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The Path not Taken

On Legal Change and its Context

Ingo Venzke[*]

1. Introduction

Legal change must be understood in relation to its context. But how? It may happen that broader contexts fatefully determine legal change. As a general claim, however, such a view is hardly tenable. Curiously enough, it is unrealistic in its denial of law's relative autonomy, as I will argue. Legal change must be related to contexts without reducing the former to the latter. The question is not whether contexts matter, but rather, how and to what extent? And what counts as context?

An introductory example may illustrate the question and sharpen the discussion. I take it from the field of European human rights law but might have chosen other fields just as well. Change has been pervasive there, ranging from the now well-settled interpretation that the prohibition of torture includes the right of non-refoulement to the more recent interpretation that the right to life includes a right of protection from detrimental environmental effects.[1] Under the impact of jurisprudence from the European Court of Human Rights (ECtHR), the law has changed significantly, even though its primary text—the European Convention of Human Rights (ECHR)—has remained largely unchanged since it entered into force in 1953. Only the First Protocol to the Convention, which entered into force in 1954, is relevant for the more specific example.[2] Its Article 1 provides that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'.

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[1] On the changing interpretation of the prohibition of torture (Article 3, ECHR) see Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 Max Planck Yearbook of United Nations Law 205; Ezgi Yildiz, 'A Norm in Flux: The Development of the Norm Against Torture Under the European Convention from a Macro Perspective' (2016) iCourts Working Paper Series No 45. On the right to life (Article 2, ECHR) see Christina Binder and Haris Huremagić, 'Menschenrechtsverpflichtung zur Reduzierung von Treibhausgasemissionen' (2021) 1 Nachhaltigkeitsrecht 109; Dimitris Xenos, 'Asserting the Right to Life (Article 2, ECHR) in the Context of Industry' (2007) 8 German Law Journal 231, who focuses on *Öneryıldız v Turkey* App no 48939/99 (ECtHR, Grand Chamber, 30 November 2004), esp paras 89ff.

[2] For an overview of the protocols, see <www.echr.coe.int/Documents/Archives_evolution_Convention_ENG.pdf> accessed 3 November 2022.

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In a recent contribution, Silvia Steininger and Jochen von Bernstorff examine the gradual extension of human rights for corporations under the ECHR. Drawing on ideas from historical institutionalism, they focus on three critical junctures in that legal development.[3] First, they point to discussions about whether the right to property should also extend to *legal* or only *natural* persons, and whether it should be included in the Convention at all, which ultimately led to the right's relegation to the First Protocol. Secondly, Steininger and von Bernstorff turn to the ECtHR's judicial practice, which has, since the 1980s, extended the right to property to include far-reaching compensation, for example for reputation loss or decline in business clientele.[4] The Court has also allowed corporations to claim rights under the Convention generally, for instance under Article 6 on fair trial, thereby further assimilating legal to natural persons. Thirdly, the authors show how these developments have paved the way for extensive property protection in international investment law. These legal changes were contingent rather than necessary, they write. But the turns at each critical juncture did make good sense. Treaty-making in the 1950s was determined by the strictures of the Cold War and the relevant court judgments of the 1980s took off together with the rise of neoliberalism. If the legal developments were not necessary, how then to understand their contingency? How to turn claims about changes in the law's context into compelling understandings of legal change.

The example highlights what an understanding of legal change must achieve and where it can go wrong. First and foremost, the development of the law must indeed be understood in relation to broader contexts without reducing it to them. The present volume's editors aptly observe that the law 'will often reflect political constellations of its time … [but] it is not merely the mirror image of politics'.[5] When the judges of the ECtHR started granting far-reaching compensation to corporations, they acted in accordance with the tides of their time and arguably in their interest, but it would come at a loss of understanding if their actions were reduced to nothing but an expression of neoliberal conditions or institutional self-aggrandizement, just as it would be unconvincing to understand their actions as

[3] Silvia Steininger and Jochen von Bernstorff, 'Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate "Human" Rights in International Law' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (OUP 2021) 280–95. On the notion of critical juncture, see Giovanni Capoccia and Daniel R Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341; Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 International Organization 367; Thomas Rixen, Lora Anne Viola, and Michael Zürn (eds), *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics* (OUP 2016).

[4] With reference to the ECtHR, *Tinnelly & Sons Ltd v United Kingdom* App no 62/1997/846/1052–53 (ECtHR, 10 July 1998); ECtHR, *Stratégies et Communications et Dumoulin v Belgium* App no 37370/97 (ECtHR, 15 July 2002).

[5] Krisch and Yildiz, this volume.

conclusively determined by the law, unaffected by ideological currents and, well, context.

But what is that context? For the editors, it is politics. But what then is politics? In the present contribution, I continue to probe difficulties that arise from putting international law in relation to broader contexts generally, be it political or otherwise. I take contexts to be composed of structures and actions that stand in a co-constitutive relationship. Structures are formed through the actions they stabilize or, the other way around, actors shape the structures that condition them.[6] Depending on particular theoretical traditions, other concepts for context could be system or field.[7] Those parallel traditions understand, as I also do, law as one such system or field. Just as politics is a context for law, law then is a context for politics. For law to be context, it needs to enjoy some relative autonomy from other contexts without being independent of them. A good way of understanding this relative autonomy is to see whether the law offers plausible reasons for its interpretation and development—a point that I will develop more fully.[8] These thoughts come together in thinking of international law as a practice, combining structural conditions with action and a sense for law's relative autonomy.[9]

To further think through how legal change relates to contexts, I build on work that explores contingency in international legal developments. *What was the path not taken?* This will be shown to be a productive question because it advocates for law's non-reductive contextualization. Contingency, I will continue to argue, marks the field of possibility, bordering on necessity on one side and chance on the other. What was possible within contexts and under circumstances as they stood? As the present volume's editors spell out further, international law certainly depends on politics.[10] While there are important variations in how to understand the political context, as the editors also detail, a traditionally important way is to turn to sovereign states and their will. Now, in a crucial passage of his legal philosophy, GWF Hegel writes that international law is 'tainted by contingency' because it 'always depends on particular sovereign wills'.[11] That may be so, but it only expresses

[6] See Anthony Giddens, *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis* (Macmillan 1979); Pierre Bourdieu and Loïc JD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992).

[7] See, respectively, Niklas Luhmann, *Law as a Social System* (OUP 2004); Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 814.

[8] I will expand on this concept in section 3.1. For a circumspect discussion of how to conceive such relative autonomy, see Christopher Tomlins, 'How Autonomous Is Law?' (2007) 3 Annual Review of Law and Social Science 45. From the many specific accounts on this point, see in particular Gunther Teubner, *Recht als Autopoietisches System* (Suhrkamp 1989); Bourdieu (n 7); Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annual Review of Law and Social Science 433.

[9] Tanja E Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in Jean d'Aspremont and others (eds), *International Law as a Profession* (OUP 2017) 287–310.

