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Venzke, I.

**DOI**

[10.1017/S2044251317000091](https://doi.org/10.1017/S2044251317000091)

**Publication date**

2018

**Document Version**

Final published version

**Published in**

Asian Journal of International Law

[Link to publication](#)

**Citation for published version (APA):**

Venzke, I. (2018). What if? Counterfactual (Hi)Stories of International Law. *Asian Journal of International Law*, 8(2), 403-431. <https://doi.org/10.1017/S2044251317000091>

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# What if? Counterfactual (Hi)Stories of International Law

Ingo VENZKE\*  
University of Amsterdam, the Netherlands  
i.venzke@uva.nl

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## Abstract

This paper proposes to think counterfactually about international law: How could it have been otherwise? Asking that question has the benefit of, first, exposing contingencies in international law's development that are otherwise glossed over in the rush towards making sense of what happened. Second, counterfactual thinking supports the understanding of what actually happened in a context-sensitive fashion. Third, it forms part of comparative moral assessments and exposes blind spots. Counterfactual thinking may thus contribute to the freedom from necessity, from grand theory, and from reality. The paper draws the contours of what writing counterfactual (hi)stories of international law is about, discusses its merits as well as drawbacks, offers guidance on how to do it, and then focuses on two probing examples: What if the International Trade Organization had been established around 1949? What if garment workers were seals and the European Commission prohibited the importation of certain textiles?

This paper questions the present shape of international law by suggesting to think counterfactually about its development: How could it have been otherwise? Counterfactual thinking, as a first approximation, involves the artificial change of at least one element of reality as we know it, followed up by an argument about what could have happened in that alternative. There could be many examples: How would the law of the sea have developed if Harry S. Truman had not unilaterally proclaimed jurisdiction over the continental shelf in 1945? What if the President of the International Court of Justice [ICJ] had not cast his tie-breaking vote to deny the Court's jurisdiction in *South West Africa* (1966) or in *Nuclear Arms Race* (2016)?<sup>1</sup>

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\* For their valuable comments on earlier versions of this paper I thank Jochen von Bernstorff, Andreas Hasenclever, and the participants of the colloquium in Tübingen (December 2014); Bas Schotel and the participants of the colloquium at the Paul Scholten Center, Amsterdam (December 2014); Hélène Ruiz-Fabri, the convenors Dino Kritsiotis, Anne Orford, and Joseph H.H. Weiler, and the participants of the Fourth Annual Junior Faculty Forum in Florence, Italy (June 2015); Michael Giudice and the participants of the Nathanson Centre Legal Philosophy Seminar, York University (September 2016); the Journal's two anonymous reviewers; and my colleagues at the Amsterdam Center for International Law. I am indebted to Fay Valinaki for her research assistance.

1. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] I.C.J. Rep. 6; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear*

What if the statute of the International Trade Organization [ITO] had not landed in the dustbins of history and instead entered into force around 1949? Or, with a different flavour, what if garment workers were seals and the European Commission prohibited the importation of textiles produced under gruesome conditions? The present paper provides a pathway towards asking questions such as these. It offers an account of what counterfactual thinking is about, what it has to offer when it comes to international law, and how it might be done.

Like all law, international law is contingent. It did not have to be like this. Saying that international law is contingent does not mean that it could have taken any shape with equal probability.<sup>2</sup> It rather means that the shape in which we find international law today was one possibility among others. As Niklas Luhmann notes in his recent, posthumously published work on *Contingency and Law*, the fact that one possibility has become real does not change the fact that it was just a possibility, and notably not a necessity.<sup>3</sup> Sometimes alternative paths were equally probable or even more probable than what actually happened. For instance, circumstances really had to conspire for the ICJ to deny its jurisdiction in *South West Africa*.<sup>4</sup> Judge Badawi passed away a year before the Judgment, Judge Bustamante had fallen sick, and Judge Zafarullah Khan was pressured not to sit in the case by the Court's President, Sir Percy Spender, whose election to the Court was quite a coincidence to begin with.<sup>5</sup> While the Judgment has been deemed to be a disaster for the Court and for international law, it was also quite unlikely.<sup>6</sup>

It is in the nature of legal thinking, even in the nature of law, that it largely abstracts from its uncertain origins and from the shaky path that has led towards the present.<sup>7</sup> International legal thinking leaves uncertainties behind and has hardly any space for

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*Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016.

2. On the difference between contingency and chance, also see P. VOGT, *Kontingenz und Zufall: Eine Ideen- und Begriffsgeschichte* (Berlin: De Gruyter, 2011), especially at 64–6.
3. N. LUHMANN, *Kontingenz und Recht* (Berlin: Suhrkamp, 2013) at 32–45.
4. On the recognized significance of the decision, see G. ABI-SAAB, “The International Court as a World Court” in V. LOWE and M. FITZMAURICE, eds., *Fifty Years of the International Court of Justice* (Cambridge: Cambridge University Press, 1996), 3; W.G. FRIEDMANN, “The Jurisprudential Implications of the South West Africa Case” (1969) 1 *Columbia Journal of Transnational Law* 1. On the circumstances of the decision's making, see the insightful study by V. KATTAN, “Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases” (2015) 5 *Asian Journal of International Law* 310.
5. On the unlikely election of Sir Percy Spender, see J. CRAWFORD, “The General Assembly, the International Court and Self-determination” in V. LOWE and M. FITZMAURICE, eds., *Fifty Years of the International Court of Justice* (Cambridge: Cambridge University Press, 1996), 585 at 588.
6. Abi-Saab, *supra* note 4 at 5 (calling the Judgment a “disaster”). For a critical overview of the reactions to the Judgment, see I. VENZKE, “The International Court of Justice During the Battle for International Law (1955–1975)—Colonial Imprints and Possibilities for Change” in J. VON BERNSTORFF and P. DANN, eds., *The Battle for International Law in the Decolonization Era* (Cambridge: Cambridge University Press, 2017, forthcoming). For a further assessment of what would have happened in the alternative, see *infra* notes 121–4 and accompanying text.
7. Even the 1966 Judgment in *South West Africa*, for example, introduced the doctrinal argument that there are “matter[s] that appertain[] to the merits of a case but which are of an antecedent character”—an argument that is now part of the doctrinal discourse in spite of its unlikely origins. *South West Africa*, *supra* note 1 at para. 4; Y. SHANY, “Jurisdiction and Admissibility” in C.P.R. ROMANO, K.J. ALTER, and Y. SHANY, *Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), 779 at 788–9.

thinking about the possible alternatives to international law's actual developments: How could it have been otherwise?

The present paper will discuss three main reasons in favour of counterfactual thinking about international law. First, counterfactual thinking helps to expose contingencies and to counteract the bias of hindsight—the bias, namely, that makes us think that outcomes were more likely once we knew about them.<sup>8</sup> Hindsight bias instils the feeling that once we know of outcomes we think that we knew it all along. It contributes to “creeping determinism”<sup>9</sup> and counterfactual thinking may work as a remedy. It is in this vein that counterfactuals have a long trajectory, especially in historiography. They help to prevent, as Philip Roth contends in his fictitious *Plot against America*, that “everything unexpected in its own time is chronicled on the page as inevitable. The terror of the unforeseen is what the science of history hides, turning a disaster into an epic.”<sup>10</sup> While it is a vibrant practice in historiography, counterfactual thinking has yet to be attuned to international law's distinct premises and sensibilities. But here, too, it can help in freeing legal thinking from false beliefs in the necessity of outcomes and developments.<sup>11</sup>

Second, counterfactual thinking can improve our understanding of how and why international law has assumed its present shape. To think of international law as contingent does not stand in the way of studying the factors that determined its development in specific instances.<sup>12</sup> Quite the contrary, it can even support inquiries into determining factors and, as such, it has a strong tradition in the social sciences. According to Max Weber, “[i]n order to penetrate to the real causal interrelationships, *we construct unreal ones*”.<sup>13</sup> Though afflicted with problems and

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8. Seminally, B. FISCHHOFF, “Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty” (1975) 1 *Journal of Experimental Psychology* 288. There is only one study that includes an investigation into the phenomenon of hindsight in thinking about law (here the likelihood of appellate court decisions), rather than thinking about judicial decisions, for instance in findings of liability in tort cases or guilt in criminal cases. That single study is Chris GUTHRIE, Jeffrey J. RACHLINSKI, and Andrew J. WISTRICH, “Inside the Judicial Mind” (2000) 86 *Cornell Law Review* 777 at 799–805. For an overview, see Doron TEICHMAN, “The Hindsight Bias and the Law in Hindsight” in Eyal ZAMIR and Doron TEICHMAN, *Behavioural Economics and the Law* (Oxford: Oxford University Press, 2014), 354–73. For studies of hindsight in liability judgments, see Jeffrey J. RACHLINSKI, “A Positive Psychological Theory of Judging in Hindsight” (1998) 65 *University of Chicago Law Review* 571–625. Also see Stephanos BIBAS, “The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel” (2004) 1 *Utah Law Review* 1; Alison C. SMITH and Edith GREENE, “Conduct and Its Consequences: Attempts at Debiasing Jury Judgments” (2005) 29 *Law and Human Behaviour* 505.
  9. Fischhoff, *supra* note 8 at 288.
  10. P. ROTH, *The Plot Against America* (New York: Vintage, 2004) at 114.
  11. See R.M. UNGER, *False Necessity* (London: Verso, 2001); D. KENNEDY, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997) at 18 (speaking of “false determinacy”). Neither Unger or Kennedy consider the phenomenon of hindsight bias. But the remedies they consider against false necessities are close to counterfactual thinking—institutional imagination, in Unger's case, and deconstruction, in Kennedy's.
  12. My conception of contingency follows Luhmann, *supra* note 3. For Luhmann, contingency notably excludes the impossible and presumes an already structured context in which actors are embedded (at 47–61). Susan Marks also wishes to “revoke the idea that things can be, and quite frequently are, contingent without being random, accidental, or arbitrary”. See Susan MARKS, “False Contingency” (2009) 62 *Current Legal Problems* 1 at 2.
  13. M. WEBER, “Objective Possibility and Adequate Causation in Historical Explanation” in Weard A. SHILS and Henry A. FINCH, eds., *The Methodology of the Social Sciences* (Glencoe: Free Press, 1949), 164 at 185–6 (italics in original).

therefore approached with caution, counterfactual thinking has the advantage of offering explanations that stay close to specific contexts rather than relying on grand theory that builds on systemic variables. Counterfactual thinking singles out individual explanatory factors, changes them, and then asks what would have happened in the alternative.<sup>14</sup> By changing the context, counterfactual thinking preserves that context to a much greater extent. It frees explanations from the abstractions of grand theory.

