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Cracking the Frame? On the Prospects of Change in a World of Struggle

Ingo Venzke*

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David Kennedy. ***A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy***. Princeton, NJ: Princeton University Press, 2016. Pp. 312. $29.95, £22.95. ISBN: 9780691146782.

Abstract

Critical scholarship classically lays bare the assumptions and choices that people make when they argue. By displaying the consequences of those assumptions and choices, it seeks to instil a sense of responsibility for them. Drawing them out into the open, critical scholarship presents them for contestation, unsettles them, and opens them up for change. In his latest book, A World of Struggle, *David Kennedy directs our attention to the background work of expertise – how it rules through arguments, how it shapes the global political economy and how it sustains unjust distributions of gains. Kennedy offers a warm invitation to join the struggle to imagine and remake the world differently. In the present review essay, I discuss this invitation's specific appeal. More generally, I ask about the prospects of change in international law as well as the activities that might support such change. I submit, first, that carving out background assumptions and choices is not enough. What is needed is an account of transitions – something that Kennedy acknowledges but does not provide. Second, I approach the vexed question of who could effectively crack existing frames – a question that Kennedy ducks. And, third, I discuss the role of violence, rhetoric and reason in the argumentative practice of expert work – distinctions that Kennedy refutes. I am ultimately happy to accept Kennedy's invitation. It surely comes with immense acuity, subtle side blows and not so subtle punches, always in his signature style. I conclude that, with the aim of inducing change, a core activity of scholars should be to trace changes in concrete contexts and to thereby regain a sense for the possibilities of the past.*

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1 Introduction: Let's Do Law Like It's 1648

It is all over town, again: things have to change.[1] War and poverty scorch large parts of the world, while a small, privileged rest of the world walls up to protect its riches. As a sense of injustice spreads together with a felt urgency for change, hopes in international law as a vehicle towards some better world seem to dwindle. At the same time, the entanglements of international law in the perpetuation of injustice are ever more apparent, especially in the global political economy.[2] While service providers in the West can hold developing countries to their commitments on market access, agricultural producers in the Global South find little support from international law to make their way to Western consumers. A series of legal obligations prevent host countries from reaping the benefits of foreign investment – from prohibitions on local contents requirements to limitations on capital control. At a time when the promises of neo-liberalism ring hollow, the search for alternative international legal arrangements is open.

We have certainly been there before or have at least been close. Calls for a new international economic order (NIEO) of the 1960s and 1970s echo in present sensibilities. The largest part of Mohammed Bedjaoui's seminal *Towards a New International Economic Order* is dedicated to a powerful summary of the drastic imbalances in the world and of the largely unbridled economic forces that work either with the help of international law or within its blind spots.[3] No wonder then that his voice, next to others in the drive towards a NIEO, have recently found renewed resonance.[4] Spurred by tragedy and recurrent doubt, calls for new approaches to international law have since become as frequent as sirens in any big city.[5] Like many city neurotics, international

[1] This impression imposes itself in view of both packed city squares and crowded bookshelves. At the time of writing, the *nuit debout* draws increasing numbers onto the Place de la République, for instance. For examples from the bookshelves, see N. Klein, *This Changes Everything: Capitalism vs. The Climate* (2014). Christoph Menke even declares that 'the revolution is back: in the catalogues of publishers, in feuilletons, talkshows, and anyway in many theater programmes and art exhibitions'. See Menke, 'Zur Möglichkeit der Revolution', 794 *Merkur* (2015) 53, at 53 (author's translation).

[2] von Bernstorff, 'International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization', 26 *European Journal of International Law* (*EJIL*) (2015) 279; B. Stark (ed.), *International Law and Its Discontents: Confronting Crises* (2015); Pogge, 'The Role of International Law in Reproducing Massive Poverty', in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (2010) 417.

[3] M. Bedjaoui, *Towards a New International Economic Order* (1979).

[4] Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', 62 *International and Comparative Law Quarterly* (2013) 31; Gilman, 'The New International Economic Order', 6 *Humanity* (2015) 1; Özsu, '"In the Interests of Mankind as a Whole": Mohammed Bedjaoui's New International Economic Order', 6 *Humanity* (2015) 129; Anghie, 'Legal Aspects of the New International Economic Order', 6 *Humanity* (2015) 145; see already B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003), at 73–94 (for the resonance in Kennedy's *World of Struggle*, see 206, n. 23).

[5] Falk, 'New Approaches to the Study of International Law', 61 *American Journal of International Law* (1967) 477; Skouteris, 'Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship', 10 *Leiden Journal of International Law* (*LJIL*) (1997) 415; Kennedy, 'When Renewal Repeats: Thinking against the Box', 32 *New York University Journal of International Law and Policy* (2000) 335; Korhonen, 'New International Law: Silence, Defence of Deliverance?', 7 *EJIL* (1996) 1; Kennedy, 'Preface', in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (2012) v.

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lawyers may by now only become anxious in moments of extended silence. Taking stock in the year 2000, David Kennedy thus observed that '[t]he discipline of international law today is cheek by jowl with people calling for new thinking and renewal, even as they offer up the most shopworn ideas and initiatives'.[6] In keen recognition of the many difficulties and likely dead ends for genuine change – in view of the fact that renewal was continuously being absorbed in conventional professional practice and continuously repeating itself – Kennedy maintained distance with the possibility of change.[7] Not so today.

While Kennedy led the way in and out of the 'new approaches to international law', he remains ever more committed to pushing for change in ways that crack prevailing frames of seeing and making the world.[8] Already in 2008, he 'worr[ied] that our projects to rethink global governance fail to grasp the depth of the injustice of the world today and the urgency of change'.[9] Part of the failure is due to expert routines that cloud hard choices and that entrench inequalities.[10] As of late, Kennedy's focus has shifted to the political economy as a core terrain on which to locate and critique expert work, to reveal the hidden choices and the impact that expert work has had and, ultimately, to open up space for imagining the world differently.[11]

These and other threads are tied together in Kennedy's new monograph, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*. Kennedy argues – one could see it coming – that the routine work of expertise, including the practice of legal experts, contributes significantly to the perpetuation of injustice in the world. Through their routine work, experts prepare the ground for decisions by others. They go about their work denying their agency. The core set-up of Kennedy's argument is classical for critical scholarship: to draw out the choices that are made in quotidian expert work, to show the immense distributive effects that such choices have and to instil a sense of responsibility for those choices among experts.[12] Calling this set-up classical should not discard it. Critique is not a one-time intervention but, rather, continuous work, not the least because it is easily forgotten.

6 Kennedy, 'Renewal Repeats', *supra* note 5, at 335.

7 *Ibid.*

8 For the trajectory of new approaches to international law and Kennedy's more recent stance, see Kennedy, 'Preface', *supra* note 5. See also Tzouvala, 'New Approaches to International Law: The History of a Project', 27 *EJIL* (2016) 215.