[10] Krisch and Yildiz, this volume.

[11] GWF Hegel, *Elements of the Philosophy of Right* (HB Nisbet tr, CUP 1991) 368, §333.

a relationship of dependence, not of possibility, unless the inquiry extends into the uncertainties of sovereign will. Could sovereign wills have been different? Why weren't they? In the German original, Hegel does not write of contingency (*Kontingenz*), but of *Zufälligkeit*, whose literal translation is 'coincidence', which is something quite different.[12] Exploring the contingency of international legal developments notably moves on from describing a relationship of dependence on other contexts, which it takes for granted, to ask about alternative possibilities under conditioning contexts. It is thus able to recognize law's relative autonomy, as opposed to just stipulating its rather obvious dependence.

I will continue by situating the question of contingency in the path of international law in response to idealist and realist accounts of legal change, and in reaction to difficulties that Third World Approaches to International Law (TWAIL) encountered when they turned to the possibilities of a different law (section 2). I will then focus on the drive to contextualize legal developments under the impact of political as well as legal realism and the challenges that arise in the practice of doing so (section 3). I then push back against that drive to contextualize legal developments, arguing that such developments not only tend to escape contexts, but that it is often far from clear what counts as context, and what to make of it (section 4). Each section thereby allows me to develop a key concept of my contribution. Whereas section 2 clarifies the notion of *contingency*, section 3 unfolds the idea of law's relative *autonomy.* That idea of autonomy connects, in short, to a distinct mode of justification and to the argument that the law seems to have its own causes that are equally significant as those that realist accounts see at work. Section 4 then expands on the understanding of legal *change* as a shift in argumentative burdens regarding claims about what is (il)legal, encompassing the change in legal reasons for future change. The section continues by asking what would make a difference. What would possibly be *path-breaking*? Is it not that political or economic structures ultimately catch up, and any moment of contingency in law's development flattens out in the long run? While occasionally compelling, I argue that such a view tends to overstate the determinacy of other contexts and underrate the law's side in its co-constitution of other contexts, including the political. But even then, a sense for legal paths not taken gets lost in *ex-post* rationalizations and narrative storytelling. The concluding section 5 returns to the question of what counts as law's context once more. The fundamental choice seems obvious—or is it? Why politics? Or what kind?

[12] GWF Hegel, *Grundlinien der Philosophie des Rechts*, Werke, vol 7 (Suhrkamp 1986) 500 §333: 'Die *Kantische* Vorstellung eines ewigen Friedens durch einen Staatenbund … setzt die *Einstimmigkeit* der Staaten voraus, welche auf moralischen, religiösen oder welchen Gründen und Rücksichten, überaupt immer auf besonderen souveränen Willen beruhe und dadurch mit Zufälligkeit behaftet bliebe.' Especially within the realm of English-language literature, contingency sometimes slides into the concept of chance. In other languages 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.

2. Situating Contingency

Whereas the development of international law is viewed as a progressive unfolding in an *idealist* tradition, a *realist* tradition sees it as a mirror image of power politics. While the former is unconcerned with conditioning contexts, the latter has little patience for formal legal reasoning or claims about law's relative autonomy. Granted, this classic dichotomy has been under pressure. It still reverberates in contemporary debates, however. The contingency of international law has not been an issue for either side, neither for idealists who have embraced a strong teleology, nor for realists who reduced the law to its context of power politics. Taking their cues from political and legal realism, TWAIL scholars then turned to the history of international law not only to deride the law as an instrument of domination, but also to ask about possibilities for its change. They were thus pulled in opposite directions. The stronger their critique of international law as a handmaiden of the powerful, the weaker their claim that the law could change for the better, and vice versa. That is the uptake of situating contingency in international law's development: it demands law's utter contextualization while asking what else was possible within any broader context (C.).

2.1 Idealism

Many accounts of legal change have embraced a strong teleology rooted in religion, rationality, and in beliefs of progress.[13] When legal positivism emerged in the seventeenth century, it ran parallel, but never truly replaced, natural law theories. While, in short, the latter had come to understand the law as given to man, the former has held that law is man-made, subject to changing earthly conditions and political choices.[14] But natural law thinking notably lived on in cross-cutting background assumptions about the inherent rationality of the international legal order and its developments. Even if legal developments were related to historical conditions and concrete practices, it was in the form of an unfolding without relevant actors that would have come with particular interests. Following Samuel Moyn, many modern thinkers seem to 'have done little more than update Leibniz's old

[13] On the religious traces in the notion of progress and its derivative, (sustainable) development, see Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Asser 2010); Jacobus A Du Pisani, 'Sustainable Development—Historical Roots of the Concept' (2006) 3 Environmental Sciences 83.

[14] The work of Hugo Grotius stands out as a bridge between the two approaches and shows that the contrast between them should not be overstated. See also Janne E Nijman, 'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium' in Martti Koskenniemi, Mónica García-Salmones Rovira, and Paolo Amorosa (eds), *International Law and Religion: Historical and Contemporary Perspectives* (OUP 2017).

providentialist view that there is a hidden plan of nature, a cunning of reason, or a history working behind the backs of men, even if God did not author it'.[15]

The influential nineteenth-century Austrian public lawyer Georg Jellinek, for instance, rejected all bases for international law other than the free will of sovereign states. At the same time, however, he saw the law as an expression—objective, rational, and historically situated—of 'European civilized nations' (*Europäische Kulturvölker*).[16] For him, legal developments were those of a continuous, progressive realization of what European civilized nations required. Those nations did not appear, however, as actors with interests, but rather as mediaries of humanity. Such a strong teleology may well have been the common denominator for histories of international law into the twentieth century and beyond. It pictures international law, as Martti Koskenniemi put it, 'as the transformation of humankind's collective experience into a redemptive future'.[17] Even if they became less overt in their Eurocentric and colonialist outlook, later accounts have continued to depict legal change above all as a progressive realization of the will of the international community or the consciousness of humanity as a whole, writing the law's history as a long arch that ultimately bends towards justice.[18]

No plausible theory has survived concerning laws of history that would compel international law down a set path towards a singular future. And yet, several historical renderings continue to be marked by assumptions about a certain teleology, be it inherent in international law generally, or in specific legal doctrines. Since the work of Hugo Grotius, scholars have combined those assumptions with a commitment to positivism. The recent book on *Global Constitutionalism and the Path of International Law* is one case in point—committed to positivism, rejecting both utopianism (idealism) and scepticism (realism), it confidently posits that 'international law is continuously evolving from a modest arrangement to sophisticated institutionalism at its core', and it is quite certain in reading concrete legal developments as an embodiment of this process.[19] While such thinking is arguably most common among international lawyers, it is not alien to adjacent disciplines either. At least some accounts in international relations scholarship bear such an imprint,

[15] Samuel Moyn, 'From Situated Freedom to Plausible Worlds' in Venzke and Heller, *Contingency in International Law* (n 3) 515, 518.