The third main reason in favour of counterfactual thinking lies in the realm of comparative moral assessments. Moral assessments typically involve implicit assumptions about alternatives that counterfactual thinking makes explicit. For example, Thomas Pogge has proposed an alternative set of rules for international economic law that could arguably alleviate extreme poverty.<sup>15</sup> Robert Howse and Ruti Teitel take his counterfactual seriously and play through the consequences.<sup>16</sup> It is not so clear that the world that Pogge proposes would indeed be the better one. While this specific case may be uncertain, other counterfactuals can motivate by drawing utopias or dystopias. They can expose biases in the world and in the development of international law. For example, how would the laws of war have developed had Saudi Arabia occupied the US east coast? Or, what if garment workers were seals? Would it change the trade policy of the European Union [EU] towards the importation of textiles produced under gruesome conditions? The point of such counterfactuals is analytical purchase, not probability. Counterfactual (hi)stories of international law thus serve the cause of freedom from reality in pursuit of normative commitments.

Section I will briefly introduce what counterfactual thinking has been about. Section II then expands on existing uses of counterfactual thinking and on the three main reasons in favour of counterfactual thinking: exposing contingency in the service of freedom from necessity (II.A.); supporting causal statements in a context-sensitive fashion, freed from the abstractions of grand theory (II.B.); and pursuing normative commitments in freedom from reality (II.C.). How then to best use counterfactuals? Bearing the varieties of counterfactual thinking in mind, Section III makes suggestions on what to change (III.A), how to argue about the consequences of such changes (III.B), and where to stop when thinking through alternative paths (III.C). It also summarizes what, in any event, not to do (III.D). Section IV turns to the practice of thinking counterfactually with two probing examples: What if the ITO had been established around 1949 (IV.A)? What if garment workers were seals (IV.B)? To think counterfactually about the development of international law is not without difficulty, if only because it is rarely done. It also has drawbacks. Section V concludes by summarizing the potential of counterfactual thinking about international law while pointing to its limits—some to overcome, others to respect.

14. See in particular, J. FEARON, "Counterfactuals and Hypothesis Testing in Political Science" (1991) 43 *World Politics* 169.

15. T. POGGE, "The Role of International Law in Reproducing Mass Poverty" in S. BESSON and J. TASIIOULAS, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 417.

16. R. HOWSE and R. TEITEL, "Global Justice, Poverty, and the International Economic Order" in S. BESSON and J. TASIIOULAS, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 437 at 438–9.

## I. THE CONTOURS OF COUNTERFACTUAL THINKING

Counterfactual thinking is far from alien to international lawyers. Legal practice is peppered with it.<sup>17</sup> According to the Permanent Court of International Justice, for instance, “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>18</sup> The steadfast assumption in those counterfactuals is that everything would have stayed the same, but for the illegal act. Other segments of legal reasoning employ slightly more developed counterfactual scenarios, especially when it comes to establishing causation and responsibility. Would a wrongful act have occurred had it not been for specific (in)action?<sup>19</sup> Still other uses of counterfactuals support statements about parties’ intentions—for example, if parties had wanted to limit the application of most-favourable-nation clauses to substantive standards of investment protection, would they not have said so in the treaty?<sup>20</sup>

There are many more examples of counterfactual reasoning *within* the practice of international law. They are not the main concern of the present paper, which sets out to think counterfactually *about* international law. For that purpose, it seeks inspiration not from the practice of legal reasoning, but from other disciplines, in particular from historiography, from social science, and from critical theory.

Early examples of counterfactual (hi)stories are embedded in struggles of squaring human choice with divine desire and destiny. In the context of the seventeenth century, Blaise Pascal wrote his famed words that the face of the whole world would be different if Cleopatra’s nose had been shorter and had thus not attracted the attention of Mark Antony.<sup>21</sup> Over a century later, Victor Hugo still turned to literary expression and fashioned a world in which Napoleon had won the battle of Waterloo—how could he possibly have lost?<sup>22</sup> It was Hugo’s compatriot Louis Geoffroy who drew out this world in further detail in what was the first book of alternative history.<sup>23</sup> It is all in the title: *Napoléon et la conquête du monde (1812–1832): Histoire de la Monarchie universelle*.<sup>24</sup>

Geoffroy’s novel triggered the first scholarly treatment of the matter with theoretical ambitions.<sup>25</sup> French Philosopher Charles Renouvier gave it an initial name.

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17. H. WEBER, “The ‘But For’ Test and Other Devices—The Role of Hypothetical Events in the Law” (2009) 34 *Historical Social Research* 118.
  18. *Chorzów Factory (Germany v. Poland)*, Merits, [1928] P.C.I.J. Series A., No. 17 at 47.
  19. I. PLAKOKEFALOS, “Causation in the Law of State Responsibility and the Problem of Over-determination: In Search of Clarity” (2015) 26 *European Journal of International Law* 471.
  20. See e.g. *Maffezini v. Spain*, Decision on Jurisdiction, 25 Jan. 2000, [2000] ICSID Case No. ARB/97/7 at para. 53.
  21. “Le nez de Cléopâtre: s’il eût été plus court, toute la face de la terre aurait changé.” See D. CLARKE, “Blaise Pascal” *The Stanford Encyclopedia of Philosophy* (18 March 2014), online: The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/spr2014/entries/pascal/>>.
  22. V. HUGO, *Les Misérables*, trans. Dorman DENNY (London: Penguin, 1988 [1862]) at 279–324.
  23. While there is not an established distinction between counterfactual, alternative, or virtual history, I see them on a scale on which histories take increasing distance from what actually happened.
  24. Online: <<http://gallica.bnf.fr/ark:/12148/bpt6k5580929>>.
  25. R. EVANS, *Altered Pasts: Counterfactuals in History* (New York: Little, Brown, 2014) at 12.

According to Renouvier, Geoffroy “composes a *uchronie*—a utopia of past time. He writes history, not as it was, but as it could have been.”<sup>26</sup> Today, the website *uchronia.net* offers a “bibliography of over 3200 novels, stories, essays and other printed material involving the ‘what ifs’ of history.”<sup>27</sup> A 2011 overview of counterfactual histories compares 116 novels and finds a fascination with histories of Nazism, amounting to eighty percent of the total.<sup>28</sup>

Like E.H. Carr, most historians used to dismiss counterfactual histories as mere “parlour games”.<sup>29</sup> “What if? histories” remained at the level of entertainment up to the 1990s. But they have become more serious business since then.<sup>30</sup> A sprawling number of edited volumes have left behind sporadic earlier accounts that did not gain much traction.<sup>31</sup> Counterfactuals now help the historian, as Johan Huizinga put it, to “constantly put himself at a point in the past at which the known factors will seem to permit different outcomes”.<sup>32</sup> With a more engaged and forward-looking twist, Patrick Boucheron argued in his recent inaugural address at the *Collège de France* that “history is capable of granting the rightful place to the futures that were never realized, to the potentials that were never met”.<sup>33</sup> Counterfactual thinking frequently plays a crucial supporting role in this regard.

Connecting the callings of historiography with the ambitions of social sciences, accounts of why something has happened are necessarily also accounts of why something else did not happen.<sup>34</sup> Causal statements necessarily involve (typically implicit) counterfactual propositions.<sup>35</sup> Max Weber offered an early argument in favour of counterfactual analysis to make explicit the counterfactual assumptions in explanations and assessments of past events. James Fearon picked up the argument and showed how counter-factuals are particularly helpful in supporting causal statements in specific, single instances.<sup>36</sup> Ned Lebow then brought counterfactual thinking to

26. C. RENOUVIER, *Uchronie (l'utopie dans l'histoire)* (Paris: Félix Alcan, 1904 [1857]) as quoted and translated in Evans, *supra* note 25.

27. Online: <[www.uchronia.net](http://www.uchronia.net)>.

28. G.D. ROSENFELD, *The World Hitler Never Made: Alternate History and the Memory of Nazism* (2011) 518, cited in Evans, *supra* note 25 at 96.

29. E.H. CARR, *What Is History?* (Harmondsworth: Penguin, 1987) at 97. See also A.J.P. TALYOR, *The Struggle for Mastery in Europe 1848–1918* (Oxford: Clarendon Press, 1954) at 513 (“a historian should never deal in speculations about what did not happen”).

30. See e.g. Alexander DEMANDT, *Ungeschehene Geschichte* (Göttingen: Vandenhoeck & Ruprecht, 1986); Allan MEGILL, “The New Counterfactualists” (2004) 5 *Historically Speaking* 17; Roland WENZLHUEMER, “Unpredictability, Contingency and Counterfactuals” (2009) 34 *Historical Social Research* 9.

31. R. COWLEY, ed., *More What If? Eminent Historians Imagine What Might Have Been* (New York: G.P. Putnam’s Sons, 2003); E. BENZONI, *La storia con i se* (Venice: Marsilio, 2013).

32. J. HUIZINGA, “The Idea of History” in F. STERN, ed., *The Varieties of History* (New York: Vintage, 1973), 292.

33. Patrick BOUCHERON, “Was Geschichte vermag” (2016) 804 *Merkur* 5 at 24 (“Die Geschichte vermag es, den nie verwirklichten Zukünften, den nie erreichten Potenzialen zu ihrem Recht zu verhelfen.”) (my translation in text).

34. In support of this proposition, Elazar WEINRYB, “Historiographic Counterfactuals” in Aviezer TUCKER, ed., *A Companion to the Philosophy of History and Historiography* (Chichester: Blackwell, 2009), 109 at 109–19.

35. A. TUCKER, *Our Knowledge of the Past* (Cambridge: Cambridge University Press, 2004) at 226; Fearon, *supra* note 14 at 173.

36. Fearon, *supra* note 14; Weber, *supra* note 13.

fruition in international relations scholarship.<sup>37</sup> He has challenged the grand theoretical accounts on the course of international politics, criticized the extent to which they rely only on systemic variables, and questioned those accounts' simplistic assumption of linear causation. As I will argue below, many of the arguments in support of counterfactual thinking for understanding and explaining why something has happened apply a fortiori to the development of international law.<sup>38</sup>

Critical theory and its practice have shown the capacity of counterfactuals to expose blind spots, which provides another source of inspiration and motivation for the present argument in support of counterfactual (hi)stories of international law. Counterfactuals have an important tradition in critical thinking, especially in feminist writings. As opposed to the counterfactuals in the study of what could have happened or of why something has (not) happened, miracle counterfactuals have no pretention of being probable. They expose wrongs and possibly fuel action.<sup>39</sup> A powerful example is the short story "If I Were a Man", in which Charlotte Perkins Gilman describes the world of a housewife who one day finds herself in the shoes of her husband to then experience how the world is made for men by men.<sup>40</sup> The story has an analytical function as it exposes the world as it presents itself differently for different sexes. It also has a motivational, programmatic function as it constructs the utopia in which males and females live as non-gendered humans.<sup>41</sup>

A project that has insightfully used an improbable counterfactual in the field of international law is the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery. Inspired by critical and historical literature on people's tribunals, the project highlighted the difference that an alternate gender constellation would have made for the judicial practice of the International Military Tribunal for the Far East.<sup>42</sup> One of the project's functions was precisely to provide "a feminist past *manqué* for international law".<sup>43</sup> The focus was on what the actual tribunal might and probably should have done, not what it could have done, given the real structural constraints and biases at the time.<sup>44</sup>

37. R.N. LEBOW, *Forbidden Fruit* (Princeton, NJ: Princeton University Press, 2010). See also P.H. TETLOCK and A. BELKIN, "Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives" in P. H. TETLOCK and A. BELKIN, eds., *Counterfactual Thought Experiments* (Princeton, NJ: Princeton University Press, 1996), 16.