9 Kennedy, 'The Mystery of Global Governance', 1 *Ohio Northern University Law Review* (2008) 827, at 851.

10 *Ibid.*, at 352. See also Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 27 *Sydney Law Review* (2004) 1; Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise', 5 *European Human Rights Law Review* (2001) 463.

11 Kennedy, 'Preface', *supra* note 5; Kennedy, 'Law and the Political Economy of the World', 26 *LJIL* (2013) 7.

12 It may well be the core of critical theory to ask why some positions dominate rather than others. See also Horkheimer, 'Traditional and Critical Theory', in *Critical Theory: Selected Essays* (2002) 188; Koskenniemi, 'What Is Crtitical Research in International Law?', 29 *LJIL* (2016) 727. For classical examples by a leading author to whom David Kennedy acknowledges his debt, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1976) 1685; D. Kennedy, *A Critique of Adjudication (fin de siècle)* (1997).

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Kennedy's present book is more radical and more committed than his past interventions. Are we living in a world that, on Kennedy's reading, resembles 1945 when international legal structures were seen to require reform or should we do law like it is 1648 when, according to Kennedy, everything needed to be rethought? That is a matter of perception, of course, but Kennedy is content to see that the sensibility seems to shift towards the latter. To do law like it is 1648 demands fundamental rethinking – not a tactical engagement in the struggle about how trade law ought to establish whether a governmental measure is discriminatory but, rather, a strategic rethinking of the embedded background beliefs on which this question is decided.

Most trade law experts might well be aware of the fact that their arguments from necessity – this is a discriminatory trade measure, that is what trade law requires – are frail in the sense that they could also go the other way. Kennedy submits that their feeling – as those of other experts – is one of disenchantment paired with faith in their practice. The point is that the cumulative effect of their practice gives shape to the political economy in a way that clouds their agency. Their struggles produce normalcy.[13] Not their choices but, seemingly, their natural boundaries seem to do the job – boundaries such as those between economic efficiency and trade-distortive protectionism. Kennedy further submits that the distributive effects of drawing boundaries here and not there remain hidden. While such effects are probably on the minds of those engaged in expert work, such awareness finds no expression in the way in which boundaries are articulated.

That law is a product of a struggle in which people use it to advance their projects is yet another noteworthy feature of Kennedy's world. The law reflects the interests of past winners. We should forego the temptation, Kennedy urges, to place this struggle within an overall order that makes sense of it and, thus, takes away its edges (especially at 57).[14] There is no invisible hand that turns individual struggle into something that is overall good. Rather than understanding individual action as some contribution to a whole, be it voluntary or inadvertently, the struggle between people with projects ought to remain at the core of the analysis.[15]

Different threads of Kennedy's previous work have clearly led the way to the present monograph, which, as a renewed critical intervention, comes at an opportune moment. It provides reinforcement for anyone who shares the sense that things need to change and who places little trust in incremental reform. Maybe the best way to describe the book is as a warm invitation. It is an appealing invitation that I am happy to accept, even if I might not join all of the planned activities and wish to add some others. Kennedy's invitation surely comes with immense acuity, subtle side blows as well as not so subtle punches, and always in his signature style.

[13] Tarullo, 'Logic, Myth, and the International Economic Order', 26 *Harvard International Law Journal* (1985) 533 (also quoted by Kennedy at 191, n. 9). See also A. Lang, *World Trade Law after Neoliberalism* (2011), especially at 16–17.

[14] See note 19 in this article and accompanying text.

[15] Kennedy suggests 'think[ing] of people coming to struggle with little backpacks of legal and other entitlements, powers, and vulnerabilities' (at 67).

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I will begin this review essay by outlining the core of *A World of Struggle*. Signing on to the book's main program, I will then turn to a more detailed discussion of the prospects of change as well as the activities that might support it. I submit, first, that carving out background assumptions and choices, even at different times, is not enough. What is needed is an account of transitions – something that Kennedy acknowledges but does not provide. Second, I approach the vexed question of who could effectively crack existing frames – a question that Kennedy ducks. Third, I discuss the role of violence, rhetoric, and reason in the argumentative practice of expert work – distinctions that Kennedy refutes. I conclude that, with the aim of inducing change, a core activity of scholars should be to expose the contingency of international law in a context-sensitive fashion and to thereby regain a sense for the possibilities of the past.

2 The World We Live in: Struggle, Expertise and Law

A *Struggle*

Kennedy places his account between ground-level anthropological analysis of people and birds-eye observations of the world they inhibit (at 2). It is a book, he explains, 'about the stories people tell themselves and one another in places like Davos and the power they exercise in doing so' (at 1). The first of eight chapters makes visible the ways in which these stories contribute to making the world – how they identify problems, solutions, and possibilities for action. It does so anecdotally. Kennedy sensitizes the reader to see the distinctions that these stories perpetuate – in particular, distinctions between the political and economic realm as well as between local and global problems – and the consequences that connect to such largely unquestioned distinctions. For example, in common imagination, the escape of globalized economic forces from the reach of public institutions is a dilemma that plagues present economic governance. Common responses include the strengthening of public institutions on different levels of governance or the elaboration of codes of conduct for multinational enterprises. The identification of the phenomenon – its problems and solutions – reinforce the division between public and private realms, each with their own logic. Public actors need to stick to their mandate, and private persons only do what is in their best interest. Such stories, Kennedy writes, let many people off the hook. In the end, nobody really does anything – or at least nothing that is not to be expected – within this imagination (at 28).[16]

The task that Kennedy sets up is to foreground the technical work of experts that makes and unmakes those boundaries between the political and economic, the public and private, realms. Since this expert work remains largely hidden, the boundaries remain relatively stable (at 32). The task is not to draw the boundaries differently but, rather, to quarrel over what is really political and what is really of an economic

[16] See in further detail Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', 4 *London Review of International Law* (2016) 127.

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nature. Instead, we should expose the forces and dynamics by which earlier struggles had drawn the divides and settled boundaries (at 39). For international lawyers, this means to take a step back from the legal discourse and to instead re-examine the terrain, not to ask what would be the better interpretation of the law but, rather, to ask how the current interpretation came about – how this, and not that, understanding has become dominant.[17]

The program is clear and inviting. While later chapters spell out parts of it in further detail, I see it as the book's main drawback that it engages relatively little in the practice that it preaches. Only anecdotally and in short summaries does Kennedy provide inquiries that would 'expose the forces and dynamics by which earlier struggles had drawn the divides and settled boundaries' (at 32). The research agenda that Kennedy outlines would require mostly critical historical work. In his *Mystery of Global Governance*, Kennedy had already suggested that 'just writing the history of domination and inequality, and their erasure, into the maps legal intellectuals have already produced will be a great work'.[18] I agree and wished that the present monograph had followed suit. The histories of international legal thought that Kennedy offers are both impressive for their insight and degree of synthesis. However, they are also too swift to reveal the patterns of domination or the forces and dynamics that have shaped legal thought. They provide snapshots of the past, not views of transitions – archaeology, not genealogy, as I will elaborate later in this review.