[16] Georg Jellinek, *Allgemeine Staatslehre* (Häring 1914); see Jochen von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics' (2014) 25 European Journal of International Law 977. Others are similar to Jellineck, such as Ernest Nys, *Les origines du droit international* (Castaignes Bruxelles 1894); see

Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender, Anne Peters, and Simone Peter (eds), *Oxford Handbook of the History of International Law* (OUP 2012) 943–70, 943.

[17] Koskenniemi, 'A History of International Law Histories' (n 16) 944.

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

[19] Surendra R Bhandari, *Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World* (Brill 2016), citation at 309.

especially under the impact of the buoyant 1990s. Those who have pictured the establishment of the International Criminal Court (ICC) as the pinnacle in the process of international constitutionalization may serve as a case in point.[20] Wayne Sandholtz has been more careful in his analysis of how norms change but has still linked that change to 'foundational metanorms of international society … that are at the core of *the* liberal Western tradition which is increasingly globalized'.[21] Contingency has been a non-issue. The possibility of alternative paths has not been denied, but if those paths existed, then only as aberrations.[22]

2.2 Realism

Legal and political realists have mounted convincing challenges to claims about the law's inherent rationality and the logics that drive the law's progression. At the turn of the twentieth century, Oliver Wendell Holmes' *The Path of Law* set out the programme of a social scientific study of the law, centred on what institutions with authority are likely to do. To Felix Cohen, abstract formal reasoning was *Transcendental Nonsense*.[23] Like others, they argued in the national setting of the US legal system.[24] Regarding international law, political rather than legal realists moved first. On the brink of the Second World War, EH Carr set out his masterful critique of utopian thinking to expose the 'real basis of the professedly abstract principles commonly invoked in international politics'.[25] He did not deny that actors also pursue normative principles but averred that those principles are typically reflections of self-interest.

After the War, émigré Hans Morgenthau set up the agenda of international relations scholarship in opposition to law and with a loud claim to social-scientific objectivity. In his well-known view, 'politics, like society in general, is governed by objective laws that have their roots in human nature'.[26] 'International Politics, like

[20] For a critical discussion see Theresa Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court' (2012) 10 International Journal of Constitutional Law 1076.

[21] Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (OUP 2007) 21 and 270.

[22] Geoff Gordon, 'The Time of Contingency in International Law' in Venzke and Heller, *Contingency in International Law* (n 3) 162–75.

[23] Oliver Wendell Holmes, 'The Path of Law' (1897) 10 Harvard Law Review 457. See also, in particular, Roscoe Pound, 'Philosophical Theory and International Law' (1923) 1 Bibliotheca Visseriana 71; Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.

[24] They were, however, deeply influenced by the free-law movement (*Freirechtsschule*), see Rudolph von Jhering, *The Struggle for Law* (1915); Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (1913). On the fact of influence, see James E Herget and Stephen Wallace, 'The German Free Law Movement as the Source of American Realism' (1987) 73 Virginia Law Review 399.

[25] Edward Hallett Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (HarperCollins 1946) 87

[26] Hans J Morgenthau, *Politics Among Nations* (6th edn, Peking University Press 2004) 4. In further detail, see Aalberts and Venzke (n 9). Morgenthau's anthropological foundation of realism was soon

all politics, is a struggle for power', he notably continued.[27] Invocations of international law could not bear on state actions, lest they were in sync with the prevailing balance of power. International law was deemed to depend on changing political conditions and bargains to be struck under them. It was reduced to that context with little, if any, autonomy of its own. In the following, I sidestep many of the further developments that political and legal realism has undergone since then, choosing instead to focus on drawing out three main implications for thinking about international legal change.

A first legacy of realist views has been to turn away from the law as a system of rules to instances of practice, to collecting diplomatic acts, treaties, and case law. That was the spirit of Arthur Nussbaum's influential *Concise History of the Law of Nations*, which notably warned against 'the deflecting influence of ideologies and hope'.[28] International law would change to the extent the repository of practice changed. That is as straightforward as it is dissatisfying. Whereas idealist accounts were marked by an overbearing teleology, chronicles of practice had no sense of direction.[29]

A second legacy has then been to write the history of international law as a succession of epochs marked by leading powers. Inspired by Carl Schmitt, who had embraced political realism in a historiographic apology of Nazi geopolitics in his *Nomos of the Earth*,[30] Wilhelm Grewes' *Epochs of International Law* offered an influential account in that vein, where the dominance of one power marks each passing legal epoch.[31] Just as idealists would not espouse a necessitarian view of the law, neither would realists. But they did not have a sense of international law's contingency either or in any event did not convey it. Saying that the law would have been different if states had acted differently under different power relations only proves the point. Such a claim only posits, like Hegel above, a relationship of dependence. But was there any possibility of a different law under the power relations as they prevailed?

The third implication of realism comes with a critical twist and leads to the necessity of providing precisely such an account of contingency. Third World

paralleled by structural reasons, see especially Kenneth N Waltz, *Man, the State, and War. A Theoretical Analysis* (Columbia University Press 1959).

[27] Morgenthau, *Politics Among Nations* (n 26) 31.

[28] See Koskenniemi, 'A History of International Law Histories' (n 16) 960. cf Nehal Bhuta, 'A Thousand Flowers Blooming, or the Desert of the Real? International Law and its Many Problems of History' (manuscript on file with the author, 2021).

[29] cf Walter Benjamin, 'Über den Begriff der Geschichte (1940)' in *Gesammelte Schriften*, vols 1 and 2 (Suhrkamp 1974) 694 (Thesis III).

[30] Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven 1950); in English: Carl Schmitt, *The Nomos of the Earth* (Telos Press 2003).

[31] Wilhelm G Grewe, *Epochen er Völkerrechtsgeschichte* (Nomos 1984); in English: Wilhelm G Grewe, *The Epochs of International Law* (Michael Byres tr, de Gruyter 2000); For a critical discussion, see also Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 European Journal of International Law 369.

Approaches to International Law have pioneered historical work in international law from a critically realist perspective.[32] They adopt a realist approach in rejecting assumptions about international law's gradual unfolding to serve the values of humanity—primarily because it seemed that the Third World was not included in that vision of humanity. They have been strong in exposing the many false universals in Eurocentric scholarship and practice.[33] By highlighting the practices of colonialism, TWAIL scholars have not only exposed the violence vested in international law, or in any event legitimized by it. They have also viewed colonialism as a transformative context, giving agency to both colonized and 'semi-peripheral' states.[34] Similarly, decolonization is depicted as a process of potentially universalizing international law, but primarily as a force that transforms it.[35] While realist in their outlook, however, few TWAIL scholars would give up on international law as an instrument of potential emancipation—not through the law as it stood, nor as it actually developed, but through law as they imagined that it could be.[36]

They thus had to think hard about the change they wanted to see simply because it would not come naturally. As much as they derided international law as a tool of subjugation and exploitation, they believed in its emancipatory potential because, to them, the law was also more than an expression of power-political contexts.[37] While they understood legal change against the background of other contexts, especially of economic structures and action, they recognized law's relative autonomy. They also held a concrete view on necessary agency. They argued that the change that they wanted to see should be brought about by the UN General Assembly, where decolonization had shifted majorities.[38] Perhaps TWAIL's first

[32] James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey Dunoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP 2022). cf Genevieve Painter, 'Contingency in International Legal History: Why Now?' in Venzke and Heller, *Contingency in International Law* (n 3) 44–59, 49.