38. See *infra* notes 80–83 and accompanying text.

39. Compare Karen KNOP, "Form and Imagination in the Work of Ronald St. John Macdonald" (2002) 40 *Canadian Yearbook of International Law* 287 at 287–307 (drawing on Thomas Moore's concept of utopia as a combination of both "good place" (*eu topos*) as well as "no place" (*ou topos*), with reference to Thomas MOORE, *Utopia: Latin Text and English Translation* (Cambridge: Cambridge University Press, 1995)).

40. Charlotte Perkins GILMAN, "If I Were a Man" (1914), in *Yellow Wall-paper and Other Stories* (Oxford: Oxford University Press, 2009), 262.

41. B. CHRIST, "'If I Were a Man': Functions of Counterfactuals in Feminist Writing" in D. BIRKE, M. BUTTER, and T. KÉOPPE, eds., *Counterfactual Thinking—Counterfactual Writing* (Berlin: De Gruyter, 2011), 190.

42. Karen KNOP, "The Tokyo Women's Tribunal and the Turn to Fiction" in Fleur JOHNS, Richard JOYCE, and Sundhya PAHUJA, eds., *Events: The Force of International Law* (Abingdon: Routledge, 2011), 145.

43. *Ibid.*, at 160.

44. *Ibid.*, at 158.

These practices of counterfactual thinking—in historiography, social science, and critical thinking—offer rich inspiration for thinking counterfactually about international law. Before expanding on the reasons for following up on that inspiration, I wish to distinguish counterfactual thinking from another practice that is already well established within the field of international law: the writing of counter-narratives. Counter-narratives suggest that international law is different from how it is typically seen. They offer unravelling rereadings.<sup>45</sup> Narratives that run counter to received wisdom are similar to histories counter to the facts. In both cases, the world changes.<sup>46</sup> But while it is true that facts only come to life in the context of a narrative, changing the narrative is still not the same as changing the facts. For example, counter-narratives can do all sorts of things with the events surrounding the assassination of Franz Ferdinand and his wife in Sarajevo, but they cannot bring them back to life. Counterfactuals can.

## II. WHY THINK COUNTERFACTUALLY ABOUT INTERNATIONAL LAW?

### A. *Contingency: Freedom from Necessity*

A first set of arguments in favour of writing counterfactual (hi)stories in international law connects to the use of counterfactual thinking in historiography. It exposes the contingency of overall developments, of concrete decisions, even of international law's foundational concepts.<sup>47</sup> It helps to work against what Roberto Unger has called beliefs in “false necessity”—the beliefs, namely, which wrongly suggest that outcomes were next to necessary.<sup>48</sup> To appreciate how counterfactual thinking can help in this regard requires an understanding of the dynamics that sustain such wrong beliefs. I will draw attention to two related dynamics in this regard: over-determination (1) and hindsight bias (2).

#### 1. *Over-determination*

Writing about his own guild of historians, Richard Evans noted recently that they “prefer to pile up causes until events are overdetermined, that is, they have so many causes that if one did not operate, the others would and the event in question would still have occurred”.<sup>49</sup> For example, almost all studies on the causes of World War I [WWI] suggest that the war would have broken out even if Franz Ferdinand and his wife had not been shot in Sarajevo on 28 June 1914. Ned Lebow employs counterfactual

45. K. GREENMAN, “Re-Reading Vitoria: Re-Conceptualising the Responsibility of Rebel Movements” (2014) 83 *Nordic Journal of International Law* 357; A. ORFORD, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), especially at 38.

46. On facts and their interpretation in the context of (legal) historiography, see M. STOLLEIS, *Rechtsgeschichte schreiben: Rekonstruktion, Erzählung, Fiktion?* (Basel: Schwabe, 2008); Q. SKINNER, “The Practice of History and the Cult of the Fact” in *Visions of Politics*, vol. I, (Cambridge: Cambridge University Press, 2002), 8.

47. See also S. PAHUJA, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 43 (demanding “an appreciation of the contingency of law’s founding categories [and of] the structures that hold those contingencies in place”).

48. Unger, *supra* note 11; also see Kennedy, *supra* note 11.

49. Evans, *supra* note 25 at 82.

thinking to argue that this is not so certain. He rather submits that WWI was contingent on a number of underlying and immediate causes that were shaky and might well have supported different trajectories.<sup>50</sup> It may well be questioned whether that is indeed the case. The point is that there is in fact a meaningful debate about the significance of the Archduke's assassination that centres on the plausibility of competing counterfactual histories.<sup>51</sup>

In a volume that has been as attention grabbing as it is problematic, Niall Ferguson sees counterfactual histories as a “necessary antidote” to scholarship that makes too much of what has actually happened.<sup>52</sup> Ferguson brusquely criticizes Hegel for arguing that “[t]he sole aim of philosophical inquiry is to eliminate the contingent”.<sup>53</sup> That “[i]n history we must look for a general design, the ultimate end of the world. We must bring into history the belief and conviction that the realm of the will is not at the mercy of contingency.”<sup>54</sup> Ferguson's main target is historiography with Marxist leanings, while he portrays a more general dislike for studies that place too much emphasis on structural analysis. For his part then, Ferguson elevates the will of key individuals above everything else, creating decontextualized actors who hardly feel the constraints of their time or place. In so doing, Ferguson overcompensates for the faults of a Marxist straw man and turns out to be himself unconvincing.

The use of counterfactuals has indeed been mostly advocated by historians who lean towards actor-centred approaches to the detriment of attention paid to determining social structures. Political leanings between right and left are clearly distributed accordingly.<sup>55</sup> Hans-Ulrich Wehler pairs his social-structural account of German history with deep criticism of counterfactuals.<sup>56</sup> Conversely, Thomas Nipperdey places more emphasis on actors and defends the use of counterfactuals so as to “understand the past out of its own possibilities”—to “fulfill the historian's noble dream” of giving an open future back to the past.<sup>57</sup> But the tool of counterfactuals is not per se loaded in favour of either approach to history. Not only can it carve out contingencies; it can also end up exposing tragedies in the sense that certain outcomes were bound to occur no matter what people would have done, given the circumstances of the time. I hold with Marx, after all, that “[men] make their own history, but they do

50. See Lebow, *supra* note 37 at 69–102.

51. In spite of his scepticism of counterfactual history, Evans engages at length with such arguments and testifies to the possibility of such debates, see Evans, *supra* note 25 at 173–4.

52. N. FERGUSON, “Virtual History: Towards a ‘Chaotic’ Theory of the Past” in N. FERGUSON, ed., *Virtual History: Alternatives and Counterfactuals* (New York: Basic Books, 1999), 1 at 89.

53. G.W.F. HEGEL, “Second Draft: Philosophical History of the World” in *Lectures on the Philosophy of World History* (Cambridge: Cambridge University Press, 1975), at 26–30, as quoted in Ferguson, *supra* note 52 at 29.

54. *Ibid.*

55. On the thinking on contingency in historiography, including the political dimensions of doing so, see Yemima BEN-MENACHEM, “Historical Necessity and Contingency” in Aviezer TUCKER, ed., *A Companion to the Philosophy of History and Historiography* (Chichester: Blackwell, 2009), 120.

56. H.U. WEHLER, *Deutsche Gesellschaftsgeschichte*, vol. 2 (Munich: C.H. Beck, 1987) 660. Also see Ton NIJHUIS, “Geschiedenis, toeval en contingentie” in S. HAAKMA and E. LEMMENS, eds., *Toeval* (Utrecht: Studium Generale, 2003), 49 at 59.

57. Thomas NIPPERDEY, “Kann Geschichte objektiv sein?” in *Nachdenken über die deutsche Geschichte* (Munich: C.H. Beck, 1986), 232.

not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.”<sup>58</sup> Counterfactual thinking can show the importance of men just as well as their impotence, the possibilities of choice just as well as the persistence of tragedy.

The point remains that the dynamics of explaining the past create a host of reasons that, even if contradictory, mutually reinforce each other in support of what has happened, creating an appearance of necessity. Why is that appearance influential even if few scholars or practitioners would subscribe to a theoretical programme according to which historical developments are somehow necessary?<sup>59</sup>

The dynamics that sustain false beliefs in the high likelihood, if not necessity, of outcomes include those of rationalization—of rushing towards making sense of what has happened. When it comes to law and legal developments, Roberto Unger notably blamed the dominant mode of “rationalizing legal analysis” for the creation of false necessity.<sup>60</sup> That mode of legal analysis, according to Unger, represents law and its development “as expressions, albeit flawed, of connected sets of policies and principles”.<sup>61</sup> It gives too much credit to actual legal developments. Rationalizing legal analysis is not interested in seeing contingency but, with a strong teleology, typically uses history in support of the present.<sup>62</sup>

## 2. *Hindsight bias*

There is yet another, more profound dynamic at play in sustaining the appearance of necessity: the bias of hindsight. This bias describes the increased beliefs in the likelihood of outcomes once we know of them.<sup>63</sup> Baruch Fischhoff opened a variety of empirical studies of this phenomenon with his path-breaking paper of 1975. He places his argument squarely within the context of how we think of historical developments. Among other examples, he quotes historian Georges Florovsky, who wrote 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

58. K. MARX, *The Eighteenth Brumaire of Louis Bonaparte* (Moscow: Progress Publishers, 1934) at 10; also quoted in support of her balanced account in Marks, *supra* note 12 at 1.

59. For a lasting critique of this position, see Karl R. POPPER, *The Poverty of Historicism* (Boston, MA: Beacon, 1958). This is the point of Fischhoff’s “creeping determinism—in contrast with philosophical determinism, which is the conscious belief that whatever happens has to happen”; Fischhoff, *supra* note 8 at 288.

60. R.M. UNGER, *What Should Legal Analysis Become?* (New York: Verso, 1996) at 36.

61. *Ibid.*

62. A. ORFORD, “The Past as Law or History? The Relevance of Imperialism for Modern International Law” in E. JOUANNET, H. RUIZ-FABRI, and M. TOUFAYAN, eds., *Tiers Monde: Bilan et Perspectives* (Paris: Société de Législation Comparée, 2013), 97; R. LESAFFER, “International Law and its History: The Story of an Unrequited Love” in M.C.R. CRAVEN, M. FITZMAURICE, and M. VOGIATZI, eds., *Time, History and International Law* (Leiden: M. Nijhoff, 2007), 27 at 34. Perhaps that is just the lawyer’s perspective, Bardo FASSBENDER and Anne PETERS, “Introduction: Towards A Global History Of International Law” in *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 1 at 15. Also see J.L. DUNOFF, A. WIENER, M. KUMM, A.F. LANG, and J. TULLY, “Hard Times: Progress Narratives, Historical Contingency and the Fate of Global Constitutionalism” (2015) 4 *Global Constitutionalism* 1 at 13.

