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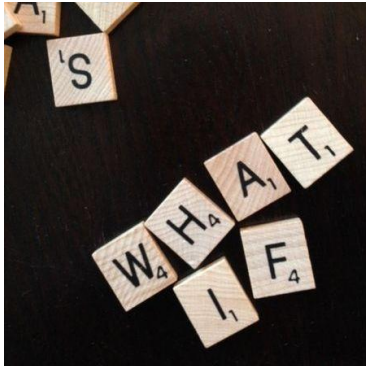


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What If? Alternative Realities of International Law

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What would international human rights law look like today if we had been spared the horrors of WWII? What would trade law be like had the balance of U.S. Senators tipped in favour of establishing the International Trade Organization in 1948? What if the PCIJ had decided *SS Lotus* differently? What if Dionisio Anzilotti, who drafted the judgment, had not lived through WWI, or Hersch Lauterpacht had become a professional piano player?

Counterfactual thinking – thinking counter to the facts – pervades many disciplines: philosophy and epistemology, psychology and the study of biases, social sciences and the study of causation. Counterfactuals make the material for fiction, such as Philip Roth's *The Plot Against America* or Robert Harris' *Fatherland* – both set against the background of a victorious Nazi Germany.¹ Turning to the field of historiography, the use of counterfactuals has triggered truly heated debates. Albeit famously dismissed as a parlour game by E.H. Carr, counterfactual thinking in and about history has been on the rise, together with an increasingly refined methodology.²

The core suggestion of counterfactual thinking is to deliberately change one or more factors within a given context and to argue what would have happened under those changed circumstances. Common demands are that such changes be specific, minimal and to some degree likely. It is interesting to bear in mind that the actual course of events might in fact have been much less likely than an alternative. Philip Roth thus muses about history as the study 'where everything unexpected in its own time is

¹ The website <http://www.uchronia.net/> offers a 'bibliography of over 3200 novels, stories, essays and other printed material involving the "what ifs" of history'.

² Edward H. Carr, *What Is History?* (Knopf 1962) at 127. See further Martin Bunzl, 'Counterfactual History: A User's Guide' (2004) 109 *American Historical Review* 845.

chronicled on the page as inevitable. The terror of the unforeseen is what the science of history hides, turning a disaster into an epic'.³ Counterfactuals purport to correct that.

International legal reasoning is imbued with counterfactual thinking as well, especially when it comes to issues of causation, responsibility and damages. When thinking *about* international law, counterfactuals play important roles in assessing the effectiveness of international law, of its institutions and of concrete decisions – would Nigeria have ceded Bakassi to Cameroon had it not been for the judgment of the ICJ?

I suggest employing counterfactual thinking about international law with three different ambitions. First, showing how specific legal decisions and the course of law could have been different frees the mind from the spell of necessity. Second, counterfactual thinking can support causal statements and assessments of the significance of certain factors. It does so in a way that stays much closer to the historical context than grand theories that place their bets on systemic variables. Counterfactual thinking changes the concrete context and preserves it to a larger extent. Third, starting to engage in the practice of counterfactual thinking fuels the imagination. While there are so many things blatantly amiss in international society, it strikes me as remarkably difficult to imagine alternative realities.

I. Freedom from Necessity

Niklas Luhmann reminds us in *Kontingenz und Recht* of modernity's shift from accounting for possibility in a pre-determined world towards making sense of regularities in a world that is, in principle, contingent. The problem of contingency – the deep-running insight that everything could also be different – lies at the heart of all his theorizing. According to Luhmann, contingency means that something is possible without being necessary. It excludes the impossible. It means seeing what is possible in light of alternative possibilities. What is possible continues to be possible even if it becomes real. It could also not be.⁴ Most fields of science have digested this characteristically modern way of thinking. This is not so of legal scholarship, which, according to Luhmann, continues to sideline the contingent and to build around necessity instead.

Not least due to the lasting impetus of critical legal studies, such supposedly pre-modern ways of thinking have been left behind. And yet, a variety of mechanisms still push us towards believing that the present state of international law is somehow necessary. First, there are the legal histories that are told for the purpose of the present. They blend out contingency in anachronistic and decontextualized interpretations. Even if the aim is to show 'how it actually was' (Leopold von Ranke), then the task of making sense of the past is embedded in the struggle for best understandings and explanations. Richard Evans notes about his own profession of historians that they 'prefer to pile up causes until events are over-determined, that is, they have so many

³ Philip Roth, *The Plot Against America* (Vintage 2004) at 114.

⁴ Niklas Luhmann, *Kontingenz und Recht* (Suhrkamp 2013) at 32-6.

causes that if one did not operate, the others would and the event in question would still have occurred'.⁵

Over-determination is one expression of the benefit of hindsight. Social scientists fall prey to it just like others and end up regarding the future as open but the past as inevitable. Experiments have repeatedly shown that 'as soon as observers learn the outcome of an historical process they begin to reorganize their understanding of the causal forces at work so that the outcome appears more retrospectively foreseeable than it was prospectively'.⁶ The hindsight bias renders events much more likely than they actually were or than they were perceived at the time. That seems to also hold true for legal decisions and the course of international law. Counterfactual thinking stems itself against the production of an over-determined past and a necessary present to highlight contingency and the possibility of what has become real. It aims at preventing that 'everything unexpected in its own time is chronicled ... as inevitable'.