[33] Gathii (n 32); BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3–27. cf Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 Rechtsgeschichte 152–76, 175, TWAIL has pushed the realization that 'Europe, too, is just a continent with its particular interests and neurosis, wisdom and stupidity'.

[34] See Mohsen Al-Attar, 'Subverting Eurocentric Epistemology: The Value of Nonsense When Designing Counterfactuals' in Venzke and Heller, *Contingency in International Law* (n 3) 145–61.

[35] Anthony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard International Law Journal 1; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (CUP 2014).

[36] See eg Makau W Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31–38; Mohammed Bedjaoui, *Towards a New International Economic Order* (UNESCO 1979). This may be a truism, however, since the statement relates to 'Third World Approaches to International Law'—where an outright rejection of international law may indeed be hard to find. There may be a wider bias because it is easier, surely for international lawyers, to identify those who have engaged with international law rather than argued against it entirely. Painter thus counsels caution: 'Let us not forget the places and the human and non-human lives that would rather be emancipated from international law than emancipated through it.' Painter (n 32) at 59.

[37] eg Bedjaoui (n 36).

[38] Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 Indian Journal of International Law 23.

generation offered an account of international legal change that, in its take on the past and then open future, was overly optimistic. Its turn to history, in any case, has been eye-opening, as it reveals legal change as it should be seen: within the intricate dynamics of situated actors who utilize international law to advance their interests and convictions.

Later generations of TWAIL continued this trajectory but were less pronounced or less hopeful in their take on legal change. It was next to inevitable: the stronger their critique of international law as a tool of relentless domination, the less compelling would be their claims about possibly emancipatory change. If the law did change, then it was deemed superficial, only to update its categories and rules to better serve structural conditions of domination under evolving circumstances.[39] TWAIL scholarship has thus run into thinking hard about contingency in international law, as it has catered to the critical sensibilities both of wanting to show the possibilities of a different law as well as the determining forces that have driven the law down one path rather than another.[40] While both critical sensibilities may point in opposite directions, they are both crucial to keep inquiries about the possibilities of legal change on the terrain of contingency, situated precisely between necessity on one side and chance on the other, without collapsing into either.

2.3 Contingency

Thinking through contingencies in the path of international law probes what else could have happened within 'given' contexts.[41] It bears repeating that I understand contingency to mark the field of what is possible, bordering on necessity, on one side, and chance on the other. It is a modality that does not depend on what actually happens (*vel non*). Whatever happened, while possible, did not become necessary only because it happened.[42] What *is* could also *not be*. Likewise, something is not impossible only because it did not happen. It already merits emphasis, moreover, that contingency and necessity are modalities that are not inherent properties of any development. They are instead formed through experiences and expectations, as well as narrative emplotment, as I will continue to argue in section 4.[43]

In agreement with the present volume's framework, this setup of contingency ties the possibilities of legal change to different actions.[44] It is not unlike Marx who

[39] See the discussion in Al-Attar (n 34).

[40] Yemima Ben-Menahem, 'Historical Necessity and Contingency' in Aviezer Tucker (ed), *A Companion to the Philosophy of History and Historiography* (Blackwell 2009) 120.

[41] For the moment, I will set aside the assumption that contexts are never 'given', i.e. that the circumstances or conditions in which events take place are not fixed or predetermined, see section 4.

[42] Niklas Luhmann, *Kontingenz und Recht* (Suhrkamp 2013) 32–33.

[43] Luhmann (n 42) 44; Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (Johns Hopkins University Press 1973) 283.

[44] Introduction, in this volume at *9, stating that the pathways of change are actor-centric; see also the restatement in the conclusion, at *18.

spoke of co-constitutive structures and actors *avant la lettre* thus: '[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.'[45] Thinking about contingency should be able to cover a lot of common ground.[46] And yet, it has occasionally been the victim of spats between those who want to defend spheres of freedom to act differently and others who challenged the overemphasis of seemingly free-floating actors in support of structural understandings for why things turned out the way they did.[47]

Understanding what else could have happened and what did happen, however, are two sides of the same coin.[48] Only with a keen sense of why things turned out the way they did is it possible to argue about how they could have turned out differently. Both sides of the coin in fact require each other across academic disciplines and theoretical traditions.[49] Nothing is per se novel or controversial about this claim. Still, thinking through the possibility of paths not taken is something that continues to linger in the background. Counterfactuals are often not made explicit or lack plausibility.[50]

While Steininger and von Bernstorff note that the legal changes they examined were contingent, the law's contextualization also revealed why the law developed the way it did. Their example illustrates a general point: the more one looks for contingency, the more it slips away, as Michele Tedescini put it.[51] Or as Genevieve Painter argues, contextualizing the law puts in motion a line of argument that is bound to find the law's fateful determination in that context.[52] Behind every possibility of a different law, a different trajectory of change, stand reasons that have compelled the law down one path rather than another. One question that stands out when putting the search for contingency into practice is thus when to stop looking for the next underlying reason—late enough, I submit, not to exaggerate possibilities that did not exist and early enough not to reduce all actions to

[45] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (Progress Publishers 1934) 10.

[46] Allan Megill, 'History's Unresolving Tensions: Reality and Implications' (2019) 23 Rethinking History 279.

[47] One of the most notorious targets for that latter critique is Niall Ferguson, *Virtual History: Alternatives and Counterfactuals* (Basic Books 1999). On the formative debate between EH Carr and Isaiah Berlin, see Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1; Ingo Venzke, 'Situating Contingency in the Path of International Law' in Venzke and Heller, *Contingency in International Law* (n 3) 3–20.

[48] Aviezer Tucker, *Our Knowledge of the Past* (CUP 2004) 226.

[49] James D Fearon, 'Counterfactuals and Hypothesis Testing in Political Science' (1991) 43 World Politics 169; Philip E Tetlock and Richard Ned Lebow, 'Poking Counterfactual Holes in Covering Laws: Cognitive Styles and Historical Reasoning' (2001) 95 American Political Science Review 829; Tucker (n 48).

[50] Fearon (n 49).

[51] Michele Tedeschini, 'Historical Base and Legal Superstructure: Reading Contingency and Necessity in the *Tadic* Challenge' in Venzke and Heller, *Contingency in International Law* (n 3) 129–44.