63. For a general overview, see N.J. ROESE and K.D. VOHS, “Hindsight Bias” (2012) 7 *Perspectives on Psychological Science* 411; for an overview of how the phenomenon relates to legal practice, see Teichman, *supra* note 8.

regular or linear fashion according to a recognizable pattern with an alleged inner necessity. So that we get the impression that it really could not have happened otherwise.<sup>64</sup>

Fischhoff thus draws attention to the dynamics of historical thinking, which does not expose contingency but instead works towards “creeping determinism”.<sup>65</sup>

Different motivational and cognitive reasons sustain the bias of hindsight. It is pleasant to think that one knew an outcome all along, and it fits well with wanting to be seen as an expert.<sup>66</sup> We would arguably undermine our claim to expertise if we acknowledged *ex post* our uncertainty *ex ante*. Our self-esteem might further motivate us not only to keep quiet about our uncertainty *ex ante*, but also to effectively forget about it.<sup>67</sup> On a cognitive level it is very difficult to ignore information if we typically wish to incorporate all available information into our process of thinking.<sup>68</sup> This is what Fischhoff and others have shown through a series of experiments: once people know about an outcome they align their memory of their *ex ante* assessments with that actual outcome.<sup>69</sup>

It seems that most international lawyers now agree that the ICJ could not possibly have acted other than by reaffirming Germany’s immunity in Italian courts even if those lawyers disagree in substance.<sup>70</sup> But I wonder how many international lawyers did not expect the Court to sign on to larger parts of the Italian pleadings. I also suppose that they do not fully and adequately remember their *ex ante* expectations, or that they do prefer to remain quiet about them. To illustrate the point with a final twist: one might imagine that the Court had found an exception to state immunities when it comes to international crimes. Would not many international lawyers have reassured each other that the time was ripe for this step and that it was well supported in international law? I am not suggesting that there is among international lawyers a belief in the infallibility of judges. The more modest point is, just once more, that outcome knowledge impacts assessments of probability. It increases the perceived likelihood of whatever has in fact happened.

In response to these dynamics, counterfactual thinking has been shown to have the capacity of working as a debiasing device.<sup>71</sup> It can mitigate the negative implications of hindsight and resist the dynamics that present outcomes as more likely than

64. Georges FLOROVSKY, “The Study of the Past” in Ronald H. NASH, ed., *Ideas of History*, vol. 2 (New York: E.P. Dutton, 1969), 351 at 369; quoted in Fischhoff, *supra* note 8 at 288.

65. Fischhoff, *supra* note 8 at 288.

66. *Ibid.*

67. *Ibid.*

68. Teichman, *supra* note 8 at 354. Also see the accessible account of the phenomenon and its reasons in Daniel KAHNEMAN, *Thinking Fast and Slow* (New York: Farrar, Straus, and Giroux, 2011) at 202–4.

69. Fischhoff, *supra* note 8; Nicolaos E. SYNODINOS, “Hindsight Distortion: ‘I Knew-It-All Along and I Was Sure About It’” (1986) 16 *Journal of Applied Social Psychology* 107.

70. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] I.C.J. Rep. 99. The relationship between assessments of probability and normative assessments would be a further fascinating field of study—to what extend do we deem developments more likely because we agree with them or less likely because we don’t want them to happen or to have happened?

71. See Lawrence J. SANNA and Norbert SCHWARZ, “Metacognitive Experiences and Human Judgment: The Case of Hindsight Bias and Its Debiasing” (2006) 15 *Current Directions in Psychological Science* 172; Roesch and Vohs, *supra* note 64 at 417–18; Teichman, *supra* note 8 at 364–6.

they were. In this sense, counterfactual thinking can help the cause of freedom from necessity.

### B. *Context: Freedom from Grand Theory*

A second set of arguments in favour of counterfactual thinking about international law emphasizes its usefulness in understanding and explaining why something has happened the way it did. While thinking counterfactually may carve out contingencies, it may also expose the real constraints of any specific time and place. It specifies whether, and if so how, international law could plausibly have been otherwise. To understand the factors that have made international law also informs any account of how it could possibly have turned out differently. Counterfactual thinking studies determination in a way that resists the dynamics that support hindsight bias, especially against the reliance on ready-made explanatory schemes of what has happened. Its advantage over other mechanisms of arguing about determination is that it is sensitive to the specific context. It is especially well suited to support inquiries into determining factors in situations that are relatively unique, and thus where there are few similar cases, and where determination is complex.<sup>72</sup>

The use of counterfactuals resists the temptation of relying on systemic variables for the explanation of what has happened—variables such as material power relationships, states' domestic political systems, or the power of ideas. The grand aim of those theories that do rely on such variables, to be sure, is to carve out regularities, not to explain the concrete event or to study the dynamics that might undermine regularities.<sup>73</sup> But the certainty with which they explain the past still stands in remarkable contrast to the uncertainty about anything that will happen tomorrow. Even if they leave us with great uncertainty about the future, they enjoy an appeal for their clarity and supposed predictive value.<sup>74</sup> They seek an explanatory framework to guide action, and understandably so. But there always remains a gap between the regularities that grand theories postulate and their explanatory power for concrete cases. The enterprise of grand theory may not be in vain, but if we wish to understand a specific outcome, or an even broader development in international law, then an emphasis on systemic variables is far less helpful than a deep understanding of the concrete context.

The cues for using counterfactuals in this effort of thinking about why something has happened come from an early methodological paper by Max Weber on how to establish the significance of events, of determining factors, and of concrete instances of (in)action.<sup>75</sup> From the infinite number of possible variables, how do we know what mattered, and to what degree? Weber suggests that we first isolate a factor that might suggest itself *prima*

72. This argument is made with great insight by Fearon, *supra* note 13.

73. Lebow, *supra* note 37 at 33.

74. See Hannah ARENDT, interviewed by Roger Errera in October 1973, excerpts published in *The New York Review of Books*, 26 October 1973, at 18, noting that “[p]eople find such theories in order to get rid of contingency and unexpectedness”. On the questionable dimensions of the longing for certainty in the social sciences, see Max HORKHEIMER, “Traditional and Critical Theory” in *Critical Theory: Selected Essays* (New York: Continuum, 2002), 188, originally published as “Philosophie und kritische Theorie” (1937) 6 *Zeitschrift für Sozialforschung* 627.

75. Weber, *supra* note 13 at 185–6.

facie and then change it. Second, we generalize against a background of “empirical rules” (*Erfahrungsregeln*) to then, third, judge the possibilities of what would have happened if that specific factor had been modified.<sup>76</sup> Does the isolated factor make a difference? How does it make a difference? Would an event still have occurred at all, at another time, in another form? To pick up the earlier prominent example in historiography: What if Franz Ferdinand and his wife had not been assassinated? What difference would it have made, if any?<sup>77</sup> What difference do specific factors make relative to others—power relations when compared to political leadership, for example?<sup>78</sup> With an eye to international law, what if Hersch Lauterpacht had become a professional piano player or Antonio Cassese never developed an interest in international criminal law? Weber concedes that we cannot know with certainty what would have happened in hypothetical alternatives. But that does not render the inquiry meaningless. Quite the contrary, according to Weber, historiography and the social sciences would be greatly impoverished if they could only ask questions whose answers were certain.<sup>79</sup>

The purchase of counterfactuals is thus recognized, not least in the study of historical institutionalism and its analysis of critical junctures—moments of increased possibilities for change.<sup>80</sup> When it comes to international law, there is a further asset to counterfactual thinking. By preserving contexts, it offers a better account of the autonomy of legal practice that might otherwise get lost in explanations of why an international judicial decision was reached or why legal developments took a specific turn. Those explanations need to take the mindsets of the participants seriously. Those mindsets are part of the social structure and need to be factored into explanations.<sup>81</sup> The task is to explain a practice—legal practice—that is at least

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76. *Ibid.*, at 173–7. It is certainly a crucial question how we arrive at “empirical rules” and what distinguishes them from (grand) theories. On that matter, see the sharp paper by Fearon, *supra* note 14.
77. Paul W. SCHROEDER, “Embedded Counterfactuals and WWI as an Unavoidable War” in D. WETZEL, R. JERVIS, and J. LEVY, eds., *Systems, Stability, and Statecraft* (New York: Palgrave Macmillan, 2004), at 186. On the weighing of factors leading to the end of the Cold War, see R. Ned LEBOW and George W. BRESLAUER, “Leadership and the End of the Cold War: Did it Have to End this Way?” in Lebow *supra* note 37 at 103. Also see P. TETLOCK and G. PARKER, “Counterfactual Thought Experiments” in P. TETLOCK, R. LEBOW, and G. PARKER, eds., *Unmaking the West* (Ann Arbor, MI: University of Michigan Press, 2006), 14.
78. R. JERVIS, “Do Leaders Matter and How Would We Know?” (2013) 22 *Security Studies* 153. I am deliberately leaving aside the study of conditional counterfactuals, including their treatment in David Lewis’ theory of causation. See David LEWIS, *counterfactuals* (Malden: Blackwell, 1973); for a pointed introduction and critique, see Aviezer TUCKER, “Causation in Historiography” in Aviezer TUCKER, *A Companion to the Philosophy of History and Historiography* (Chichester: Blackwell, 2009), 98; Julian REISS, “Counterfactuals” in Harold KINCAID, ed., *Oxford Handbook of Philosophy of Social Science* (Oxford: Oxford University Press, 2012), 154.
79. Weber, *supra* note 13 at 164, 175.
80. Seminally, Berins Ruth COLLIER and David COLLIER, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (Princeton, NJ: Princeton University Press, 1991). Also see G. CAPOCCIA and R.D. KELEMEN, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism” (2007) 59 *World Politics* 341 at 348; James MAHONEY, *The Legacies of Liberalism* (Baltimore, MD: Johns Hopkins Press, 2002), especially at 7. For a conceptualization of such moments of ruptures in international law as events, see Fleur JOHNS, Richard JOYCE, and Sundhya PAHUJA, “Introduction” in Fleur JOHNS, Richard JOYCE, and Sundhya PAHUJA, eds., *Events: The Force of International Law* (Abingdon: Routledge, 2011), 1.
81. P. BOURDIEU and L.J.D. WACQUANT, *An Invitation to Reflexive Sociology* (Chicago, IL: University of Chicago Press, 1992) at 9, 127–8; I. VENZKE, *How Interpretation Makes International Law* (Oxford: Oxford University Press, 2012) at 14, 45–6.

partially a product of subjective predispositions.<sup>82</sup> It strikes me that the importance of these predispositions frequently gets lost in accounts of why something has or has not happened in international law.<sup>83</sup> Asking how it could have been otherwise adds to context-sensitive explanation, it can take participants' mindsets on board, and it thereby respects legal practice as a distinct enterprise that is typically not reducible to a set of systemic variables.

### C. Commitment: Freedom from Reality

#### I. Comparative assessments

Should amnesties ever be allowed even for international crimes? Unless one ascribes to the position of doing justice even if the world comes down, answers to questions such as this are judged by their consequences. What would follow from a prohibition of amnesties? Would their prohibition be more likely to deter future international crimes, or would it rather protract conflicts, given that amnesties are off the table in any political settlement?