Chapter 2 opens with a compelling argument in favour of examining the struggle between people with projects: '[G]lobal struggle is an interaction of people with projects, engaging one another on a terrain so as to generate, garner and preserve gains others are forced to forgo' (at 74). One way in which Kennedy supports his claim to keep the focus on conflict is with reference to Carl von Clausewitz, who appears repeatedly throughout the book. In this book, he is used as an illustration of how the world – not only during war but also in commerce and in politics – should be perceived with conflict at its centre (at 57). The ever-contentious Carl Schmitt offers further support with his deeply antagonistic conception of politics.[19]

The uptake of this starting point is three-fold. First, a focus on overall order rather than on individual conflict highlights particular gains and losses. With a focus on overall order and aggregate assessments, individual moves and strategies easily just seem beneficial – limiting carbon emissions helps curb climate change, free trade increases the size of the cake for all and of the pieces for every trading country and so on. But from the perspective of the participants – people with projects – each of these moves and strategies clearly has winners and losers. Second, even if people agree with one another, keeping conflict on the table helps to see both elements of hegemony that have shaped the terrain of struggle in the past and elements of coercion that stabilize agreements in the present. Third, maintaining the emphasis on the struggle between people reveals the strategic use of descriptions and classifications. Instead of accepting one

[17] See Koskenniemi, *supra* note 12.

[18] Kennedy, *supra* note 9, at 852.

[19] C. Schmitt, *The Concept of the Political* (2007) (referenced by Kennedy at 57–58, 255).

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frame or another for analysis, we see how competing frames are used in the struggle so as to define problems and solutions and to classify issues as political or economic.

Remarkably, even established modes of analysis that take conditions of conflict as their starting point end up looking for order that makes sense of the mess and which, in turn, tend to reduce conflict to an exception rather than the rule. Hedley Bull's *The Anarchical Society: A Study of Order in World Politics* (1977) is illustrative in this regard (at 76–78). As one of the seminal contributions to the sociologically inclined English School in the discipline of international relations, it does what sociology tends to do generally: it identifies patterns of order in a world that is, in principle, unordered.[20] Even if anarchy is the starting point, order advances to the centre of attention. Similarly in economic thinking: the invisible hand steers the self-interested action of each individual towards systemic gain for all. Analysis leans towards projecting the logic of the system onto the actors that populate it. Pierre Bourdieu simply calls it 'social physics'.[21] This mode of thinking, Kennedy argues, naturalizes both actors and structures, whereas, notably, 'most significant work of expertise can be the making and unmaking of actors and of the game to be played' (at 6).

B *Expertise*

Kennedy proposes a 'cartography of engagement' – an inquiry into the field of expertise that makes specific worlds emerge as an antidote to systemic analysis that gravitates around order rather than conflict (at 75). How to do it? Chapter 2 gives an initial summary (at 66–69). The more elaborate answer follows in the fourth chapter (at 120–134). Chapter 3 sits uncomfortably in between and reminds the reader of the world-making power of ideas, something that was maybe sufficiently clear from the introduction and the first chapter. In Chapter 4, a 'cartography of engagement' ought to first identify the expert community. As Kennedy notes, starting with the people has the advantage of sidestepping the need for different kinds of theories of action or of order. Second, cartography ought to map the boundaries of different fields of expertise and the roles that experts see for themselves and for others. Third, it also should crucially turn to the knowledge that experts use. The shared understandings that surface in expert work are of key interest. Such understandings may at best be implicitly acknowledged. Emphatic interpretations ask what needs to be assumed to make sense of expert work and thereby bring shared understandings out into the open.[22]

[20] See the opening of H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), at xxviii: '[A]n inquiry into the nature of order in world politics' (quoted by Kennedy at 76, n. 2). See also R.N. Lebow, *Forbidden Fruit: Counterfactuals and International Relations* (2010), emphasizing the tendency of theory, and of scholarship more generally, to see order rather than disorder.

[21] P. Bourdieu and L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (1992), at 7–8: '[A]n objective structure, grasped from the outside, whose articulations can be materially observed, measured, and mapped out independently of the representations of those who live in it.'

[22] Drawing on developments in hermeneutics, Kennedy already called for such emphatic interpretations in Kennedy, 'The Turn to Interpretation', 58 *Southern California Law Review* (1985) 251. See also, precisely in the field of international political economy, A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (2011).

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Chapter 5 expands on the ways in which experts rule, namely by argument and assertion. Here as elsewhere, Kennedy uses the notion of arguing interchangeably with other notions such as persuading, convincing or asserting. In this chapter, he aims to follow through with his programme of foregrounding the background choices that experts make with regard to three specific fields: trade, development and war. Before he turns to the concrete material, however, he asks head on: How come experts have this power, while the indeterminacy, or frailty, of their knowledge is ever more strongly on their minds? With a view to international law, he notes that the field is fragmented not only along regimes of different subject matters but also along a series of different approaches, each lending support to opposing claims. And yet it seems that its experts are in increasing demand. While one might expect any field to fall out of use or to lose its clarity as a result of such fragmentation, the opposite seems to be the case (at 153). Kennedy suspects that it is precisely because of internal fragmentation and the plurality of approaches that experts can rule effectively: '[T]he more heterogeneous the material, the more sophisticated the expert' (at 155).

Several points are worth interrogating at this stage of Kennedy's argument. Kennedy deliberately chooses not to buy into any (grand) theoretical framework in presenting his world of struggle, largely so as to not privilege one frame over another. In the course of this review, I will note further downsides of this choice. However, first I wish to ask: Is it possible to step out of theoretical frameworks? The focus on expertise certainly side-lines other influential phenomena that shape the world. Taking people with projects as a starting point and writing cartographies of engagement are presented as almost neutral choices in contrast to the ideologically laden perspectives of law and economics or international relations theory. Indeed, Kennedy notes that 'it is not possible to escape the tendentious nature of inquiry into the significance of expert performance in global political and economic affairs' (at 122). This is an instance of the typical self-reflexivity of critical scholarship – it turns its argument against itself in the sense that it would not expose hidden biases of other approaches to claim neutrality for itself. Such self-reflexivity would have further questioned the apparent withdrawal from theory, the choice for people with projects as a starting point and the writing of cartographies of engagement as a method.[23]

What is more, shortly after the indeterminacy thesis created waves in international legal scholarship, it was flanked by the reminder that, of course, some legal arguments are more likely to succeed than others.[24] If not international law as such,

[23] For an extended, critical discussion of the practice of mapping, see Orford, 'A Journal of the Voyage from Apology to Utopia', 7 *German Law Journal* (2006) 993.

[24] For the claim that international legal argument is structurally indeterminate, see especially Kennedy, 'Theses about International Law Discourse', 23 *German Yearbook of International Law* (1980) 353; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 600–614. The postscript to the latter publication also provides an account of structural biases, which stabilize the dominance of some interpetations over others.