II. Freedom from Grand Theory

Theories typically abstract from reality and make sense of it in light of a limited set of key factors. They gloss over contextual differences when explaining why something had to happen the way it did – why an international court decided this way or why the course of international law had taken that turn. Counterfactual thinking may support explanations, causal statements and assessments of significance in a way that stays closer to contextual conditions. Since the context is deliberately changed, it can be better preserved. It is possible to zoom in and isolate specific factors in a setting, change them and then submit what would have happened under changed circumstances. Max Weber suggested as much in his methods of social science: 'In order to penetrate to the real causal relationships we construct unreal ones'.⁷ It does not speak against this method, Weber notes firmly, that it cannot be established with certainty what would have happened under changed circumstances. Quite to the contrary, historiography and the social sciences would be profoundly impoverished could they only ask questions whose answers were certain.⁸

What matters and to what extent in explaining legal decisions and the course of international law? Is it background events (WWII), institutions (International Trade Organization), decisions (*SS Lotus*) or specific persons (Anzilotti or Lauterpacht)? Counterfactual analyses in this regard could proceed in a way that is very sensitive to the context, including the argumentative constraints and the autonomy of international law as a practice. In contrast to the abstractions of grand theory, it would stay attuned to the practical limits of international legal argument. It would stay attuned to international law as an argumentative practice whose shape is not reduced to outside forces and systemic factors.

⁵ Richard Evans, *Altered Pasts* (Little, Brown 2014) at 82.

⁶ Philip E. Tetlock and Geoffrey Parker, 'Counterfactual Thought Experiments' in Philip E. Tetlock, Richard Ned Lebow and Geoffrey Parker (eds.) *Unmaking the West* (University of Michigan Press 2006) 14 at 25.

⁷ Max Weber, *The Methodology of the Social Sciences*, Weard A. Shils and Henry A. Finch transl. (Free Press 1949) at 185-6.

⁸ *Ibid.* at 164.

III. Freedom from Reality

While so much is blatantly amiss in international society, it is strikingly difficult to think of better alternative realities. To start doing so may well begin an inquiry into better worlds. They may even be inspiring and motivational. They 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 pedestrian work of those jaded international lawyers who have no sense of purpose, on the other. Of course, critical legal studies have alerted us to the dangers of high-dosed moral fervour, which fuels both cynical and sincere empire. It has also argued that the last thing possibly worth striving for is the formal modus of international legal argument.⁹

That last straw of a progressive formalism might not be enough to hang on to. In any event, many participants are in the game of international law for reasons other than the kick they get out of playing it. Money may be a purpose for some. For others it might be the struggle towards a better future. As Robert Musil wrote: 'Such fools are also called idealists by those who wish to praise them'.¹⁰ Counterfactual thinking helps those fools in articulating and assessing alternative realities. It trains the imagination. And it helps critique by thinking through the consequences of concrete suggestions.

Outlook

Alternate histories have in the past aimed at entertainment, mostly. In a prominent and controversial volume, British historian Niall Ferguson has promoted counterfactual thinking with a scholarly ambition. He advocated a chaotic theory of the past and the use of counterfactuals as 'the necessary antidote to determinism'.¹¹ Rather than burying the enterprise, critiques of Ferguson's volume have refined the approach. Evans, whose just published monograph is highly suspect of counterfactuals in history, inadvertently shows that there is good sense to them. He skillfully rejects the conclusions that others have drawn on the basis of deliberately changed circumstances. Those arguments are meaningful because assessments hinge on them. When it comes to international law, for example: How significant were the *South West Africa Cases* for the development of international law? What difference did they make? Should they have been decided differently?

One of the main points of critique connected to Ferguson's use of counterfactuals has been his postulation of seemingly free-floating actors who are rather unconstrained by historical conditions. His deliberate aim has indeed been to restore free will in the field of historiography that he perceived to be dominated by materialism. The politics of counterfactuals would be quite different in the field of international law, where formalism and legalism do their best to blend out the actor from the operation of the law. But here too, the emphasis on actors and possibilities of choice need to be placed within context and structural constraints. Luhmann was adamant about this in his work on contingency

⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2001) at 491-509.

¹⁰ Robert Musil, *The Man without Qualities*, vol. I, Sophie Wilkins transl. (Vintage 1995) at 11.

¹¹ Niall Ferguson, 'Introduction - Virtual History: Towards a "chaotic" theory of the past' in Niall Ferguson (ed.) *Virtual History* (Basic 1997) 1 at 89.

and law. On his account, contingency always presupposes social structures because they draw the line between the possible and the impossible (which contingency excludes).¹² Or, as Marx prominently put it: 'People make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found to be already there, given and transmitted from the past'.¹³ This is why the context needs to be preserved, and counterfactuals paradoxically do just that.

The demands we can raise in the construction of unreal scenarios differ in degree with regard to the task for which we might employ them. When approaching international law, I think there are in particular three such tasks: to show contingency and support the cause of freedom from necessity, to re-contextualize explanations in contrast to abstractions of grand theory, and, finally, to look up from reality to train the imagination.

¹² Luhmann, *Kontingenz und Recht* at 61.

¹³ Karl Marx, *Der achtzehnte Brumaire des Louis Bonaparte (1852)* at 226, as translated in Evans, *Altered Pasts* at 54.