Historic (in)action likewise tends to be assessed in comparison to the consequences of concrete alternatives, be they implicit or explicit. The Allied bombing of Dresden towards the end of World War II [WWII] is typically criticized because, even without it, the Third Reich would have fallen shortly thereafter. Yet closer to the field of international law, the wisdom of the ICJ's decision to affirm its jurisdiction in *Nicaragua* is mostly judged by its consequences, which included a strengthening of many countries' faith in the Court as well as the US withdrawal of its unilateral declaration accepting the Court's jurisdiction.<sup>84</sup> Counterfactual thinking pushes strongly towards fleshing out the consequences in a thorough and rather detailed fashion. It suggests playing through the scenario in which something was (not) the case.

Pushing such comparative assessments too hard and far runs the risk of inducing paralysis in view of a tyranny of possibilities.<sup>85</sup> Plus, the further we go, the more uncertain alternative projections into the future become. The belief in the multiplicity of options—in part commercially feigned and in part real—is perhaps a characteristic feature and pathological condition of modern societies.<sup>86</sup> The reaction is oftentimes fatigue, indifference, and increasing reluctance to consider alternative possibilities at all.<sup>87</sup> The awareness of contingency might be taxing. The argument in support of explicit counterfactuals would then be even stronger. Debate, politics, and normative judgement

82. This point has already been made strongly by P. ALLOTT, "International Law and the Idea of History" (1999) 1 *Journal of the History of International Law* 1.

83. The difficulty is, in other words, to avoid the pitfalls that come with explanations of law and legal developments in the image of the natural sciences or, as Pierre Bourdieu put it, that come with ideas of "social physics"; see Bourdieu and Wacquant, *supra* note 81 at 7–8.

84. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] I.C.J. Rep. 15.

85. The statement that "man's autonomy turned into a tyranny of possibilities" is commonly attributed to Hannah Arendt, though no source is ever offered, nor could I trace any. See e.g. U. BECK and E. BECK-GERNSHEIM, "Individualisierung in modernen Gesellschaften Perspektiven und Konroversen einer subjektorientierten Soziologie" in U. BECK and E. BECK-GERNSHEIM, eds., *Riskante Freiheiten* (Frankfurt am Main: Suhrkamp, 1994), 10 at 18; Z. BAUMAN, *Postmodernity and its Discontents* (New York: New York University Press, 1997) at 73.

86. P. GROSS, *Die Multioptionsgesellschaft* (Frankfurt am Main: Suhrkamp, 1994).

87. *Ibid.*, at 27–30.

must be about alternatives, and counterfactual thinking helps to spell them out, if not to create them.<sup>88</sup> It is mainly for that reason that Angela Merkel was criticized for terming her stance on the Greek debt crises *alternativlos* “without alternative”. The term was voted to be the annual “non-word” of the German language in 2010 precisely for the fundamentally flawed and stifling posture that it conveys in a political discourse.<sup>89</sup>

## 2. Analytical counterfactuals

Counterfactual thinking can be instrumental in creating alternatives and in making choices between them. It can also help when pursuing a given goal, a desired world. It can be used to show a world in which, for instance, welfare was distributed more justly or borders were open for all people. It could be used to show how much more horrid the world would arguably still be without feeble international institutions such as the United Nations High Commissioner for Refugees [UNHCR] or the International Committee of the Red Cross [ICRC], etc. Counterfactual thinking can inspire with the utopia or dystopia that it draws. Rachel Carson’s path-breaking book *Silent Spring*, which spurred the ecological movement, opens with the counterfactual of a sunny spring day during which no birds could be heard.<sup>90</sup> Another shocking counterfactual probes biases when it comes to how much we value the life of all humans. Philip Tetlock, Aaron Belin, and Ned Lebow thus propose, with the deliberate intention to disturb, that “if the Black African population of Darfur had been bottle-nosed dolphins, the West would not have allowed their slaughter”.<sup>91</sup>

Provocative counterfactuals with analytical purchase can shock, and they can inspire. That might be precisely the point, to free the mind from the constraints of reality. While so much is amiss in international society, it is strikingly difficult to think of better realistic alternatives. To start doing so may well begin an inquiry into better worlds. Such narratives may bridge the gap between philosophical castles in the air that are easily deflated by down-to-earth international lawyers, on the one hand, and the work of some international lawyers who profoundly wonder about purpose, on the other. Of course, high-doses of moral fervour come with negative side effects as they fuel both cynical and sincere empire.<sup>92</sup> Perhaps the last thing worth striving for is the formal modus of international legal argument, to prevent it from overt moralization.<sup>93</sup> But that last straw of a progressive formalism shows cracks under further critical questioning and might, in any event, not be enough to hang on to. Many participants in

88. This is something that Roberto Unger is also after with his call for “institutional imagination”, or David Kennedy with his invitation to think the world afresh. See Unger, *supra* note 60 and David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016).

89. “Die Unwörter ab 2010” *Unwort des Jahres* (2010), online: Unwort des Jahres <<http://www.unwortdesjahres.net/index.php?id=35>>; “Unwort des Jahres ist ‘alternativlos’” *Zeit Online* (18 January 2011), online: *Zeit Online* <<http://www.zeit.de>>.

90. R. CARSON, *Silent Spring* (Boston, MA: Houghton Mifflin, 1962).

91. Lebow, *supra* note 37 at 42, slightly adapting a similar counterfactual in Tetlock and Belkin, *supra* note 37 at 14.

92. M. KOSKENNIEMI, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001) at 492; see further J. VON BERNSTORFF and I. VENZKE, “Ethos, Ethics and Morality in International Relations” in R. WOLFRUM, ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2010).

93. Koskenniemi, *supra* note 92 at 500–3.

international legal discourse wish to struggle for a better future. With Robert Musil, “[s]uch fools are also called idealists by those who wish to praise them”.<sup>94</sup> Counterfactual thinking helps these fools in articulating and assessing alternatives, freed from the spell of reality. For Musil, as for others, positing that it could be otherwise is therefore the core of critical thinking.<sup>95</sup>

### III. HOW TO THINK COUNTERFACTUALLY?

How to make best use of counterfactuals depends on the more specific purposes for which they are employed. For counterfactuals to expose contingency, they need to be probable and plausible. In order to support causal statements, counterfactuals can be improbable postulations. Counterfactuals used in pursuit of normative commitments can start with a miracle—the housewife one day finding herself in the shoes of her husband. Demands for good counterfactuals thus differ.<sup>96</sup> Bearing such differences in mind, the present section draws together suggestions on how to think counterfactually about international law, what to do and what to avoid.

#### A. *What to Change?*

The purchase of counterfactuals typically relies on the world as we know it. This world renders some changes plausible, keeps arguments about the consequences of such changes meaningful, and accounts for counterfactuals’ analytical purchase. If everything were changed we would learn little about the world as we have it. That is the shared ambition of all the threads of counterfactual thinking that I have discussed. Reality needs to be preserved to the largest degree possible, which is more difficult than it may seem.<sup>97</sup>

For example, the course of international law would have been different if UN Members had followed up on the programme of Article 43 UN Charter<sup>98</sup> and had entered into agreements with the Security Council to place armed forces at the Council’s disposal. Given everything we know about international politics, the chances for something like that to happen were greatest in the context of new beginnings, after WWII and with the *Agenda for Peace*<sup>99</sup> after the Cold War. But even then chances were

94. Robert MUSIL, *The Man Without Qualities*, vol. I, trans. Sophie WILKINS and Burton PIKE (New York: Vintage, 1995) at 11.

95. *Ibid.* (“Well, it could probably just as well be otherwise. So the sense of possibility could be defined outright as the ability to conceive of everything there might be just as well, and to attach no more importance to what is than to what is not.”). Also see Christoph MENKE, “Die Möglichkeit eines anderen Rechts” (2014) 62 *Deutsche Zeitschrift für Philosophie* 136.

96. Tetlock and Belkin, *supra* note 37 (distinguishing between plausible and miracle counterfactuals); Steven WEBER, “Counterfactuals, Past and Future” in P.E. TETLOCK and A. BELKIN, eds., *Counterfactual Thought Experiments in World Politics* (Princeton, NJ: Princeton University Press, 1996), 268 (adding “folk counterfactuals” as a third category).

97. J. ELSTER, *Logic and Society: Contradictions and Possible Worlds* (New York: Wiley, 1978); G. HAWTHORN, *Plausible Worlds: Possibility and Understanding in History and the Social Sciences* (Cambridge: Cambridge University Press, 1991) 31–60.

98. *1945 Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. 993 (entered into force 24 October 1945) [UN Charter].

99. *An Agenda for Peace*, United Nations Security Council, A/47/277.

truly small. A whole lot would have had to change for state actors to enter into such agreements. While explicit disagreements seemed technical on the surface—relating to the composition of troops and procedures for their deployment—obstacles lay deeper.<sup>100</sup> Sticking to the early beginnings, the emerging constellation of the Cold War closed this small window of opportunity soon after the UN Charter entered into force. For agreements under Article 43 to be likely, this key obstacle would have had to be pushed out of the way. But a world in which state actors were so disposed as to conclude armed forces agreements with the Security Council in the years after 1945 would be a very different one to begin with. International law would have developed differently, but it would have done so because the world would have been a very different one. In such cases, counterfactual thinking loses traction. It becomes a futile exercise to ask what would have happened had countries committed armed forces because in order to make sense of that alternative reality we just need to change too much.

In contrast, it would be an undue restriction to limit counterfactuals to possibilities that historical actors actually contemplated.<sup>101</sup> Such a limitation would wrongly sustain the questionable assumptions that underlie narrations where the actions of great men and very few women steer the course of history.<sup>102</sup> At the same time, chance does not make for good counterfactuals either. Pascal's suggestion that the face of the world would be different if Cleopatra's nose had been shorter is intriguing and possibly entertaining. But it is arbitrary.<sup>103</sup> There is no reason why Cleopatra's nose would be shorter. As Lebow notes, "[g]ood counterfactuals ought to arise from the context".<sup>104</sup> It is not paradoxical to demand that counterfactuals be realistic. One of the principal lessons to draw is that for certain counterfactuals to occur, other things typically need to change, which, in turn, undoes the world to a greater extent. This has consequences for our ability to argue about what would have happened in the alternative and it renders the concrete change less interesting.

These considerations lead to a demand for minimalism.<sup>105</sup> They also point to co-tenability as a criterion—the need, namely, to consider other changes so as to render a counterfactual likely.<sup>106</sup> To only change one thing might, in fact, be artificial and unrealistic.<sup>107</sup> A counterfactual might be more realistic if more is changed. At the same time, minimalism is needed so as to be in a position of sensibly arguing about consequences in a world with which we are still familiar and about which we ultimately want to learn something. Good changes are thus near events, something that was likely

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100. M.F. FURET, "Article 43" in J.P. COT, A. PELLET, and M. FORTEAU, eds., *La Charte des Nations Unies* (Paris: Economica, 2005), 1261; R.B. RUSSELL, *United Nations Experience with Military Forces* (Washington, DC: Brookings Institution, 1964) at 12–18.