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then social dynamics or structural biases limit the range of what is possible in legal argument.[25] As Kennedy notes, '[i]t remains difficult to explain why some arguments succeed or persuade while others fail when the vocabulary has become so plastic. It is hard not to conclude – or at least be suspicious – that "something else" is going on' (at 159–160). This something else continues to be elusive. Staying away from theory – as Kennedy claims to do – may indeed make it impossible to pin it down. If one is interested in understanding the power dynamics of expert struggle across time, then capturing at least part of that something else would seem to be the main enterprise.[26] Furthermore, one might have expected a look at the dynamics that stabilize dominant positions within scientific disciplines and at the overtly political decisions to empower some voices rather than others.[27]

Expertise provides a seemingly neutralizing language in which people can converse about concrete and apparently technical questions in spite of their profound ideological differences in the abstract. One may wonder if it is not necessary for expertise to rule that at least some people are fooled by it in the sense that they take the technical reasons that experts offer as the real reasons for concrete positions (rather than the underlying ideological differences). Would there not need to be some people who defer to the judgment of experts for expertise to rule? These people may indeed exist, but, I submit, they would probably be quite far away from places like Davos. It strikes me that the moment somebody comes into view as a person with a project, they will not buy into claims of expertise but, rather, seek the expertise that suits them.

C *Law*

Chapter 6 provides the most direct and illuminating analysis to clarify what Kennedy's argument can achieve. Staying attuned to the workings of law in the construction of the global political economy, Kennedy illustrates how law is relevant in the struggle of people with projects in three related, but distinct, ways (at 175–176). First, law is an effective tool for defeating rivals. People struggle to pull the law onto their side precisely because they recognize that it allocates gains and losses.[28] With regard to trade law, for example, it is relatively well known how US service providers pushed for non-discriminate market access abroad and, to a large degree, succeeded with the General Agreement on Trade

[25] Seminally, Marks, 'False Contingency', 62 *Current Legal Problems* (2009) 1. See also Beckett, 'False Contingency', in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts of International Law* (forthcoming); Marks, 'International Judicial Activism and the Commodity-Form Theory of International Law', 18 *EJIL* (2007) 199; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 62–64.

[26] Marks, 'False Contingency', *supra* note 25.

[27] Note the wide range of what may well be called 'politically assigned epistemic authorities' in global governance, M. Zürn, *From Constitutional Rule to Loosely Coupled Spheres of Liquid Authority: A Reflexive Approach* (2016).

[28] One may also call it 'hegemonic contestation' (Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review of International Affairs* (2004) 197) or a 'semantic struggle' (Venzke, *supra* note 25, at 37–42).

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in Services, while globally non-competitive farmers in the USA kept their protectionist privileges.[29] Kennedy uses other examples, but the point remains relatively familiar. More interesting is the reminder that apparently neutral notions such as productivity or competitiveness depend on legal arrangements simply because those arrangements make some actors more productive or competitive.[30] Appreciating this point, and not forgetting about it, 'denaturalizes the failure to capture gains. The gains from trade … are not distributed between country A and country B by the operation of economic forces [but also] through struggle over the authority to exclude others from access to parts of the process through which value is generated' (at 183). Kennedy thus draws attention to the role of law in the distribution of value between different kinds of production.[31]

A second way in which law is relevant for people in the world of struggle is by providing a language for advocacy, negotiation and conflict resolution. Here, Kennedy nicely sets up his story with the example of negotiations initiated by the USA with Japan on a series of measures that the USA identified as being unfair barriers to trade. Trade law provided the terrain for the negotiations just as well as the repertoire for challenging Japanese trade measures. Kennedy's overall argument possibly gains its strongest illustration at this point. All sides to the debate used expert arguments to fight certain measures and to defend and promote others. They did so in the language of expertise that assigned the attributes of 'unfair barriers to trade' and 'normal regulatory infrastructure for market activity' to these measures. The setting required precisely such expertise and did not allow for overt reference to individual interests. Expertise provided the language to maintain the conversation. Had the negotiating sides not used this language, and had they instead referred to what suited them individually, their conversation would have ended soon after it started. Individual negotiating positions had to link in a sufficiently coherent fashion to principles. In this way, expert work contributed to shaping what would have been deemed (ab)normal or (un)fair.[32] As I will argue later in this review, this example also shows the limits of Kennedy's conception of international law as an argumentative practice. That practice is restrained by the need to link to principles and may thus curb exercises of power.

Third, international law shapes the balance of power among individuals. Not unlike Bedjaoui, Kennedy takes inspiration from Gunnar Myrdal's analysis of centres and peripheries according to which success begets success.[33] It should be possible, Kennedy argues, 'to trace the role of law not only in the distribution of gains, but in the process by which inequalities are reproduced or exacerbated' (at 204–205). Adopting further concepts from Myrdal's work, Kennedy identifies a few global legal arrangements that follow the logic of the intervening welfare state so as to redistribute past gains and to

[29] General Agreement on Trade in Services 1994, 1869 UNTS 183.

[30] See already Kennedy, 'Preface', *supra* note 5, at xiv: 'We know that the elements of economic life – capital, labor, credit, money, liquidity – are creatures of law.' See also Tzouvala, *supra* note 8 at 231–232.

[31] This point is taken further in the Insitute for Global Law and Policy, Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto', 4 *London Review of International Law* (2016) 57.

[32] Tarullo, *supra* note 13; Lang, *supra* note 13.

[33] See Bedjaoui, *supra* note 3, especially at 78; Kennedy, *World of Struggle* (at 202–217), with references to Myrdal, *Economic Theory and Underdeveloped Regions* (1957), at 13.

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mitigate inequality. More common are examples of the Myrdalian 'oppressor state', which reinforces the position of past winners. Examples of winners' law include the unconstrained movement of capital, immigration laws that invite highly skilled labour while keeping out poor migrants or intellectual property laws favouring specific kinds of innovation in the centre and corporate, as well as antitrust, laws that allow for huge private companies while stigmatizing state-owned enterprises in the periphery (at 207).

Chapter 7 turns to the expertise of international lawyers, in particular, and further teases out how they cope with their own disenchantment due to the internal fragmentation of international law and the apparent lack of progress in the world. Kennedy opts for the exuberant, spiritual vocabulary of professional faith. Faith is what holds the field together with all of its divisions and contradictions (at 242). Any new theory or attempt to make sense of the whole would inadvertently add yet another position to a disenchanted field: 'We should understand contemporary international legal theory in this way: a ministry to a doubting church' (at 252).

Chapter 8 focuses on legal expertise in the laws of war. It is a great chapter on its own, but its content is neither new – it recaptures Kennedy's *Of War and Law* (2006) – nor does it fit well in a study on global political economy. It shows how the laws of war facilitate killing and alleviate the responsibility of those who do the killing. In fact, the Weberian epigram of Kennedy's book of 2006 could have been used in 2016 just as well: 'May the human freedom of responsible decision be the vocation of our politics.' The epilogue to *The World of Struggle* again ends on this note. We should 'inhabit our expertise as fighting faith and experience politics as our vocation in just the sense that Max Weber imagined: with passion, with proportion, and with responsibility in an irrational world that cannot be known or predicted. … Together, you can change the world. The spirit of 1648 is to begin' (at 278–279).