[52] Painter (n 32).

a necessary expression of their context.[53] This is nothing other than the domain of history *tout court*: it does not stop asking why something happened until it is adequately explained, nor does it deny the possibilities of different action. For Reinhart Koselleck, inquiries into historical causation are in this way 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.[54]

Inquiring into the determining forces that ground all action does not lead towards necessitarian views of history, nor does probing alternative possibilities slide into chance. Historiography only makes sense on the presumption of contingency.[55] All that would otherwise be left to do would be to vindicate the laws of history (for which, once more, no plausible theory has survived), or to chronicle events while resigning oneself to the apparent incapacity to learn anything about them. This is what I see as the present volume's main aim: to provide a comprehensive explanation of the path of international law adequately, and as its main challenge, to do so without glossing over the possibility of paths not taken.

3. Law's Autonomy and Reasons for Change

The drive to contextualize legal developments, while per se uncontroversial, stumbles on difficulties when put into practice. How to contextualize legal change without reducing it to context, political or otherwise? And why not reduce it to its context? I have suggested that such a reduction would be, curiously enough, unrealistic as it would fail to account for the law's relative autonomy. Granted, law's relative autonomy is not a given. There are instances where the law may encounter its fateful determination within its context, essentially implying that, in that particular moment, the law lacks autonomy or normativity (A.).[56] But more often than

[53] cf Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 Temple International and Comparative Law Journal 215–40.

[54] Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004) 127. cf EH Carr *What Is History?* (Penguin 1982) 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.'

[55] See also Allan Megill, 'History's Unresolving Tensions: Reality and Implications' (2019) 23 Rethinking History 279.

[56] cf Koskenniemi, 'Histories of International Law' (n 53) 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* (Suhrkamp 2016).

not, the law has a degree of relative autonomy, which means that legal reasons have to be treated as no less real than those arising from other, non-legal contexts (B.). Legal reasons can and often do matter as causes for legal decisions and developments (C.).

3.1 Legal Reasoning

Law's relative autonomy is more than a legal scholar's dogma. It is rooted in a variety of sociological traditions and related socio-legal theories.[57] Karl Marx, who is often portrayed as levelling the strongest critique of law's autonomy, supposedly relegating it to the ephemeral sphere of superstructure, in fact leaves space for it and even defends it.[58] At least parts of his oeuvre read as foreshadowing the now well-received proposition that law and society stand in a co-constitutive relationship.[59] In other words, the law is part of the societal conditions that shape it. The law bears on and is part of prevailing structures and conditions of action. Practically, this means that the law offers reasons that contribute to understanding legal decisions and legal change, especially those that pass through practices of interpretation.

A good way to understand law's relative autonomy relates to legal reasoning's distinct mode of justification and the social positions of particular actors in the field. There are some things that can and cannot be said in the operational legal discourse—boundaries that are loosely set by the rules of interpretation.[60] Moreover, interpreters enjoy different degrees of authority. The role of international courts and tribunals in shaping the legal discourse continues to stand out.[61] Their importance for law's relative autonomy also becomes clear when they are absent. But does this argument in support of law's relative autonomy not run into the critique of political and legal realists who revert to underlying power relations and discard formal legal reasoning as nothing but hollow words?

This question is crucial. It rightly locates questions about the context of legal change in concrete legal practice. Approaching the question requires a brief

[57] See eg Luhmann, *Law as a Social System* (n 7); Bourdieu (n 7).

[58] See Umut Özsu, 'The Necessity of Contingency: Method and Marxism in International Law' in Venzke and Heller, *Contingency in International Law* (n 3) 60–76; Marks (n 47); Grigory I Tunkin, 'Co-existence and International Law' (1958) 95 Collected Courses 1, 47: 'different elements of superstructure mutually influence each other and they also influence the development of the economic structure itself.'

[59] See, for a discussion of such readings, in particular EP Thompson, see Tomlins, 'How Autonomous Is Law?' (n 8) 50–52.

[60] In further detail, Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 46–57.

[61] On that judicial authority, see Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 European Journal of International Law 7.

diversion into issues of legal reasoning and interpretation,[62] only to then link them back to understandings of contingency in international legal developments more generally. Cutting through a variety of different approaches, I will focus on the challenges of legal realism. There are many debates in legal theory and practice about how to justify a claim about what is (il)legal. How to support claims about what the law is, what counts as a (right) source, and what counts as a (right) interpretation? At the same time, also those who have been invested in such debates recognize that, in practice, pragmatic considerations of how to win an argument prevail. This is not only the case for legal counsel but also for scholars and judges.[63] Already for Hersch Lauterpacht the mode of interpretation was not the determining cause of judicial decision, but the form in which the judge cloaks the results arrived at by other means.[64] Philip Jessup also wrote as much back in his canonic 1966 dissent, in which he critiqued the formalism of the International Court of Justice (ICJ) at great length while granting that interpretative arguments provide 'a cloak for a conclusion reached in other ways and not a guide to a correct conclusion'.[65]

Those who use and lay claims to the law are, as TWAIL scholars and others have carved out, invested in a struggle in which they seek to align the law with their interests or convictions—actors with interests or 'people with projects'.[66] Interpreters seek to pull the law onto their side. More often than not, justifications for one rather than another interpretation, and claims about how to justify interpretations, are subordinate to the goal of winning the argument. One might then wonder what is really going on below the surface of legal arguments.

[62] I understand *interpretation* as an argumentative practice in which reasons are offered to rationally motivate others. For present purposes, I can thus use interpretation interchangeably with *reasoning* or *arguing*. In the remainder of this section, I will still respond to the realist challenge that reasons are better discarded as rhetoric or violence. In further detail, see Ingo Venzke, 'The Practice of Interpretation in International Law: Strategies of Critique' in Dunoff and Pollack (eds) (n 32)). Also Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in Andrea Bianchi and others (eds), *Interpretation in International Law* (OUP 2015) 61–77.

[63] Martti Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations 1999) 495.

[64] Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law 48, 53 (1949).

[65] *South West Africa* (*Ethiopia v South Africa; Liberia v South Africa*) (Second Phase, Judgment) [1966] ICJ Rep 6 [355] (July 18) (dissenting opinion by Jessup).

[66] cf David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016); Susan Marks and Andrew Lang, 'People with Projects: Writing the Lives of International Lawyers' (2014) 27 Temple International and Comparative Law Journal 437.