101. Ferguson raises this demand in his "Introduction", though not every contribution that follows in the volume meets it. Ferguson, *supra* note 52 at 86.

102. Lebow, *supra* note 37 at 48–9; Evans, *supra* note 25 at 131, 151–3.

103. Lebow, *supra* note 37 at 48, 54.

104. *Ibid.*

105. Weber, *supra* note 13.

106. Tetlock and Belkin, *supra* note 37 at 19–23.

107. Elster, *supra* note 97 at 85.

or even more likely to have happened, given the circumstances as they presented themselves at the time. The ICJ's decision in *South West Africa* is a case in point,<sup>108</sup> as is the establishment of the ITO. Not much would have had to change for those counterfactuals to take off.

### B. Which Consequences?

While arguing about the consequences of changed antecedents is not easy, making sense of what actually happened is not all that easy either. Different grand theories have competed for ages in making sense of the world.<sup>109</sup> The continuing difficulties in explaining what happened yesterday are also exposed by the relative incapacity to predict what will happen tomorrow. We know what has actually happened, but only on the surface. Granted, it is more difficult to make sense of the future as compared to the past simply because we lack the input from the world that would allow us to test our efforts.<sup>110</sup> But the past does not speak for itself either.<sup>111</sup>

How then to argue about the consequences of changed antecedents? It seems clear that the further we move away in time from the changed antecedent, the more paths there are for alternative worlds and the more unlikely the choice for any specific path becomes. Contingency certainly cuts both ways, counterfactual paths are contingent just like the past from which they deviate.<sup>112</sup> To illustrate compound probability, one could imagine, as I will do below, the following five steps: first, William Clayton remained in the Truman administration just a little longer, rather than returning to private business in 1948. Second, this would have added an important voice in support of the World Trade Charter<sup>113</sup> and might have tipped the balance of US Senators in favour of ratification. Third, US ratification would have sent a signal that would have led other countries to follow suit, and the International Trade Organization would have been established around the end of 1949. Fourth, the fact that the Charter defines a series of rights for host states of foreign investments would have created the interpretative principle that limitations on those rights need to be interpreted narrowly. Investment protection would also have remained an intergovernmental affair. Fifth, one specific consequence would have been that indirect expropriations would not be constrained by international investment law. If we suppose that each step in this reasoning has a probability of fifty percent, then the overall probability of the final outcome is just three percent.<sup>114</sup> That is truly low. But neither would the probability of the actual development be any higher.

108. *South West Africa*, *supra* note 1.

109. For a sobering critique of how theory projects assumptions onto the past and its alternatives, see P.E. TETLOCK, "Theory-Driven Reasoning About Plausible Pasts and Probable Futures in World Politics: Are We Prisoners of Our Preconceptions?" (1999) 43 *American Journal of Political Science* 335.

110. Wenzlhuemer, *supra* note 30.

111. See, on the distinction between fact and fiction, Stolleis, *supra* note 46; Skinner, *supra* note 46.

112. Megill, *supra* note 30.

113. *Havana Charter for an International Trade Organization*, UN Doc E/CONF.2/78.

114. The possible outcome at each juncture is either the effect as I suggest, or a different one. There are thus two options of which I propose a fifty percent probability. To find the overall probability of five consecutive events, the probability of each must be multiplied:  $(0.5)^5 = 0.03125$ . See also Lebow, *supra* note 36 at 50.

The uncertainty that exists in arguing about the consequences of changed antecedents still remains problematic. In order to mitigate the problem, it is possible to seek continued input from the world as we know it when arguing about its alternative. Historical benchmarks are helpful, such as the example of England when arguing about what would have happened if continental European law had not received Roman law in the Middle Ages.<sup>115</sup> Such a technique could help in thinking through the trajectory of international investment law, had an interstate arbitration mechanism evolved under the aegis of the International Trade Organization. Such an argument can be informed by the benchmark experience of interstate adjudication in the field of trade law. Present policy debates about the merits of an appeal mechanism in investment law likewise draw on the experience of the World Trade Organization [WTO] Appellate Body.<sup>116</sup> In sum, arguing about the consequences of counterfactual changes is only gradually different from making sense of the past.

### C. *Where to Stop?*

Our ability to say that something specific would have followed from changed antecedents decreases exponentially at every new juncture. At the same time, however, it might invite false conclusions to stop too early. For example, Colin Martin and Geoffrey Parker have argued that little would have had to change for the Spanish Armada to land its invasion force on English soil in 1588.<sup>117</sup> In fact, that might even have been the more likely scenario, one which was forestalled mainly due to bad weather conditions.<sup>118</sup> If the Spanish Armada had succeeded in reaching the English coast, it is generally acknowledged that their army would have succeeded in conquering the country. But what would have happened next? Martin and Parker continue to argue that, in accordance with actual events, Philip II's much less capable and less ambitious son, Philip III, came to power in Spain a decade later. It is thus quite likely that, under those circumstances, and with the economic difficulties that set in in the early part of his reign, the English would have successfully revolted against a Spain then in decline. The impact of the seemingly decisive change of events in 1588 would have decreased over time. It would probably have had little influence on the development of England, Spain, or Europe. If anything, the expense of occupying England would probably have accelerated the Spanish decline—a counter-intuitive consequences of the counterfactual military victory in 1588. The suggestion is to draw second-order counterfactuals, rather than to stop at the time that the Spanish Armada had successfully conquered England.

115. Raoul Charles VAN CAENEGEM, *European Law in the Past and the Future: Unity and Diversity Over Two Millennia* (Cambridge: Cambridge University Press, 2002).

116. Ingo VENZKE, "Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication" (2016) 17 *Journal of World Investment & Trade* 374.

117. Colin MARTIN and Geoffrey PARKER, *The Spanish Armada* (Manchester: Manchester University Press, 1999).

118. *Ibid.* See also G. PARKER, *The Grand Strategy of Philip II* (New Haven, CT: Yale University Press, 1998) at 281–96. On second-order counterfactuals, see R.N. LEBOW, "Counterfactual Thought Experiments: A Necessary Teaching Tool" (2007) 40 *The History Teacher* 153 at 165.

In some counterfactual stories, single events have big consequences precisely because they leave out the further historical development that would then bring back the counterfactual path close to the course of history as we know it.<sup>119</sup> For one thing, it is interesting to know that a major change, which would strike many observers as consequential, might only have had modest, if any, long-term consequences. At the same time, there may be small alternative events that would have directed developments in quite different directions. It thus holds true that “[a]s a general rule, the fewer and the more trivial the changes we introduce in history, the fewer the steps linking them to the hypothesized consequent, and the less temporal distance between antecedent and consequent, the more plausible the counterfactual becomes ... The real problem of counterfactual thought experimentation is to determine which plausible rewrites will have lasting major effects on the course of history.”<sup>120</sup>

What if the ICJ had accepted its jurisdiction in *South West Africa*? According to John Dugard, this would have ended apartheid about ten to fifteen years earlier, not because a Judgment would have worked miracles on South Africa, but because it would have swayed the US and the UK to no longer prevent the Security Council from taking meaningful action.<sup>121</sup> The Judgment would arguably have tipped developments towards economic sanctions, at least earlier than 1986.<sup>122</sup> The assumption is that the Court’s Judgment on the merits would actually have condemned South Africa and vindicated the applicants. But that is far from certain. Judge Jessup, who voted in favour of the Court’s jurisdiction and followed the applicants’ argument to quite some extent, notably denied one of their most crucial claims on substance—that there is an international legal norm prohibiting differential treatment based on group membership (i.e. race).<sup>123</sup> Whereas it was indeed quite unlikely that the Court would decline its jurisdiction in 1966, more would have had to change for a decision on the merits to come out in favour of the applicants. If the Court had accepted the exercise of its jurisdiction it is thus quite likely that this alternative would have led to an outcome even worse than the fiasco of 1966, namely letting South Africa off the hook on the substance of its claims, not on the technicality of jurisdictional competence.

#### D. *What Not to Do?*

Which counterfactuals to choose, how to argue about consequences, and where to stop? All these questions heavily depend on the choices of researchers, their knowledge

119. This has been a compelling critique of Ferguson’s volume, *supra* note 52; see Evans, *supra* note 25 at 61.

120. Lebow, *supra* note 37 at 48.

121. Comment made at the symposium, “A Court for the World? Trust in the ICJ 50 years after South West Africa”, The Hague, 30 November 2016. On the applicants’ strategies, see Anthony D’AMATO, “Legal and Political Strategies of the South West Africa Litigation” (1967) 4 *Law in Transition Quarterly* 8 at 33–5; Ernest A. GROSS, “The South West Africa Case: What Happened?” (1966) 45 *Foreign Affairs* 36 at 41.

122. This is when the Security Council actually took meaningful action, including economic sanctions—a whole forty years after the onset of apartheid and twenty years after the Court’s *South West Africa* Judgment. See *The Question of South Africa*, UN SC Res. 591, 28 November 1986.

123. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, Dissenting Opinion of Judge Jessup, [1966] I.C.J. Rep. 6, 325, at paras. 432–3.

interests, and their political projects. At the same time, there are rather clear blunders that need to be avoided in any and all events. Drawing together some of the above considerations: first, changes might not easily be isolated. It is necessary to consider what would have had to be the case for changes to be likely and what else would change with them. Second, contingency cuts both ways. Third, there is a danger of fatigue in counterfactual thinking if all efforts were invested in showing how an event might have turned out differently—the Spanish Armada winning against the English naval force in 1588 or the Court accepting its jurisdiction in *South West Africa*. Thinking further, this would probably not have had the significant lasting effects that the scenario suggests at first sight.

In addition, fourth, present knowledge must not be projected into the past and into the minds of historical actors. It has been argued, for example, that early public health measures would have drastically reduced deaths in the fourteenth-century European pandemics.<sup>124</sup> That is probably true. It is also a moot point. Communities would have had to first recognize that their human intervention could have contained the disease, and they would have had to muster the required will and means to impose quarantines and travel bans in opposition to the dominant merchant class.<sup>125</sup> Changes might only become likely with changes in knowledge. But such changes would then render the counterfactual inferences useless. One of the most famous examples in economic history posits that, if railroads had not been invented and had thus not started to span the North-American continent, the pressure to invent the internal combustion engine would have increased, in all probability leading to its earlier discovery.<sup>126</sup> But if technological knowledge had been in place for the production of internal combustion engines, then railroads would have developed earlier since their engines are technological forerunners of the internal combustion engines in road vehicles.<sup>127</sup> Counterfactuals must not project later knowledge onto historical actors, nor may knowledge be kept from historical actors that they actually possessed, or needed to possess, for the counterfactuals to make sense.

#### IV. THINKING COUNTERFACTUALLY: PROBING EXAMPLES

In the preceding sections I have tied my argument about counterfactual thinking to instances in the practice and development of international law, not least through a series of examples. Those suggestions for counterfactual (hi)stories of international law have aimed at different directions, pursued different ambitions, and came with different demands on how they might best be written. In the present section I provide two probing examples. The first one develops a plausible counterfactual to reveal both contingencies and determining factors in the development of international law—what *could* have been the case? (A) The second example focuses on the use of

124. Lebow, *supra* note 37 at 54.

125. *Ibid.*, with reference to Hawthorn, *supra* note 97 at 31–60.

