is ‘tainted by contingency’ because it ‘always depends on particular sovereign wills.’<sup>90</sup> But one would then learn little about the law’s contingency unless the query extended into the vicissitudes of sovereign will. The translation is important here because the German original speaks not of contingency (*Kontingenz*), but of *Zufälligkeit*, whose literal translation is ‘coincidence’—something quite different.<sup>91</sup>

There is a still deeper problem that troubles the practice of contextualising legal developments. Placing the law in relation to its context may put in motion a line of argument

<sup>88</sup> For such an understanding of legal interpretation, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 40–49.

<sup>89</sup> See Alexander, in this volume, for the argument centred on international humanitarian law, as well as Nijman, in this volume.

<sup>90</sup> GWF Hegel, *Grundlinien der Philosophie des Rechts* (Suhrkamp 1986) 500 [§333]. On this understanding of contingency in international law also see dos Reis and Delic, both in this volume.

<sup>91</sup> For the original see Hegel (n 90), ‘Die Kantische Vorstellung eines ewigen Friedens durch einen Staatenbund ... setzt die *Einstimmigkeit* der Staaten voraus, welche auf moralischen, religiösen oder welchen Gründen und Rücksichten, überhaupt immer auf besonderen souveränen Willen beruhe und dadurch mit Zufälligkeit behaftet bliebe’ (italics in original). It is also particularly in English language literature that contingency sometimes slides into chance. In other languages that I read it is not possible to say, as is perfectly fine in English, that something is ‘contingent on’ something else, which only expresses a relationship of dependence but says nothing about possibilities.

that is bound to find law's fateful determination in that context.<sup>92</sup> It may be compelling and insightful, for example, to tie legal developments to the rise of neo-liberalism to thereby expose and critique neo-liberalism's trenchant operation. But the possibility of alternative legal arrangements tends to get lost, lest the context was to change.<sup>93</sup> Also under the spell of neo-liberalism the law continues to be riddled with tensions. The law remains to some degree pliable, not least because what neo-liberalism demands from the law is not so straightforward. Struggles on the inside of the law about what to do with those demands must be part of the story.<sup>94</sup> No context speaks for itself, nor are its boundaries given—questions of what counts as context and how to read it are crucial sites of contingency, of politics, and of intense academic debate.<sup>95</sup> Exactly the same could also be said about what counts as law, adding yet another layer to the indeterminacy of the context.<sup>96</sup> Historical anthropology has made that point beyond refute, also in the field of international law.<sup>97</sup>

It is for instance common to read the 1977 Additional Protocol I (API) to the Geneva Conventions, which ended up internationalising 'armed conflicts in which people fight against colonial domination or alien occupation and against racist regimes in the exercise of their right of self-determination',<sup>98</sup> against the background context of anti-colonial struggle. Emma Stone Mackinnon demonstrates in her chapter, however, that the outcome of API was contingent on lawyers' battles over how to read that background. Legal positions varied widely, also among those vested in anti-colonial struggles. Mackinnon thus notes more generally that '[l]aw is not simply determined by its context, but is itself a site for argumentation over the meaning of that context.'<sup>99</sup>

It may occasionally be that the law meets its fateful determination in its context, which is tantamount to saying that, in that moment, the law has no autonomy or normativity to speak of.<sup>100</sup> That is the case when decisions are legally groundless, as Michele Tedeschini argues in his contribution with the example of the *Tadic* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>101</sup> For Tedeschini, this was an unprecedented decision—it was the first that the ICTY rendered and the first to assess the legality of the UN Security Council Resolution establishing the ICTY. Unprecedented as the decision was, Tedeschini shows, it was next to necessary as judges fell back on how they saw their role in the history of international criminal law, which seemed to leave them with no choice.<sup>102</sup>

<sup>92</sup> See Painter, in this volume.

<sup>93</sup> For an insightful account where, however, contingency gets lost, see Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).

<sup>94</sup> This resonates with Justin Desautels-Stein's argument to not reduce the law to its context but to look at the legal process instead (in this volume), as well as Filipe dos Reis' distinction between contingency in origin and as origin (in this volume).

<sup>95</sup> See Venzke (n 5).

<sup>96</sup> I thank Genevieve Painter for this point in particular, next to many other invaluable comments.

<sup>97</sup> See Madelaine Chiam and others, 'History, Anthropology and the Archive of International Law' (2017) 5 *London Review of International Law* 3. See especially Genevieve Painter, 'A Letter from the Haudenosaunee Confederacy to King George V: Writing and Reading Jurisdictions in International Legal History' (2017) 5 *London Review of International Law* 7.

<sup>98</sup> Art 1(4).