3.2 Real Reasons

Even if actors were driven by the sincere conviction of making true, right, or just claims about the law, their claims are bound to remain partial.[67] This is one lasting lesson of much political and legal realism. While the categorical rejection of universal positions would be as unconvincing as their affirmation, no actor can escape their context, time, and space. In a debate about the laws of war, for example, it is clear that '[n]o one, after all, experiences the death of her husband or sister as humanitarian and proportional'.[68] Suggesting that the widow is biased and irrational for not agreeing with the claim that her husband's killing was legal would only add insult to injury. And even if, with shaky confidence, one were to abstract from the perspective of the widow, it is still hard to deny that interpretative claims stand under the spell of everyone's situatedness. That is also the case for judges, who are only human, including those on the bench of the ECtHR who expanded the rights of corporations in sync with the rising tides of neoliberalism. In a classically critical spirit, such a contextualization can possibly work towards greater awareness and reflexivity,[69] enabling inquiries into the socially constructed consciousness of actors.[70] What were they thinking?

Considerations of what is (il)legal expresses *social* beliefs. That is what the concepts of epistemic and interpretative communities want to capture. As such, the concepts have purchase. How else should the divide be understood between military and humanitarian lawyers when it comes to what they respectively call the laws of war or humanitarian law?[71] For understandings of legal change, locating interpretative practice within communities draws out constraints that bear on all action and, as the editors' framework has also highlighted, conditions for the reception of any interpretative claim.[72]

This take on the reality of legal practice and, by extension, factors that explain legal change or stasis are revealing and yet problematic. The reasons that actors offer in support of their claims about the law tend to fall off the radar.[73] That is most evident for understandings that resort to the concept of interpretative communities

[67] Outi Korhonen, 'New International Law: Silence, Defence of Deliverance?' (1996) 7 European Journal of International Law 1.

[68] Kennedy, *A World of Struggle* (n 66) 275.

[69] Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?' (2016) 29 Leiden Journal of International Law 979; Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 London Review of International Law 63.

[70] David Kennedy, 'The Turn to Interpretation' (1985) 58 Southern California Law Review 251, 255 .

[71] David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 Leiden Journal of International Law 315; cf Stephan W Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 Leiden Journal of International Law 401, 430.

[72] Krisch and Yildiz, this volume.

[73] cf Jan Klabbers, 'The Relative Autonomy of International Law, or the Forgotten Politics of Interdisciplinarity' (2005) 1 Journal of International Law and International Relations 35.

within which arguments are accepted if they resonate with the interpretive angles that a specific community shares.[74] That the community shares such an angle is a premise, not the result of arguments about the law. If the interpretative angle defines the community, what happens between communities other than brute competition? Between communities, it seems, international law is silent. International legal change would have to connect to changes in interpretative angles or to the balance of power not between nations but between interpretative communities.[75]

Realist schools of thought in international relations, via Morgenthau and onwards, have held that self-interest is the unshakable foundation for all action—including claims about the law. Some authors have suggested that arguments are merely cheap rhetoric, capable of offering new information at best, but unlikely to alter an actor's predisposition.[76] Competing constructivist schools of thought have always questioned the foundational role of self-interest. They have drawn attention to interests' social construction and have advanced the position that interests may indeed change through processes of arguing.[77] There really is no good reason for restricting the role of arguments to instrumentalist questions of how to get what we want and not to extend it to questions of what we want in the first place. What actors want is a given for realists at such a level of abstraction—power, wealth, maximizing interests (well, which?)—that it is often practically meaningless. For one, questions that seem instrumental—how to pursue given interests?—then quickly become questions of what actors really want. For another, explanations that turn to self-interest at least occasionally seem to turn in a loop of *ex-post* rationalization where interests are only inferred from the behaviour that they are supposed to explain.

Putting those difficulties aside, it follows from realist critiques that successful claims about what is (il)legal are best understood as an expression of power.[78] But any such claim may just as well meet with something like genuine agreement, or even induce a change in other actors' predispositions, either because they learn how they can better get what they want or what they really want. Realists, in short, claim to get closer to reality, but it is not so clear that they do.

[74] Stanley Fish, *Doing What Comes Naturally* (Duke University Press 1989) 141–42. Disagreement about how to interpret the law is, according to Fish, 'not … a disagreement that could be settled by the text because what would be in dispute would be the interpretative "angle" from which the text was to be seen, and in being seen, made'.

[75] cf ibid 153, expressing his scepticism of general accounts of change, suggesting that it should be understood in the context of historical reconstruction instead.

[76] eg Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005). The founding father of realism was much more nuanced and would defend the national interest as a point of reference but be less dismissive about the possibility of meaningful legal argument. See Oliver Jütersonke, *Morgenthau, Law and Realism* (CUP 2010).

[77] See, classically, Thomas Risse, 'Let's Argue!': Communicative Action in World Politics' (2000) 54 International Organization 1. See also Nicole Deitelhoff, *Überzeugung in der Politik* (Suhrkamp 2006).

[78] See, in agreement, Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 Leiden Journal of International Law 189, 206.

3.3 Which Reality? An Example of Reasons for Change

Why does a claimant who nowadays institutes proceedings at the ICJ need to argue that the respondent was 'aware, or could not have been unaware' of a dispute with the claimant?[79] The ICJ introduced such a jurisdictional requirement with its *Marshall Islands* judgment of 2016. The ICJ's majority of course asserted that there was nothing new about this requirement. The denial of novelty lies in the nature of the game, in the strictures of judicial legitimacy. But the decision did change the law in the sense that it redistributed argumentative burdens, which is clear to see in later legal practice. How to understand this change? What are the reasons for this decision to begin with, and for its reception?

It is not evidently wrong—unreal or surreal—to say that the ICJ, in its majority, declined the exercise of its jurisdiction in *Marshall Islands* due to the formal, legal reason that it found no dispute between the parties since the respondent was not aware (nor could have been) that a dispute existed. Such an understanding of the decision is, however, clearly incomplete. Dissenting judges have lamented how the majority's reasoning all too easily reveals that the real reasons lie elsewhere, certainly not in the existence *vel non* of a dispute. Commentators have for instance pointed out that all judges from nations who possessed nuclear weapons were in the majority that voted against the Court's jurisdiction (affirming the jurisdiction in that case would have put under scrutiny nuclear weapon states' duty to negotiate disarmament).[80] But realist understandings, which place reasons such as the distribution of nuclear weapons and judges' nationality centre stage, are equally partial as they no longer offer a view of legal reasons and of how the law operates.[81] No judge in the majority could justify the decision with a reference to the interest of their country of nationality (and the fact that they possessed nuclear weapons). Just as interpretations in law cut out what cannot be squeezed into the scope of legal reasons, realist approaches cut out an understanding of interpretations as a practice of normative argument.[82] That law is normative is in fact just another way of saying that it has some autonomy.[83]

For the law to function as law it must at least appear to have its own causes—such as the existence of a legal dispute between the parties as a condition for the ICJ's jurisdiction. And in order to succeed in law, actors need to argue with those causes to support their interpretations. That, and nothing more or less, is what law's

[79] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v United Kingdom*) (Preliminary Objections) 5 October 2016, [41].

[80] See Nico Krisch, 'Capitulation in The Hague: The Marshall Islands Cases' (*EJIL Talk!*, 10 October 2016).