I have suggested that maybe the best way to describe the book is as a warm invitation. It is indeed appealing, written lucidly, with great insight and in a punchy style. Yet there are also a few drawbacks to note before I turn to focus on specific points of substance in the next sections. The captivating language cannot gloss over an excess of repetition. The points of Chapter 3 have already been made well in the pages that precede it. The world-making power of ideas is stressed repeatedly, just as the significance of boundary work and the distributive consequences that flow from it. As noted, Chapter 8 does not fit. As the addressee of an invitation to join a project, I can furthermore not help but notice that the invitation's argument is mostly supported by references to Kennedy's own works as well as to those of a few chosen colleagues. A discussion of Francisco de Vitoria (at 92) or of the doctrine of sources (at 144) is supported by his articles on 'Primitive Legal Scholarship' and 'The Sources of International Law', both of which, to be sure, contain so many references that the main text is squeezed against the top of the page, running in single lines above a wealth of footnotes.[34] Other sections of the

[34] Kennedy, 'Primitive Legal Scholarship', 27 *Harvard International Law Journal* (1986) 1; Kennedy, 'The Sources of International Law', 2 *American University Journal of International Law and Policy* (1987) 1.

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book make do without any reference – a discussion of the core of functionalism (at 99), for instance, without as much as a nod to David Mitrany or of bureaucratic decision making that is stuck in dominant frames (at 199) without a nod to Graham Allison.[35] These are classics. In addition, recent legal scholarship is simply absent. Experts of international law may easily add other voices as they read along. At least a disclaimer might have been in place, whatever else one makes of this choice.[36] As it stands, Kennedy's book is backed up mostly with his own expertise, which we are invited to accept.

3 Cracking the Frame? Possibilities of Change

The possibility of fundamental change is the foremost concern that permeates Kennedy's book. The most promising way of tackling flagrant injustice in the world leads via deconstruction and re-imagination, revealing the assumptions and choices that are implicit in expert work. The contingency of presumed boundaries, in particular, ought to be revealed. The times are those of 1648 when everything needed to be rethought. Shifting boundaries a bit in one direction or another will not do the job. It is not enough to be better at playing the game of international law. It is necessary to change the rules and its players. International lawyers must crack the frame. They should do that as experts. Can we?

Given the central concern for changing the present state of affairs, one might have expected that Kennedy would look at changes in the past. Expert work is certainly dynamic in his understanding. It builds on the sediment – settled outcomes – of prior expert struggle, and it feeds back into that sediment (especially at 137–139). Moreover, Kennedy frequently resorts to the past in order to remind the reader of different sensibilities and of different frames that used to be prevalent, thus suggesting that change is indeed possible. However, the process by which frames have changed remains in the dark. His cartographies reveal frames prevailing at different times as snapshots. These snapshots appear as the result of archaeological work that, according to Michel Foucault, wants to 'grasp the implicit systems which determine our most familiar behavior without our knowing it … the constraint they impose upon us'.[37] The mapping that Kennedy provides distinguishes historical periods but does not show transitions. How does one frame replace another? What is the process and what are the dynamics by which

[35] D. Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (1943); D. Mitrany, *The Functional Theory of Politics* (1975); Allison, 'Conceptual Models and the Cuban Missile Crisis', 63 *American Political Science Review* (1969) 689.

[36] See the first footnote in Kennedy, 'Political Economy', *supra* note 11: 'This essay summarizes and extends a series of studies I have undertaken … I cite here only works developing examples which I highlight here and which were not cited in those prior studies.'

[37] Simon, 'A Conversation with Michel Foucault', 38 *Partisan Review* (1971) 192, at 201, quoted in Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions', 16 *Punishment and Society* (2014) 365, at 369.

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frames change? The distinctive task of the archaeologist is 'not to trace out processes of change … but instead to distinguish these historical epochs and trace the differential logic of each in their structures'.[38] In this take, a specific frame dominates in a specific epoch. It even defines the epoch and possibly blends out other, competing frames.

The distinct periods that Kennedy identifies are marked by epochal events. Throughout the book, cracks and shifts in prevailing frames are caused by shattering events. The events of 9/11 contributed to turning all kinds of things into security issues and to unravelling past beliefs in light of the allegedly new, categorical threat of terrorism (at 32). The global economic crisis of 2009 shook background beliefs about the virtues of deregulation (at 32), and the publication of the first photos of planet earth in 1965 gave rise to frames that pictured problems as global (at 91). It seems as though change requires an external push.[39] The effect of all of these events is of course mediated by expert struggles that, in fact, render these events meaningful. These events did not create new arguments, but they reinforced arguments that were already there. They recalibrated the terrain of struggle. However, the question remains: How do such events, or their absence, relate to the conditions and possibilities of change?[40]

In order to tease out the possibilities of cracking frames and of inducing change by way of reimagining the world, the process of change must be better understood. One way of examining change even without leaning on theorems of political science is to engage in genealogy, rather than archaeology, not to place emphasis on the prevailing background beliefs at different moments in time but, rather, to see conflicting beliefs at all times and to see change. The core of Kennedy's argument resonates closely with the ambition of genealogy to understand the present as a product of past struggles that are now largely forgotten.[41] Genealogical inquiry seeks to unearth past conflict, to emphasize heterogeneity, to reveal the power relations on which outcomes depend

[38] This is how Garland, *supra* note 37, at 370, fittingly summarizes Foucauldian archeology. See also M.S. Roth, 'Foucault's "History of the Present"', 20 *History and Theory* (1981) 32. But see Boucheron, 'Was Geschichte vermag', 804 *Merkur* (2016) 5, at 12–13 (arguing that the archaeology of knowledge reminds us that the lowest strata of history are still active today).

[39] Dealing with precisely that question. Johns, Joyce and Pahuja, 'Introduction', in F. Johns *et al.* (eds), *Events: The Force of International Law* (2011) 1.

[40] One could think, for instance, among other things, about 'opportunity structures'. See P. de Wilde and M. Zürn, 'Can the Politicization of European Integration be Reversed?', 50 *Journal of Common Market Studies* (2012) 137, at 143–145. Or 'critical junctures' in institutional development. Seminally B. Ruth Collier and D. Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (1991); Capoccia and Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism', 59 *World Politics* (2007) 341.

[41] While Kennedy's book is imbued with this aspiration, I have suggested that it does not practically engage in such genealogical inquiry. Links to Foucault's work are only made explicit in one note that refers to the concepts of 'governmentality' and 'biopower' (at 281, n. 4). Foucault, by the way, would probably not have minded the use of his thought without further ado, since he himself was set against extensive referencing: 'For myself, I prefer to utilise the writers I like. The only valid tribute to thought such as Nietzsche's is precisely to use it, to deform it, to make it groan and protest.' M. Foucault, *Power/Knowledge* (1980), at 53–54.