<sup>99</sup> Mackinnon, in this volume.

<sup>100</sup> cf Koskeniemi (n 31) 216, arguing that the law, as a normative phenomenon, cannot just be reduced to its context. See more generally, Christoph Möllers, *Die Möglichkeit der Normen—Über eine Praxis jenseits von Moralität und Kausalität* (Surhkamp 2016).

<sup>101</sup> Tedeschini, in this volume.

<sup>102</sup> *ibid.*

The pseudo-formalist position that legal arguments determine a legal decision is surely difficult to maintain, but reaching through the law for the real underlying reasons may dismiss the autonomy of the law all too quickly. The law tends to have its own reasons that are no less real, its own realm of possibility.<sup>103</sup>

### VIII. Conveying contingency

I have suggested that inquiries into what happened and what else could have happened are indeed two sides of the same coin.<sup>104</sup> Following this analogy, however, it is impossible to simultaneously see both sides of the coin without further ado. We can keep turning it around, but whenever we look at one side, it is difficult to also have a sense of the other. And when we flip the coin, the side of contingency tends to land face down, like all the historical material once it is locked into and arrested in writing. As Moyn notes, contingency tends to be banished narratively.<sup>105</sup> No one knew that better than Musil, whose *dramatis personae* remained fully invested in organising Kaiser Franz Josef's approaching 70th anniversary in 1918, oblivious to the imminence of the First World War as well as the Kaiser's natural death in 1916. The novel remained unfinished. Musil had sketched several endings and remained unsatisfied with each: How could he close his opus without undercutting the power of all previous pages? How could he end without imposing a direction on everything he had written before?

I have been particularly interested in contingencies in the history of international economic law, including the history of the International Trade Organization (ITO).<sup>106</sup> The ITO's statute was backed by the United States and signed in 1948 by fifty-three states at the time (for comparison, the UN counted fifty-eight members). Will Clayton, chairman of the closing conference in Havana had crowed that '[t]his may well prove to be the greatest step in history toward order and justice in economic relations among the members of the world community and toward a great expansion in the production, distribution and consumption of goods in the world.'<sup>107</sup> It did not happen, the ITO never saw the light of day.

My point here is that existing histories repeatedly omit the possibility of the ITO's success. Douglas Irwin recently offered a most informed account, piling up reasons for the ITO's fate—it could not have been otherwise. What happened against the expectations of almost all actors at the time is a given for Irwin: The US Congress did not ratify the statute, other countries turned away, and the ITO's statute ended in the dustbin of history.<sup>108</sup> The actions of the ITO's most ardent supporters are tragic as they approach the organisation's preordained downfall. In contrast, as Irwin moves up to the 1990s, the establishment of the North Atlantic Free Trade Agreement (NAFTA) comes as a surprise.<sup>109</sup> But contingency is

<sup>103</sup> Venzke (n 77); cf Ino Augsberg, 'Some Realism about New Legal Realism: What's New, What's Legal, What's Real?' (2015) 28 *Leiden Journal of International Law* 457.

<sup>104</sup> Tucker (n 12).

<sup>105</sup> Moyn, in this volume.

<sup>106</sup> I offer a small account of its history as a plausible counterfactual in Venzke (n 83) 424–28.

<sup>107</sup> Statement by the Honourable William L Clayton at final plenary session, on 23 March 1948, quoted in Richard Toye, 'The International Trade Organization' in Martin Daunton and others (eds), *The Oxford Handbook on the World Trade Organization* (OUP 2012) 85, 95.

<sup>108</sup> Douglas A Irwin, *Clashing Over Commerce: A History of US Trade Policy* (University of Chicago Press 2017) 502–505.

<sup>109</sup> *ibid* 636–42.



lost again because early on Irwin foreshadows what we know—NAFTA was established. He thus conveys no sense that it was possible, perhaps even quite likely, that NAFTA would not be established. The certainty that is portrayed about NAFTA's establishment makes those who did not see it coming look a bit foolish and their anxieties overblown. If the first instance is rendered tragic, the second is comic.<sup>110</sup> Contingency is lost twice.

Moyn claims in his chapter that exposing contingency requires a markedly different style, a style of side-shadowing, which Musil mastered, as opposed to the much more common fore- and back-shadowing that is inherent in Irwin's account as in many others. The technique of side-shadowing recalls Musil's passage quoted above: '[i]f we look left and right, we see an overwhelming mass of important events without recognizable direction.'<sup>111</sup> One way of achieving a similar effect may be to dwell on particular events, rather than 'engulf[ing] events into international law's evolutionary narratives,' as Genevieve Painter writes in her chapter.<sup>112</sup> But as Fleur Johns, Richard Joyce, and Sundhya Pahuja know from their efforts in 'eventing international law,' that is easier said than done.<sup>113</sup> Musil despaired over how to end his novel, but he had the literary luxury of keeping it unfinished. Can we end an inquiry into the contingency of international law's past without taking a stance on what could (not) have happened—reviving past expectations, perhaps, and showing beliefs in possibility? We then indeed feel the strictures of our professional standards and expectations.<sup>114</sup> And other than in fiction, there are things we know to have happened in the world's non-fictional history.