126. R.W. FOGEL, *Railroads and American Economic Growth* (Baltimore, MD: Johns Hopkins Press, 1964).

127. Lebow, *supra* note 37 at 55.

counterfactuals to question and guide normative choices and projects—what *should* have been the case? (B)

A. *What if the International Trade Organization had been Established?*

When President Truman was submitting the ITO Charter<sup>128</sup> to Congress, he stressed that “[t]his Charter is an integral part of the larger program of international economic reconstruction and development. The great objectives of the European recovery program will be only partially realized unless we achieve a vigorous world trading system.” He called it “an essential step in our foreign policy”.<sup>129</sup> Conditions were in principle favourable for the Charter’s adoption and for the ITO’s establishment. Against the odds, Truman had won the Presidential elections of 1948 in an unexpected landslide victory. He had political capital. What if the ITO was established towards the end of 1949, sixty days after the twenty-seventh instrument of acceptance had been deposited?<sup>130</sup>

In 1949 it was difficult, though not impossible, to imagine what would happen if the ITO Charter was not adopted. It was rendered so difficult because that alternative seemed so bleak and distant. The prospect of setting up the ITO presented itself with apparent necessity. At the time, Clair Wilcox, who headed the US delegation during the negotiations in Havana, ventured into the unknown and explored the future of international economic law without the ITO:

[T]he future of the General Agreement [on Tariffs and Trade] depends upon the fate of the Charter. It is in effect provisionally, not definitely; it can be denounced on short notice. If the United States were to renounce the Charter, many of the contracting parties might withdraw from the Agreement. If this were to happen, tariffs would rise, quota systems and exchange controls would be maintained and strengthened, bilateralism would persist and discrimination be intensified. In almost every country, outside the United States, detailed administrative regulation of exports and imports, instead of being the exception, would become the general rule. Under these circumstances, the Bank and the Fund would be condemned to futility; the commitments required of countries participating in the European recovery program would be nullified; the whole effort to restore a freer trading system would end in failure.<sup>131</sup>

The US had been a driving force behind the ITO. Cordell Hull proposed a “permanent international trade congress” as a member of Congress as far back as 1916.<sup>132</sup> Later, as longest serving Secretary of State, he placed strong emphasis on trade liberalization and international economic governance. The Conference on Trade and Employment in

128. *Supra* note 114.

129. “Special Message to the Congress Transmitting the Charter for the International Trade Organization” *Truman Library* (28 April 1949), online: Truman Library <<http://trumanlibrary.org/publicpapers/index.php?pid=1105>>.

130. This would have been in line with art. 103(2)(1) of the *Havana Charter*, which provides that “[t]his Charter shall enter into force: (i) on the sixtieth day following the day on which a majority of the governments signing the Final Act of the United Nations Conference on Trade and Employment have deposited instruments of acceptance ...”.

131. C. WILCOX, “The Promise of the World Trade Charter” (1949) 27 *Foreign Affairs* 486 at 496.

132. In 1925 Hull used the term “International Trade Organization”. R. TOYE, “The International Trade Organization” in M. DAUNTON, A. NARLIKAR, and R. STERN, eds., *Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012), 85 at 87.

Havana, which led to the final version of the so-called World Trade Charter,<sup>133</sup> started in November 1947 under the chairmanship of Will Clayton, former Under-Secretary of State for Economic Affairs and an ardent supporter of the ITO. The Havana Conference drew on working documents that had already ripened in a series of meetings and conferences, notably in London and Geneva. Fifty-six state representatives were present in Havana and fifty-three participants signed the Final Act of the Conference on 24 March 1948. Clayton concluded: “This may well prove to be the greatest step in history toward order and justice in economic relations among the members of the world community and toward a great expansion in the production, distribution and consumption of goods in the world.”<sup>134</sup>

Already at Havana, the Interim Commission for the International Trade Organization [ICITO] was established in order to pursue the objectives of the Charter in the interim period and to facilitate the eventual establishment of the ITO.<sup>135</sup> ICITO was further tasked with organizing the first regular session of the Conference of the Organization, which could have convened in Geneva in March 1950, two years after the World Trade Charter had been adopted in Havana.<sup>136</sup> There was momentum and support, a project set on track.

Shortly after the Havana Conference, both Wilcox and Clayton left the administration and the ITO lost two of its most ardent supporters.<sup>137</sup> Truman then did not submit the Charter to Congress until April 1949, and the longer the ratification process was delayed, the less likely were the chances for the Charter’s adoption. Congress was increasingly occupied with the North Atlantic Treaty, and its foreign economic policy shifted gradually towards the Economic Cooperation Administration [ECA], which oversaw the implementation of the Marshall Plan.<sup>138</sup>

If only the administration had acted a bit more swiftly, Congress would most likely have ratified the ITO. It is true that the US business community was only lukewarm about the Charter,<sup>139</sup> mainly because of an issue that was relatively marginal during the negotiations themselves: the rather low standards of investment protection that were incorporated in the Charter at a very late stage.<sup>140</sup> But there was no strong opposition, no unbending resistance. The business community could have been swayed, and Congress with it.

133. *Supra* note 114.

134. Statement by the Honourable William L. Clayton at final plenary session, on 23 March 1948, NA RG 43 ITF Box 145, quoted in Toye, *supra* note 132 at 95.

135. “Resolution Establishing an Interim Commission for the International Trade Organization”, UN Conference on Trade and Employment. Those states in fact included the US.

136. To enter into force, ratification of the majority of signatory governments was needed. According to art. 2(a) annex to the Resolution Establishing ICITO, the first Conference of the Organization shall be held at a time between four and six months after the last acceptance needed to bring the Charter into force. On the actual continued role of ICITO, see Pieter Jan KUIJPER, “WTO Institutional Aspects” in Daniel L. BETHLEHEM, Donald MCRAE, Rodney NEUFELD, and Isabelle Van NEUFELD, eds., *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009), 79 at 82–3.

137. Toye, *supra* note 132 at 96.

138. W. DIEBOLD, “The End of the ITO” in K. ANDERSON and B.M. HOEKMAN, eds., *The Global Trading System* (New York: I.B. Tauris, 2002), 81 at 84–5.

139. See Andrew LANG, *World Trade Law after Neoliberalism* (Oxford: Oxford University Press, 2011) at 28.

140. Diebold, *supra* note 138 at 94.

If Congress had ratified the Havana Charter, say in June 1949, it would have paved the way for the ITO to eventually take up its work of framing global economic relations. Many governments stood ready to ratify the Charter if only Congress had done so.<sup>141</sup> Secretary of State Dean Acheson would then have recalled the long-standing US commitment to a world in which multilateralism and economic development ensure a lasting peace between nations. The Havana Charter was mostly a product of US leadership and it was unlikely that it would fail due to US (in)action.

What difference would it have made? Several provisions of the Charter strongly resonate with projects in the present and with debates of the New International Economic Order [NIEO] in the 1960s and 1970s.<sup>142</sup> The Charter creates close links between trade liberalization, welfare, and peace. It opens with an emphasis on “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. Article 1 declares as overarching ambitions the “attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of [the Charter of the United Nations]”. The Charter speaks to recurring sensibilities about justice in economic governance. It does so on the level of technical detail and on the level of overall policy. The Charter’s close connection with labour standards, for example, brings to mind the egregious conditions that persist at present, not only in the garment sector but also in other areas such as the fishing industries.<sup>143</sup> The Charter acknowledges that all members “have a common interest in the achievement and maintenance of fair labour standards”.

It is easy to get carried away with the potential of the Charter and to engage in unbridled wishful thinking: if only the World Trade Charter had entered into force, the devastating dimensions of globalization would have been curbed.<sup>144</sup> That is certainly too quick. Counterfactual histories need to stand the test of their plausibility not only as concerns the change in antecedents—establishing the ITO—but also as concerns the consequences.

More specifically then, there is potential in the Charter’s framework for the administration of primary commodities—a crucial issue as many developing countries’ public budgets have largely depended on the prices of a small number of such primary commodities. The Charter recognizes that strong fluctuations in supply, demand, stocks, and, ultimately, prices have had severe adverse effects on producers and consumers alike (Article 55). It thus tasks the ITO with studying specific commodities

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141. *Ibid.*

142. Mohammed BEDJAOUI, *Towards a New International Economic Order* (Paris: UNESCO, 1979); Jochen VON BERNSTORFF, “International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization” (2015) 26 *European Journal of International Law* 279 at 279–93; Barbara STARK, ed., *International Law and its Discontents: Confronting Crises* (Cambridge: Cambridge University Press, 2015).

143. On the specific example of shrimp fishing, see, for instance, “Shrimp Sold by Global Supermarkets is Peeled by Slave Labourers in Thailand” *The Guardian* (14 December 2015), online: The Guardian <<https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand>>.

144. For such a suggestion, in passing, see J.-C. GRAZ, *Aux sources de l’OMC: La Charte de La Havane* (Geneva: Librairie Droz, 1999) at xi–xii.

(Article 58) and with “promptly convening an inter-governmental conference to discuss measures designed to meet the special difficulties which exist or are expected to arise concerning particular primary commodities” (Article 49).

More would have had to happen on the basis of the Charter for the Commodity Council (Article 64) to take up its work. Would powerful commodity consuming countries have agreed to commodity control agreements (Article 62)? That issue was again at the forefront of the NIEO agenda which, for a brief moment at least, had the wind in its back as the West experienced its dependence on oil imports.<sup>145</sup> Even before that, commodity control agreements were of mutual interest, and the ITO would have offered a good basis for them to develop—a better one, arguably, than the agreements that existed before and after the Havana conference.<sup>146</sup> Had an international administration of commodities taken off, this would have had important further consequences. Among other things, it would probably have lessened the debt crisis of developing countries, which effectively left them without resistance to economic measures imposed by the US and the World Bank in the 1980s and thereafter.<sup>147</sup>

The Charter would probably have left its mark on international investment law too. We have become accustomed to the practice of investor-state dispute settlement. But who would have thought around 1949 that private foreign investors could sue governments for domestic regulatory policies before international arbitral tribunals on the basis of a contract or an international treaty?<sup>148</sup> Several pieces of the legal puzzle that now provide for those possibilities were introduced in the 1960s and 1970s, but they only came together to sustain the practice of investor-state arbitration from the 1990s onward.<sup>149</sup>

The World Trade Charter would have shaped those pieces of the puzzle quite differently. It defines the rights of host states, not those of foreign investors (Article 12(1)(c)). The hardest obligation on host states is to “provide adequate security for existing and future investments” (Article 12(2)(a)(i)). The Charter did not even set out a clear prohibition of non-discrimination, neither between investments of different foreign origin, nor

145. Nils GILMAN, “The New International Economic Order” (2015) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1 at 3–4.