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and, overall, to remind us of the contingency of the present.[42] It is notably directed towards the present. 'Experience has taught me', Foucault writes, 'that the history of various forms of rationality is sometimes more effective in unsettling our certitudes and dogmatism than is abstract criticism'.[43]

In order to crack the prevailing frames in the present – to undo and remake the world – it is crucial to not only reveal assumptions and choices embedded in expert work but also to understand their changes over time and to show contingency of their present shape. This has notably been the focus of Kennedy's Harvard colleague Roberto Unger. Unger's description of the core problem to be tackled closely mirrors Kennedy's: 'A political-economic discourse and a practice of legal analysis both play prominent roles today in this transposition of brute force and contingent compromise into reason and piety.'[44] The cure for Unger, as for Kennedy, is one of 'institutional imagination'.[45] Kennedy identifies the naturalizing effect of expert work as the central dynamic that clouds redistribution and that sustains the problematic 'tyranny of no alternatives' (at 28). At least when it comes to the role of law and lawyers, Unger is maybe a notch more specific when he identifies the dominant modus of rationalizing legal analysis as the basic obstacle to change. This mode of legal analysis presents law and its development 'as expressions, albeit flawed, of connected sets of policies and principles'.[46]

As legal experts, how do we break out of this dilemma and what are the conditions and possibilities of our impact? It may be easy to overestimate our capacities to imagine and to remake the world differently. A critical project may do well to expose contingencies and indeterminacy, but it should not ignore the forces and dynamics that close them down and that lead to one outcome rather than another.[47] Precisely those forces and dynamics would be described by genealogy. Moreover, it is people in places like Davos, or a next generation of privileged students wishing to make their way there, who experience the world as possibly subject to change through their imagination and action. The overwhelming outside, far from Davos, perceives the world as having been given to them, plausibly so.[48] At the same time, fundamental change can probably

[42] Foucault, 'Nietzsche, Genealogy, History', in Paul Rabinow (ed.), *The Foucault Reader* (1984) 76, at 82: 'The search for descent is not the erecting of foundations: on the contrary, it disturbs what was previously thought immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself.' See also M. Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (1994).

[43] Foucault, 'Politics and Reason (1979)', reprinted in L.D. Kritzman (ed.), *Michel Foucault: Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984* (1988) 83, quoted in Garland, *supra* note 37, at 373.

[44] R.M. Unger, *False Necessity* (2001), at xxxviii.

[45] R.M. Unger, *What Should Legal Analysis Become?* (1996); see also Feichtner, 'Critical Scholarship and Responsible Practice of International Law: How Can the Two Be Reconciled?', 29 *LJIL* (2016) (forthcoming). Kennedy only fleetingly mentions Unger once on an unrelated point (at 20).

[46] Unger, *supra* note 45, at 36.

[47] Marks, 'Judicial Activism', *supra* note 25.

[48] Marks, 'False Contingency', *supra* note 25, at 14, with reference to T. Eagleton, *The English Novel* (2005), at 311.

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only come from the outside. Kennedy shies away from institutional imagination that would open up places like Davos or give outsiders a voice; maybe rightly so. In Europe, the protests against the Transatlantic Trade and Investment Partnership have shown a potential for effective politicization through social movements, largely outside institutional channels. But the disregard for institutional questions brings me to the question of the capable, acting subject at the heart of change.

4 Who Should Do It? The Thorny Question of the Subject

In a wonderful recent essay about the possibility of the revolution, Christoph Menke submits that the classic, and still unresolved, key question concerns the subject – who should do it?[49] Following Marxist thought, the society that ends in the crisis of capitalism itself produces the revolutionary subject.[50] What comes to an end produces the future. Vladimir Lenin thus argued in his *State and Revolution* that capitalism enables all to partake in the administration of the state.[51] It does so through the 'training and disciplining of millions of workers'.[52] Of course, it aims at exploitation, and yet it produces the revolutionary subject. The fact that the revolutionary subject was, in essence, the disciplined subject has since been identified as the main reason for the fact that the Russian Revolution of 1917 has turned into oppression.[53] And it has remained a difficult issue for theory – who could think of the revolution?

Menke argues that developments in post-Marxism may well be understood as a consequence of this unresolved paradox. Already according to Foucault, Marxist revolutionary theory only repeats the paradoxical relationship between capability and liberty that was already characteristic of the enlightenment.[54] Thinkers of the enlightenment predicted (or hoped) that increasing capability would coincide with increasing autonomy and, thus, liberty. One follows from the other.[55] Foucault insists that this relationship is not all that easy since there is simply no way of enabling individuals without disciplining them. And discipline, in turn, is the opposite of liberty.[56] This reasoning ultimately disqualifies every subject that is somehow socially situated as a revolutionary subject. The revolutionary subject cannot be the product of any

[49] Menke, *supra* note 1, at 55.

[50] *Ibid.*

[51] V.I. Lenin, *State and Revolution* (2014), at 121–142.

[52] *Ibid.*, at 140.

[53] Menke, *supra* note 1, at 55, with reference to Rosa Luxemburg. See R. Luxemburg, *Zur russischen Revolution: Kritik der Leninschen Revolutionstheorie* (1922) in *Rosa Luxembourg – Gesammelte Werke* (2000), at 360.

[54] Menke, *supra* note 1, at 56. Foucault, 'What Is Enlightenment?', in Rabinow, *supra* note 42, 32. The English translation speaks of 'the paradox of the relations of capacity and power'. While this is indeed a fine literal translation of the original ('*paradoxe des rapports de la capacité et du pouvoir*'), the translation may mislead. The text that follows makes clear that what is meant is capability ('*la capacité technique à agier sur les choses*'), on the one hand, and individual liberty ('*la liberté des individus*'), on the other hand. See M. Foucault, *Qu'est-ce que les lumières?* (2004), at 82.

[55] Foucault, 'What Is Enlightenment', *supra* note 54.

[56] Foucault, *Lumières*, *supra* note 54, at 83–84.

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(disciplining) society because it cannot liberate the society of which it is part. It might thus be suggested that the revolutionary subject must be the subject, unsituated and therefore unconstrained. According to Menke:

> [t]he capabilities created by capitalism are not revolutionary. Revolutionary is rather the capability of subjectivity as such: the indeterminate ability or the ability of indeterminacy, the power of negativity to abstract from everything and to say no to everything. The subject is revolutionary only as instance of indeterminate freedom and empty equality.[57]

Kennedy has faith in the ability of subjectivity as such. We need to remake the world – the world of expertise – by pulling the rug from under expert work. We need to expose the indeterminacy of expert work and the choices that it hides. We need to replace experts' faith with responsibility.[58] Experts must 'unknow'. They must relish 'the sudden experience of unknowing … the moment when the deciding self feels itself thrust forward, unmoored, into the experience' (at 255). They must cherish 'that moment of vertigo [when] professional practice suddenly has no progressive telos, and international law opens as a terrain for politics, rather than a recipe or escape from political choice. It is in such a moment that the world could look again like 1648: open to being remade' (*ibid.*).