[81] 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, 462 .

[82] Möllers (n 56) 69; Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992) 436.

[83] cf Natasha Wheatley, 'Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines' (2021) 60 History and Theory 311.

relative autonomy refers to. That this relative autonomy is real—not always, but at least often—has been recognized time and again, for instance by Max Weber when he suggested studying the states of mind of legal practitioners, above all judges, in order to get closer to the reality of the law.[84] Pierre Bourdieu likewise critiqued attempts at understanding a social practice such as legal interpretation through distanced external descriptions that explained those practices without regard for the reasons that the actors themselves have for their action. For him, 'far from being a simple ideological mask, such a rhetoric of autonomy, neutrality, and universality, … is the expression of the whole operation of the juridical field'.[85] The legal field imposes constraints on the way of arguing that may well be the basis of law's relative autonomy, which, in turn, points to legal causes for change. That is also the case for thinking of legal change and relative autonomy in the tradition of understanding law as a social system.[86]

4. Context All the Way?

4.1 What Makes a Difference?

Even if legal change cannot be reduced to contexts, it is clear that, even within its relatively autonomous operation, the law eventually adapts to, accommodates, and absorbs changing contexts. There is only variation in degrees of autonomy and speeds of adjustment, over time, space, and legal regimes.[87] Several scholars have for example diagnosed shifts in international law in response to an overall rise in authoritarian populism.[88] Asking about paths not taken thus begs the question of what would have made a difference, also in the *longue durée*. Do prevailing political or economic structures not catch up eventually? Different judicial decisions or other instances of practice, even other choices in treaty-making, would often have made little more than a dent in international law's path, bending it into a detour, perhaps. But would they have been path-breaking?

[84] Alf Ross and Scandinavian legal realism made very similar suggestions. See Jakob VH Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible?' (2015) 28 Leiden Journal of International Law 211, 217–19.

[85] Bourdieu (n 7).

[86] Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993); Luhmann, *Law as a Social System* (n 7), especially ch 6. Also in this tradition, the relative autonomy of the law can of course be broken, so to speak, when it is taken over by political or economic systems; cf Marcelo Neves, 'Grenzen der Autonomie des Rechts in einer asymmetrischen Weltgesellschaft' (2007) 93 Archiv für Rechts- und Sozialphilosophie 363.

[87] Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023).

[88] Sandholtz, this volume. If the present is something like a critical juncture, then the outcome might however not be so settled, cf Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018).

This has understandably been a hard question and a tall order for several recent contributions probing the contingency of international legal developments. In the examples of ECtHR jurisprudence and the ICJ decision in *Marshall Islands*, decisions might have been different but, as one might have expected, they did align to replicate with prevailing power structures. That is also the case in another example, one that Josef Ostransky offers on legal change in the regime of investment protection. The central arbitral decision to protect foreign investors' legitimate expectations as part of the guarantee of investors' fair and equitable treatment, he argues, was pulled out of thin air.[89] Stronger still, the leading precedent was also contradicted. There is, in short, nothing necessary about the legal developments that ended up corroborating the protection of investors' legitimate expectations. 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 have been met through resort to other legal doctrines and concepts.[90] Even if the law had looked a bit different, it would essentially have been the same. It would not have made a difference.

What would it take for the law to be different? An obvious answer would be that changes are required in the context on which legal change depends. The pull of contextualization would even suggest that it is the only possible answer, at least in the long run. Prevailing structures—material, ideal, and everything in-between—would eventually catch up. Ostransky thus closes his account by convincingly arguing that real change would only be possible if the underlying political economy were to change.[91] Others have placed emphasis on changes in prevailing narratives, or on cutting across, and thereby irritating and breaking up, particular regime perspectives that otherwise hold the law captive.[92] The present volume's framework is likewise attuned to such 'discursive openings'.[93]

In the end, however, it seems once more that placing legal change in relation to its context sets in motion a line of argument that finds law's fateful determination in that context.[94] Such a conclusion, while often plausible, just as often has shortcomings. First, it underrates the degree of law's autonomy. Secondly, there is a risk

[89] Josef Ostřanský, 'From a Fortuitous Transplant to a Fundamental Principle of Law? The Doctrine of Legitimate Expectations and the Possibilities of a Different Law' in Venzke and Heller, *Contingency in International Law* (n 3) 424–40.

[90] ibid.

[91] ibid.

[92] Amanda Alexander, 'Narrative Contingency and International Humanitarian Law: Crimes against Humanity in Cixin Liu's Post-Humanist Universe' in Venzke and Heller, *Contingency in International Law* (n 3) 349–67; Kathryn Greenman, 'The Law of State Responsibility and the Persistence of Investment Protection' in Venzke and Heller, *Contingency in International Law* (n 3) 389–403, 403, concluding that 'resistance against investor-state arbitration also comes from developed countries and mainstream international investment lawyers but to the extent that such resistance stays within international law's structural biases and fails to work against fragmentation, it is unlikely to effect change'.

[93] Krisch and Yildiz, this volume.

[94] Painter (n 32); Tomlins, 'How Autonomous Is Law?' (n 8); Christopher Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8 Annual Review of Law and Social Science 31.

of overstating the degree to which any context is determinative. The indeterminacy of law has been rubbed in,[95] but other contexts may be rather similar in that regard. I have made the first point in section 3 above and now continue by focusing on the second, a reconsideration of the determinacy of law's context or, rather, its *in*determinacy.

4.2 The Indeterminacy of Context

What counts as context and what to make of it is often far from clear. As in the examples of legal change in human rights and investment law, neoliberalism is often a plausible point of reference, enabling compelling critiques of neoliberalism's trenchant operation. But the possibility of alternative legal arrangements tends to get lost.[96] Also under the spell of neoliberalism, the law continues to be ridden with tensions and remains to some degree pliable, not least because it is not so straightforward to ascertain what neoliberalism demands from the law. Struggles on the inside of the law, about what to do with those demands must be part of the story. 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.

It is for example common to read the 1977 First Additional Protocol (AP I) to the Geneva Conventions against the background context of anti-colonial struggle and the related constellation of power. With a more idealist bent it could be read, especially on account of the International Committee of the Red Cross (ICRC), as expanding the law's humanitarian objectives to new circumstances.[97] AP I notably ended up internationalizing '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'.[98] As Emma Stone Mackinnon has recently shown, however, that outcome of AP I depended on the lawyers' battle over how to read the background. Neither power politics nor concerns for justice would dictate a specific outcome. Legal positions varied widely, also among those vested in anti-colonial struggles. Mackinnon thus concludes that '[l]aw is not simply determined by its context but is itself a site for argumentation over the meaning of that context'.[99]

[95] See the *loci classici* for international law, David Kennedy, 'Theses about International Law Discourse' (1980) 23 German Yearbook of International Law 353; Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005).

[96] 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).