Fiction may, however, offer ways of breaking from narratives that are embedded in international law, as Alexander demonstrates in her chapter. She resorts to Cixin Liu's science fiction trilogy to show what a non-humanist narrative about international humanitarian law might look like, thus replacing the two-sided coin with a different currency altogether.

## IX. Conclusion: Three locations of contingency

'How not to run from a history that we cannot make?' Isabel Feichtner recently asked echoing the historian Heinz Dieter Kittsteiner.<sup>115</sup> The question draws together the seemingly defeatist recognition that history is beyond reach with the wavering hope that there may still be something left to do. It is not a suggestion to run (where to?) but an invitation to stand, stay, and strategise. The present volume, as I see it, translates this invitation into the search for pockets of possibilities, tucked away by rationalising (legal) histories that

<sup>110</sup> For these modes of emplotment and their narrative effects, White (n 52); also see Painter, in this volume.

<sup>111</sup> Musil (n 7) 182.

<sup>112</sup> Painter, in this volume, referring to Walter Rech, 'International Law, Empire, and the Relative Indeterminacy of Narrative' in Martti Koskeniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (OUP 2017) 74; cf William H Sewell Jr, *Logics of History: Social Theory and Social Transformation* (University of Chicago Press 2005) 100–103, offering a theoretically rich conception of events as 'the conceptual vehicle by means of which historians construct or analyse the contingency . . . of social life'.

<sup>113</sup> Fleur Johns, Richard Joyce, and Sundhya Pahuja, 'Introduction' in Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 1.

<sup>114</sup> Painter, in this volume. cf Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019); Jean d'Aspremont, *The Critical Attitude and the History of International Law* (Brill 2018).

<sup>115</sup> See Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?' (2016) 29 *Leiden Journal of International Law* 979, 979; Heinz Dieter Kittsteiner, *Naturabsicht und unsichtbare Hand. Zur Kritik des geschichtsphilosophischen Denkens* (Ullstein 1980).

tend to be so closely intertwined with the operation of power at any given moment.<sup>116</sup> ‘The struggle of man against power is the struggle of memory against forgetting’, Milan Kundera averred.<sup>117</sup>

I see three such sites of struggle to recover contingency in the path of international law, each built on the other. First is the practice of contextualising the law, which works against its abstract rationalisation, its inherent logic that lifts the law above and beyond politics. The operation of the law hardly has a place for its own uncertainty. While legal histories could take greater distance from that theatre of the law, often they do not, instead offering linear histories that arrive at the present without much difficulty, laden with secondary sources that support each other in a self-referential fashion. Contextualising the law deprives it of its seemingly unsituated rationality, making it messy and malleable. Second, however, law’s contextualisation must resist treating the context as fatefully determining the law. It should neither consider that context as a given, nor law’s relation to it as somehow evident. A key site of contingency that tends to be glossed over all too quickly is the struggle over what counts as context, what to make of it; and what counts as law to begin with. The context is determinative in the sense that it sets bounds to what was (im)possible. Not everything could be done within and against that context, made of that context. But within those bounds, possibilities have often varied quite significantly. The third site of struggle lies within historiography itself and the way in which it contributes to the creation of (im)possibility. It includes the other two: what was possible in international law within and against its context?

Situating contingency in the path of international law struggles against forgetting what was the case and what may still be.<sup>118</sup> All of that in the ‘[h]ope that fate and power will not have the last word.’<sup>119</sup>

<sup>116</sup> It would indeed be a serious lack of self-reflexivity if inquiries into the contingency of international law did not consider their own relationship with power, as Johns warns in the present volume.

<sup>117</sup> Milan Kundera, *The Book of Laughter and Forgetting* (Michael Henry Heim tr, Knopf 1981) 2.

<sup>118</sup> Compare Michelle Staggs Kelsall, in this volume, arguing that the refusal to compromise on the UN Code of Conduct on Transnational Corporations has kept alive an alternative that would otherwise have been lost.

<sup>119</sup> Theodor W Adorno, ‘Spengler After the Decline’ in Theodor W Adorno, *Prisms* (Samuel and Shierry Weber tr, first published 1967, MIT Press 1983) 51, 72.