146. For early commodity agreements in the context of the League of Nations, see K.R. KHAN, *The Law and Organisation of International Commodity Agreements* (The Hague: Martinus Nijhoff, 1982) at 55–66. For the specific case of sugar, see Michael FAKHRI, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014). For the prominent later experiment with the International Tin Council [ITC], which was established in 1956 and failed with furor in the 1980s, see Matthias HARTWIG, “The International Tin Council (ITC)” in Rüdiger WOLFRUM, ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011, available at <www.mpepil.com>).

147. Bedjaoui, *supra* note 142 at 35.

148. Of course, there were earlier instances in which private parties had standing, such as in claims commissions, especially in Latin America. While such claims commissions are now occasionally seen as a predecessor to investor-state dispute settlement, they were of a quite different nature and did not lead the way. Andrew NEWCOMBE and Lluís PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer, 2009) at 7–8.

149. See Muthucumaraswamy SORNARAJAH, “Power and Justice in Foreign Investment Arbitration” (1997) 14 *Journal of International Arbitration* 104; Amr SHALAKANY, “Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism” (2000) 41 *Harvard International Law Journal* 419; Joost PAUWELYN, “At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed” (2014) *ICSID Review* 1.

between foreign and domestic investments. It merely demanded that members “give due regard to the desirability of avoiding discrimination” (Article 12(2)).<sup>150</sup> Bilateral investment treaties could be concluded as limitations on the rights of host states (Article 12(1)(d)). The Article is worth quoting in full as it reflects the Charter’s spirit:

the interests of Members whose nationals are in a position to provide capital for international investment and of Members who desire to obtain the use of such capital to promote their economic development or reconstruction may be promoted if such Members enter into bilateral or multilateral agreements relating to the opportunities and security for investment which the Members are prepared to offer and any limitations which they are prepared to accept of the rights referred to in sub-paragraph (c).

This Article, and this spirit, would most likely have introduced a thrust into the development of the law diametrically opposed to the now quite pervasive idea to decide, in cases of doubt, in favour of investment protection.

Those who interpret and apply the law, finally, make a strong difference to the development of any law.<sup>151</sup> Dispute settlement under the Charter, including for matters of investment protection, would have been an intergovernmental affair. Possibly the path towards international arbitration would have been mediated and institutionally embedded, as happened with the panel procedure in the General Agreement on Tariffs and Trade [GATT] system. Generally, it is likely that trade and investment law would have taken similar paths, both as concerns their substance and their institutional dimensions. By contrast, we know how their trajectories actually diverged after 1949 only to come closer together again more recently.<sup>152</sup>

### B. *What if Garment Workers were Seals?*

The WTO’s home, the Centre William Rappard, was built at Lake Geneva in the 1920s to first house the International Labour Organization [ILO] and then, since 1977, the Secretariat of the GATT, until the WTO was established in 1995. In these surroundings the WTO typically goes about its everyday work at quite some distance to its visible, and occasionally violent, contestation. The few times that street protest against the international trade regime reached the idyllic heart of Geneva was in connection with ministerial conferences. But when the WTO Appellate Body heard the *EC—Seals*<sup>153</sup>

150. It was this meagre outcome of which US businesses representatives, who had pushed the issue of investment protection onto the agenda in the first place, were particularly critical. Also see Jürgen KURTZ, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 35.

151. Joseph H.H. WEILER, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2001) 35 *Journal of World Trade* 191 at 191–207; Ingo VENZKE, “Making General Exceptions: The Spell of Precedents in Developing Art. XX GATT into Standards for Domestic Regulatory Policy” (2011) 12 *German Law Journal* 1111.

152. Even if those trajectories nowadays again partially converge, see Kurtz, *supra* note 150; Markus WAGNER, “Regulatory Space in International Trade Law and International Investment Law” (2015) 36 *University of Pennsylvania Journal of International Law* 1.

153. *EC—Seals*, Appellate Body Report, 22 May 2014, WTO/DS401/ABR.

case, something quite unusual happened: a small group of persons, at least one of whom was dressed up as a cute seal, protested in front of its gates.

Canada and Norway had brought a challenge against the European Union's prohibition to import and market seal products—a measure that the EU defended with heart and conviction on the basis of animal welfare concerns (the typical seal hunting technique, evocatively known as “clubbing”, is plainly gruesome).<sup>154</sup> The EU effectively won the case as its import and marketing prohibition of seal products could in principle be justified under the public morals exception.<sup>155</sup> Those who had gathered in protest during the proceedings could breathe a sigh of relief. The European Commission has since looked into similar measures, such as an import prohibition of horsemeat from countries such as Mexico after the dreadful transport conditions of live horses came to light.<sup>156</sup>

Meanwhile the Dutch government continues to sponsor an ineffective code of conduct for the textile industry. The code of conduct covers a fraction of the market and leaves choices to consumers, including whether or not they want to buy clothes produced under conditions of slavery.<sup>157</sup> The miracle counterfactual thus suggests itself: What if the victims of the Rana Plaza catastrophe in the garment industry had been seals or horses?<sup>158</sup> Would the Dutch government or the European Commission have considered prohibiting the importation and marketing of these produces whose production is so cruel? Why is it that the Commission prohibits the importation and marketing of seal products out of concerns for animal welfare but not of textiles out of concerns for humans, including many children?<sup>159</sup>

It seems that, above all, governments of developing countries are opposed to import restrictions that are connected to human rights and labour standards.

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154. *EC—Seals, ibid.* See further Robert HOWSE and Joanna LANGILLE, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values” (2012) 37 *Yale Journal of International Law* 367.
155. That is one of the main takeaways from the Appellate Body's report, even if the EU's measure was found to be illegal on a relatively minor point. See *EC—Seals, supra* note 153.
156. Animal welfare concerns are mixed with concerns about food safety here; see Wayne PACELLE, “Europeans Suspend Horsemeat Imports from Mexico—Deal Huge Blow to North American Slaughter Operations” *A Humane Nation* (8 December 2014), online: *A Humane Nation* <<http://blog.humane.society.org/wayne/2014/12/europe-bans-mexican-horsemeat.html>>.
157. On the rather egregious, though far from unique, Dutch policy here, see Natalie RIGHTON, “Kabinet presenteert lijst met eerlijke kledingmerken” *de Volkskrant* (4 July 2016), online: *de Volkskrant* <<http://www.volkskrant.nl/economie/kabinet-presenteert-lijst-met-eerlijke-kledingmerken-a432687/>>. An import prohibition would of course fall under EU competence and would thus need to be taken on the European, not Dutch, level.
158. More than 1,130 people died when the Rana Plaza building collapsed near Dhaka, Bangladesh, on 24 April 2013. For a documentary overview, see L. POULTON, F. PANETTA, J. BURKE, and D. LEVENE, “The Shirt on Your Back: The Human Cost of the Bangladeshi Garment Industry” *The Guardian* (16 April 2014), online: *The Guardian* <<https://www.theguardian.com/world/ng-interactive/2014/apr/bangladesh-shirt-on-your-back>>.
159. While the (international) legal definitions of slavery may not easily map onto present conditions, it is well established that the practical situations on the ground leave many people in a variety of slave-like situations. See the classic account by Kevin BALE, *Disposable People: New Slavery in the Global Economy* (Berkeley, CA: University of California Press, 2012). On the legal debates and their shortcomings, see H. CULLEN, “Contemporary International Legal Norms on Slavery: Problems of Judicial Interpretation and Application” in J. ALLAIN, ed., *The Legal Understanding of Slavery* (Oxford: Oxford University Press, 2013), at 304–21; N.L. MCGEEHAN, “Misunderstood and Neglected: The Marginalisation of Slavery in International Law” (2012) 16 *International Journal of Human Rights* 436.

The political debates on the issue are sprawling and the scholarly literature extensive.<sup>160</sup> Many contributions to the debate shy away from thinking through the consequences, or they do so very partially. What if an import prohibition for textiles produced under particularly dreadful conditions was in place? Who would win, who would lose? Exports would be unable to access the European market unless they met certain standards. It might be easier for exporters in some regions rather than others to reliably show the markets that they meet the standards. But in principle all exporters would be treated alike. The argument that higher labour standards in the country of production shift production sites elsewhere does not hold in this constellation. If anything, countries with low labour standards have an incentive to increase them (and to effectively enforce them) so that their producers have an easier time in reliably assuring the markets that their products are “free from slavery”. The same holds true not only at the national level but also for each producer, or for regional clusters of producers.

The costs of production would increase with higher standards. The consequences would include lower profit margins for large clothing retailers, perhaps less income for local officials from bribes to keep the standards down, and slightly higher prices for consumers in the EU. But the main point remains the exposure of imbalances, if not worse: Why does the gruesome practice of clubbing seals trigger public action when the awful treatment of labourers in the garment industry is left to the choices of consumers, guided by voluntary and largely ineffective labelling schemes?

## V. CONCLUSIONS

This paper has aimed to show, in theory and in practice, the purchase of thinking counterfactually about international law. Counterfactual (hi)stories, it has been argued in Section II, can serve the cause of freedom from necessity by exposing contingency. They free the understanding of legal developments and concrete decisions from grand theory and preserve the context. Finally, they withdraw from the spell of reality and help pursue normative commitments.

How then to think counterfactually? With due regard to those different objectives, Section III summarized suggestions on how to write counterfactual (hi)stories. It drew attention to some of the more obvious pitfalls along the way, and it pointed to some of the choices that counterfactual thinking needs to make: what to change, how to argue about consequences, and where to stop.

Writing counterfactual (hi)stories of international law is not easy. It works on principal questions, as it aspires to carve out contingencies, to increase contextual understandings of why something happened, and to spark the imagination, or to think through comparative normative assessments. Counterfactuals run the risk of overemphasizing the choices and impact of individual historical actors at the expense

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160. For a critical overview, see Michael TREBILCOCK, Robert HOWSE, and Antonia ELIASON, *The Regulation of International Trade* (Abingdon: Routledge, 2013) at 716–54.

of structural factors.<sup>161</sup> Or they may be imbued by nostalgia for a past that was not.<sup>162</sup> It is also true that the further we take counterfactuals, the shakier they become.

But wherever there is a sense of what is the case—a sense for reality (*Realitätssinn*)—there must also be a sense of what could have been—a sense for the possible (*Möglichkeitssinn*).<sup>163</sup> Counterfactuals offer a way of thinking that challenges hindsight bias, received wisdom, and common perception. It questions the present state and shape of international law by showing how it could have been different. More than anything else, the practice of writing counterfactual (hi)stories unravels and shakes the paths on which the development of international law seems to depend.

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161. Marks, *supra* note 12.

162. See Gavriel ROSENFELD, “Why Do We Ask ‘What If?’ Reflections on the Function of Alternate History” (2002) 41 *History and Theory* 72 at 72–89, arguing that counterfactual histories are deeply imbued by presentist motives. I submit, however, that such motives are not per se suspect. For a balanced argument on how history may well be read through concerns for the present or future (how it could not be read otherwise, in fact), and on how it should not be understood as a mere precursor to the present, see Martti KOSKENNIEMI, “Histories of International Law: Significance and Problems for a Critical View” (2013) 27 *Temple International and Comparative Law Journal* 215 at 230–1.

163. Musil, *supra* note 94 at 11.