[97] Emma S Mackinnon, 'Contingencies of Context: Legacies of the Algerian Revolution in the 1977 Additional Protocols to the Geneva Conventions' in Venzke and Heller, *Contingency in International Law* (n 3) 317–34, at 318, with further references.

[98] Art 1(4) Additional Protocol I to the Geneva Conventions.

[99] Mackinnon (n 97) 320.

Law's relative autonomy, understood as a distinct mode of justification, keeps a distance from other contexts. Of course, determining factors for any decision are broader than overt legal reasons. But those legal reasons, I have already suggested, are in principle no less real.

4.3 *Ex-post* Rationalization and Historical Emplotment

There are three more challenges against which the drive of relating legal change to its context needs to struggle. First are tendencies of *ex-post* rationalization and, second, the difficulties of conveying contingency in an academic text without violating a specific discipline's standards or strictures. Third is the question that one might have expected first, but here it circles back to the beginning: which context—legal change in relation to what?

Social psychologist Baruch Fischhoff placed his pioneering work on the bias of hindsight squarely within discussions about historical methodology, subscribing to the view espoused by the historian Georges Florovsky that:

> [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.[100]

In the specific domain of law, additional dynamics sustain the appearances of necessity.[101] Roberto Unger has famously blamed 'rationalizing legal analysis' as a mode of argument that creates 'false necessities'.[102] 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 challenges—as if economic globalization itself fatefully determined international trade or investment law, for instance. Some such explanations, as that of Ostransky discussed above, can claim considerable plausibility, but they also blend out alternative possibilities, including those alternatives that

[100] Georges Florovsky, 'The Study of the Past' in Ronald H Nash (ed), *Ideas of History*, vol 2 (EP Dutton 1969) 351, 369, 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.

[101] See Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 Asian Journal of International Law 403.

[102] 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.

might have opened up through different understandings of the 'given' context and the challenges it creates. In legal practice, finally, the use of the past is unabashedly instrumental, used in support of claims in the present.[103] The operation of the law benefits significantly from hindsight, and even scholarly analyses conducted from a more distant perspective tend not to undermine this effect. At least part of the legitimacy of international law seems to rest on its past, which, given the specific burdens it carries, might not have been different. When compared to all these dynamics, asking about paths not taken sets off in the opposite direction, seeking out uncertainties about the law's path.

Even then, and in addition to all that has been said, how to express a sense of contingency in a text? I have suggested that inquiries into what happened and what else could have happened are indeed two sides of the same coin.[104] Following this analogy, however, it is just not possible 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 convey a sense of the other. And when we flip the coin, the side of contingency tends to land on its back, just as all the historical material, once it is put down into writing, expels a sense of contingency. Contingency tends to be banned narratively through disciplinary strictures and related emplotments.[105]

Another example helps to illustrate this point. Douglas Irwin recently offered a most informed account of the history of international trade law, including the fate of the International Trade Organization (ITO). The ITO's statute was backed by the US and was signed in 1948 by fifty-three of the then fifty-eight states. Will Clayton, chairman of the closing conference in Havana, had claimed, albeit with some exaggeration, 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'.[106] It did not happen. The ITO was never set up.

While this development contradicted the expectations of almost all actors at the time, it had become old news, also 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.[107] The actions of the ITO's most ardent supporters are now rendered tragic as they approach the organization's preordained downfall. In contrast, as Irwin moves up to the 1990s, the establishment of the North Atlantic Free Trade Organization (NAFTA) comes as a surprise.[108] But contingency is lost again

[103] 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.

[104] Tucker (n 48).

[105] Moyn (n 15).

[106] Statement by the Honourable William L Clayton at the 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.

[107] Douglas A Irwin, *Clashing Over Commerce: A History of US Trade Policy* (University of Chicago Press 2017) 502–05.

[108] ibid 636–42.

because early on Irwin foreshadows what is known—NAFTA was established. He thus conveys no sense that it was possible, perhaps even quite likely, that NAFTA would have failed. The certainty that is portrayed about NAFTA's establishment rather 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.[109] Contingency is lost twice. The possibility of the ITO's success is repeatedly written out of existing histories that of course know what did and did not happen and are required to say so.

5. Conclusion

Why does the enigma of legal change persist? I have suggested that this has to do with difficulties when relating the law to contexts, political or otherwise. How to relate legal change to contexts without reducing the former to the latter? Thinking through law's contingency—the possibility of paths not taken—brings out those difficulties and helps to respond to them. It presses on the question of when to stop looking for the next underlying reason, one that promises to provide an explanation for why the law developed in the way it did. This inquiry, driven by the longing—disciplinary, professional, and human—to make sense of what happened, challenges us to determine when our exploration is truly comprehensive.[110] Giving in to this longing all too quickly risks producing myopic explanations of legal change that turn to the nearby reasons of ready-made stories—be it in an idealist, realist, or other grand narrative.

In the field of history, the turn to context in the 1960s arose out of a rejection of grand narratives.[111] In the field of international law, that is not equally true. Both idealist and realist accounts of international legal change have relied on context in their narratives. How else could they tell their stories and make their claims intelligible? They turned to different contexts: politics, for realists; justice, for idealists. They did so not to discard, but rather to support their grand narratives, either showcasing international law's evolution to better realize the values of humanity, or its trenchant operation as a handmaiden of domination.

EH Carr knew, writing on the brink of the Second World War and in the moment of his strongest critique of liberal idealism, that law, like politics, can be reduced neither to morality, nor to power. He saw it as a 'meeting place' for both.[112]

[109] For these modes of emplotment and their narrative effects, see White (n 43).

[110] On such a longing see, with further references, Venzke, 'What If?' (n 101).

[111] Quentin Skinner, 'Meaning and Understanding of the History of Ideas' (1969) 8 History and Theory 3.

[112] Carr, *The Twenty Years' Crisis 1919–1939* (n 25) 178. See also, more recently, Krisch, 'International Law in Times of Hegemony' (n 31), arguing that international law 'occupies an always precarious, but eventually secure position between the demands of the powerful and the ideals of justice held in international society'.

What then, finally, counts as context? In its turn to context, the field of history has always struggled to keep grand narratives from sneaking back in when it came to that question. How to choose the context and the histories that this choice creates? If anything, the recent high-flying debates about legal-historical methods in international law suggest that the answer does not lie there, in methods. As so often, those debates cloud disagreement about what to do in the present, about what the problem is perceived to be, and which practice or knowledge could possibly be emancipatory.[113] Accounts of legal change, including my own, will remain captive to that disagreement. The present volume sets out to fill gaps in understanding legal change in relation to politics. Those gaps are significant and much remains to be learned. After a long period of legal and political realism, the decision to consider politics as the context for law may seem obvious. But what kind of politics? Or, why politics?

[113] That, too, has been recognized and stressed repeatedly over time. Classically, White (n 43). See also Martti Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International Law' (2014) 22 Rechtsgeschichte—Legal History 119–38.