Apart from the fact that the recurrent reference to 1648 is peculiar and questionable,[59] Kennedy's faith in individuals, in their ability to say no, is notable. He has faith in the undetermined decisions they take, burdened but liberated by the responsibility they feel in moments of vertigo: 'In that moment we may glimpse an alternative to rule by experts: rule by people deciding responsibly in a moment of unknowing' (at 166). This is the locus of change, the place of the potential to remake the world and to remake it differently. Kennedy does not discuss the abilities of individuals or the conditions for change. This is his faith. It may also be that he has drawn the lessons of revolutionary thinking as Menke outlined them. A situated, social subject is always a disciplined subject and, as such, suspect in its revolutionary capacity. Lenin and those in his wake who had thought hard about the conditions for the revolution focused on a subject, the working class, which was enabled by capitalism. But it was also a disciplined subject and, as such, unable to fundamentally change the world. Kennedy forgoes the effort of trying to account for the conditions of change or of the abilities of the individual. They are presumed to be there when it comes to it: we learn to fly while we are falling.

[57] Menke, *supra* note 1, at 56–57: '*Revolutionär sind nicht die bestimmten, vom Kapitalismus hervorgebrachten Fähigkeiten; revolutionär ist vielmehr die Fähigkeit der Subjektivität als solcher: die unbestimmte Fähigkeit oder die Fähigkeit der Unbestimmtheit, die Kraft der Negativität, von allem zu abstrahieren und zu allem Nein zu sagen. Revolutionär ist das Subjekt nur als Instanz unbestimmter Freiheit und leerer Gleichheit*' (my translation).

[58] See also Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', 1 *London Review of International Law* (2013) 63; Feichtner, *supra* note 45.

[59] Not only does it reinforce the many mythical narratives that turned the Treaty of Westphalia into an epochal event for international law – what exactly happened then? More importantly, who acted then? The year emphasizes the role of the old dynastic monarchies that existed all along. Little changed both within their realms as well as between them. See B. Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (2009).

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We do not learn anything about the abilities we need in order to crack frames or the conditions under which progressive change might actually take off the ground, other than about a requisite sense that things really do need to change.[60] This may be a clever limitation since any such account would be embedded in a concrete image of the world, and it would give instruction and direction that Kennedy resists. However, this lack of guidance comes with its own troubles. Menke argues that placing emphasis on the undisciplined subject – the subject of indeterminate freedom and empty equality – again fails to offer a compelling account of the possibility of the revolution. How could such a subject change anything, let alone the way in which we imagine the world? Entirely unsituated, the subject is not capable of political action. It may rise up and interrupt, but it cannot think change, let alone think the revolution.[61] While its potential to unravel the world may be great, its capacity to remake it is at best uncertain. To pause while falling is no small achievement.[62] But can we take off towards a better alternative?

The questions that are thus left hanging in the air are many, and they are crucial. How would the world change if experts embraced their responsibility and decided in the keen recognition of their freedom, if they are not already doing that? How should they remake the world? Under which conditions can they remake it, and remake it into something better? If the concept were not so tainted, one might ask about conditions for progress. The subject of indeterminate freedom that says no to everything may be the only thing and the best thing to hope for.

There may still be two broad ways of providing more ground, one connecting to the individual and the other connecting to her interaction with others. The first way of proceeding could be to turn to virtue ethics and draw attention to the conditions that might sustain our hope that indeterminate decisions by responsible actors do indeed lead to something better.[63] One could thus ask about the virtues of expertise.[64] It does not require too much imagination to see why Kennedy did not take this way or even acknowledge its existence. In his world of struggle, claims about what amounts to virtuous behaviour would count as just another layer in all individuals' quest to prevail with their projects.[65]

If it is not in the virtues of the individual that we might locate conditions for progressive change, then maybe it is in the interaction between individuals. Kennedy repeatedly describes expert practice as involving argument, even placing stress on

[60] Kennedy thus takes confidence from the fact that more of his students see the world in the spirit of 1648, feeling that everything needs to be remade (at 15).

[61] Menke, *supra* note 1, at 57, also with reference to S. Zizek (ed.), *Revolution at the Gates: Zizek on Lenin, the 1917 Writings* (2004) (arguing that the critique of Marxism has led to a kind of pure politics of unconstrained responsibility that can no longer think the revolution, to think through the foundation of something new).

[62] Classically, Benjamin, 'Thesen zur Geschichtsphilosophie', 1 *Gesammelte Schriften* (1991) 1232.

[63] See already Korhonen, *supra* note 5.

[64] Klabbers, 'The Virtues of Expertise', in M. Ambrus *et al.* (eds), *The Role of 'Experts' in International and European Decision-Making Processes* (2014) 82.

[65] On the limitations of virtue ethics, see also Feichtner, *supra* note 45, at 17.

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this concept: 'People *argue* that enforcing their contractual entitlements will support market exchange even as it impedes other potential transactions and opportunities. … Establishing the privilege to discriminate or union bust on foreign job sites requires an *argument* that labor or antidiscrimination laws are public regulations that do not travel rather than implied terms of contract that should' (at 44, emphasis in the original). What does it mean for Kennedy to argue? Might this interaction not harbour a last possibility for something like reason?

5 Violence in Expert Argument

In the world of struggle, '[e]xperts rule by argument and assertion' (at 135). Kennedy describes expert work as an argumentative practice, placing stress on the notion of arguing: 'Across the fields of expertise I have studied', he writes, 'disputes take place in more or less stable types of argument, which can be pictured in a series of "levels". The basic unit of expert assertion is a link between a proposal about what to do, a reason, and an outcome' (at 145). The practice of arguing and asserting unfolds against background beliefs. It proceeds on the basis of matters that are accepted as facts and on the basis of a common sense – in other words, within frames (at 138–139). Understood as an argumentative practice, expert work amounts to a form of power or violence. Expert work perpetuates frames that already tilt the battlefield towards the advantage of some individuals rather than others. What is now accepted and left unquestioned is the product of struggles in the past. It reflects past gains and losses that expert work carries into the present. At the same time, expert work shapes the way in which the past appears at present and how it will appear in the future.

Expert argument amounts to a form of power or violence precisely because it effectively hides its true nature. Legal arguments offer a cover for any individual who pursues her interests, her project. The law provides a tilted battlefield and the armour to fight on it, not only to claim rights and obligations that reflect past gains but also to invoke a mantle of legitimacy:

> Although I put you out of business, I did so using only my legal rights and privileges. Setting up shop next door, I mobilized my relationships and entitlements, using my larger market presence to demand lower prices from suppliers and advertise to your customers, my relations with bankers to borrow when you could not. I outcompeted you – but I did not ask my uncle to pay you a visit with a lead pipe. (at 72)

What difference does it make that experts argue, rather than battle with lead pipes? Kennedy urges international lawyers to recognize the violence vested in legal argument. In another instance of his alluring signature style, he writes that '[r]ather than seeing the hand of power in the glove of law, mainstream international lawyers focus on the glove' (at 240). But does the glove not cushion the blow? On the receiving end, I would prefer if the gloves did not come off.

Kennedy has faith in the responsible decisions of individuals, but not in the way in which they engage one another with arguments. Using the notion of arguing

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interchangeably with those of persuading, convincing or asserting, being convinced by arguments or being persuaded by lead pipes almost seems to be the same thing (at 165, as an example). His indiscriminate use of these concepts is not due to a slip of the pen but, rather, due to a rejection of any distinction between them. However, a rich body of thought has tied arguing to the appeal to good reason and persuasion, conversely, to the appeal to interests.[66] For all of its diversity, argumentation theory demands respect for the grand cultural achievement of curbing, if not even replacing, violence through the 'gentle power of reason' (Berthold Brecht) and to thereby 'civilizing' the process of living together.[67] Kennedy has no regard for this body of thought and only implicitly engages with it, offering cues for his disregard.

One reason against understanding the practice of arguing as a way of cushioning the blow is yet again its proclivity to cover up the fact that we are, after all, talking about a blow in a struggle. The main reason for Kennedy's view then lies in the antagonistic nature of society – Carl Schmitt, next to Carl von Clausewitz, provides inspiration.[68] Any appeal to a common interest camouflages the particular interest at stake. As a categorical position, I submit, this is as unconvincing as is its alternative, the postulation of shared or even universal interests.[69] Which position to adopt is perhaps best understood as a question of strategy.

Kennedy delivers the more decisive punch against thinking of the practice of argumentation as a locus of something like reason by highlighting every participant's situatedness.[70] He renders the limits of understanding expert argument as cushioning the blow obvious with the example of debates about what is lawful during war. It is a matter of perspective: 'No one, after all, experiences the death of her husband or sister as humanitarian and proportional' (at 275). Considering the widow irrational for not agreeing with the expert claim about the legality of killing her husband adds insult to injury. And even if, with shaky confidence, we were to abstract from the perspective of the widow, it is hard to deny that '[p]ersuasion and consensus also rest on status of forces and are the product of coercive struggle' (at 7).

[66] See Müller, 'Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations', 10 *European Journal of International Relations* (2004) 395; Ulbert and Risse, 'Deliberately Changing the Discourse: What Does Make Arguing Effective?', 40 *Acta Politica* (2005) 351; N. Deitelhoff, *Überzeugung in der Politik: Grundzüge einer Diskurstheorie internationalen Regierens* (2006). For a critique that does not do away with the distinction, see Venzke, *supra* note 25, at 214–222.

[67] That is how Josef Kopperschmidt opens his introductory *Argumentationstheorie* (2000). See B. Brecht, *Das Leben des Galilei* (1998), at 34: '*[D]ie sanfte Gewalt der Vernunft*'.

[68] See note 18 in this review. C. Mouffe, *On the Political* (2005), at 106: '[S]ince power relations are constitutive of the social, every order is by necessity a hegemonic order.' On this position in international legal argument, see Venzke, *supra* note 25, at 61.

[69] For the difficulties in empirically establishing what is actually going on in argumentative practice, see Hanrieder, 'The False Promise of the Better Argument', 3 *International Theory* (2011) 390.

[70] Insightful on the situationality of legal argument. Korhonen, *supra* note 5, at 5–9.

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And, yet, the practice of arguing, in theory and in practice, offers a hook for questioning and challenging specific assertions as well as concrete background beliefs.[71] Sticking to one of Kennedy's own examples, it made a difference that the US government challenged Japanese trade measures through arguments. For Kennedy, they hide the clear interests at play. That is all too obvious, I submit, and falls short in four respects. First, it may well be presumed that none of the negotiators was fooled about the fact that arguments and appeals to principles (unfair, discriminatory trade barriers versus normal regulatory infrastructure) were aligned with particular interests. Second, Kennedy recognizes that there are moments at which one might not persist with one's own arguments. For him, these are moments of yielding (especially at 166), connected to moments of unknowing. The orientation of what one ought to argue is lost. These are moments in which one can think afresh, when one feels the responsibility for arguments – the moment of vertigo. The practice of arguing may well be understood as a practice that pushes people into such moments. Locked into the need to support their claims, they may ultimately run out of arguments. Third, argumentative practice is presented as a zero-sum game. The gains for some are the losses for others (at 58, 74). This may be a corrective focus, but it is unconvincing as a categorical position. It is also the case that we can do things together that we cannot do alone – gain something by acting together. Fourth, it may be remembered that Kennedy notes how the practice of argument forced all participants to link their positions to principles in a sufficiently coherent fashion. There is a demand to somehow make sense in legal argument that is absent in the wielding of a lead pipe.

6 Conclusion: The Future Lies in the Past

I have argued that Kennedy's book is perhaps best understood as a warm invitation to join the project of imagining and remaking the world differently. As a project that ultimately aims at change, there remains a core activity that should be added to the proposed program and for which I have welcomed examples to lead the way: historical inquiry that exposes the contingency of international legal developments in a context-sensitive fashion. Such inquiry investigates, hands on and in the depth of the historical material, the possibilities of alternative paths.

Kennedy notes that we should 'expose the forces and dynamics by which earlier struggles had drawn the divides and settled boundaries' (at 32) – divides and boundaries that could in principle have been drawn differently but that were drawn in a specific way after all. Revealing the controversies that were settled in a specific instance has the potential of opening up possibilities in the present. As Foucault put it, 'important and even invaluable political effects can be produced by historical analyses. … The problem is to let knowledge of the past work on the experience

[71] See Ulbert and Risse, *supra* note 66; Grobe, 'The Power of Words: Argumentative Persuasion in International Negotiations', 16 *European Journal of International Relations* (2010) 5.

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of the present'.[72] Such an activity, such a scholarly practice of historical inquiry, I submit, has immense potential that is only slowly tapped.[73] Stronger still, Patrick Boucheron affirms in his recent inaugural address at the Collège de France that history may reinstate the futures that were never realized.[74] It acts beyond the present into the future. Things have to change. But that is hardly new. The fact that voices of the NIEO are being revived should thus also be understood as a proposition to revisit the possibilities that existed in the past, to regain a sense of alternatives to the present and to possibly chart a different future.

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[72] M. Foucault, *The Birth of Biopolitics* (2008), at 130, quoted in Garland, *supra* note 37, at 373.

[73] That is in spite of the 'turn towards history' in international law, see already Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law', 16 *EJIL* (2005) 539. Of course, there are instances that do precisely that including, among others, Greenman, 'Re-Reading Vitoria: Re-Conceptualising the Responsibility of Rebel Movements', 83 *Nordic Journal of International Law* (2014) 357.

[74] Boucheron, *supra* note 38, at 24.