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## **ON DEAD CIRCUITS AND NON-EVENTS**

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## On Dead Circuits and Non-events

Fleur Johns\*

### Abstract

Many an international law scholar has traced a route for her readers from ignorance, via debunking, to contingency, and onwards to possibility. Carrying scholars along this route is a presumed connection between awareness and agency. If only people recalled (with guidance from sophisticated scholars of international law) how chancy and open-ended international legal history has been, they might have the wherewithal to take their presents and futures in another direction – or so it is often assumed. This chapter will consider some possible perils of work so oriented, both in the sense of the kinds of operations that it leaves untouched and the circuit of humanist expectation that it helps to maintain (specifically, the idea that political capacity is a likely by-product of insight). Amid the increasingly self-organising streams of digits and ‘stuff’ shaping global affairs, this circuit may be especially dangerous for the distractions and disassociations it engenders. What, this chapter will ask, if international legal scholars were to identify possibility with pattern and formula, storage and transmission, rather than irregularity and insight? Perhaps this may spawn a politics better attuned to the now.

### Keywords:

Contingency, international law, international legal history, legal theory

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## Introduction

Uncut devotion to the critique of... illusion makes us delusional. In the trick of politics we are insufficient, scarce, waiting in pockets of resistance, in stairwells, in alleys, in vain. The false image and its critique threaten the common with democracy, which is only ever to come, so that one day, which is only never to come, we will be more than we are. But we already are. We're already here, moving. We've been around. We're more than politics, more than settled, more than democratic. We surround democracy's false image in order to unsettle it. Every time it tries to enclose us in a decision, we're undecided. Every time it tries to represent our will, we're unwilling.<sup>1</sup>

What if? Those two little words can, and have, carried international lawyers so far, so high. What if the actual world with which we feel compelled to grapple – in all its inequality, intolerability and inertia – might quite plausibly have been, and might yet be, otherwise? It is valuable and productive to forbid 'the verification of a possible world by the actual one'.<sup>2</sup> It is important to pursue, in one way or another, the 'radical counterfactual'.<sup>3</sup> Many have shown this. It is possible, too, to understand much that surrounds us in terms of the

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<sup>1</sup> Stefano Harvey and Fred Moten, *The Undercommons. Fugitive Planning and Black Study* (Minor Compositions 2013) 19 (In quoting this work epigraphically, I think it behoves me to acknowledge that it is clearly not a book written for me, or for much of the audience of this chapter, and that I am uncomfortably positioned in relation to the text, as Bernard Harcourt and Allegra McLeod have acknowledged also being (albeit differently so); see Allegra McLeod, 'Toward Abolition' (*Critique & Praxis* 13/13, 27 February 2019) < <http://blogs.law.columbia.edu/praxis1313/bernard-e-harcourt-beyond-critical-praxis/>> accessed 8 October 2019; Bernard Harcourt, 'Introduction to the Undercommons: Beyond Critical Praxis' (*Critique & Praxis* 13/13, 25 February 2019) < <http://blogs.law.columbia.edu/praxis1313/allegra-mcleod-toward-abolition/>> accessed 8 October 2019)

<sup>2</sup> Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (Routledge 1993) 79

<sup>3</sup> *Ibid*

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appeal of this line of thought. Trump, Duterte, Bolsonaro: their rise signifies, to some degree, collective fascination with the road not taken.<sup>4</sup>

In this chapter, however, I wish to steel myself against the appeal of the ‘what if?’. The revelation of contingency has become something of a trope in international law and it carries some attendant risks. I want to dwell on those perils for a short time and try to sketch some possible routes around or against them. I will do so in three steps.

First, this chapter will lay out something of what the routinized revelation of contingency in international law tends to make of people, and of social, legal and political relations. A pattern tends to surround the unearthing of contingency in international legal work: a circuit linking capacity to insight, agency to awareness. I will start by simply drawing attention to this recurrent formation, with some illustrations. For all its orientation towards possibility, this pattern rules certain things in and out. Patterns tend to do that, of course; some elements will not fit the pattern and must be set aside.

The second section of this chapter will consider what gets foregrounded, and what gets foreclosed, by our continued propagation of the Enlightenment credo that knowledge and visibility – especially consciousness of contingency – are likely to enlarge transformative

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<sup>4</sup> Ernesto Londoño and Manuela Andreoni, ‘Brazil Election: How Jair Bolsonaro Turned Crisis Into Opportunity’ *New York Times* (New York, 29 October 2018) <<https://www.nytimes.com/2018/10/29/world/americas/jair-bolsonaro-brazil-profile.html>> accessed 8 October 2019 (‘Many see in [Bolsonaro] the kind of disruptive, status quo-breaking potential that propelled President Trump’s victory in 2016.’); John Reed, ‘Rodrigo Duterte and the Populist Playbook’ *Financial Times* (London, 26 July 2018) <<https://www.ft.com/content/98589db0-8132-11e8-bc55-50daf11b720d>> accessed 8 October 2019 (‘Although heir to one of the country’s oldest political families, Duterte painted himself as an outsider...and capitalised on popular discontent with “Imperial Manila”, the disdainful term Filipinos use for their dynastic political and business elites.’)

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possibility. As explained further below, to fixate on revealing contingency for emancipatory ends is to presuppose that power, in the international legal field, rests upon the denial of contingency. On the contrary, however, there are many modes of power and hierarchy prevailing on the global plane that insist and thrive upon contingency. Holding fast to the idea that contingency begets negotiability makes it difficult to engage these latter modes of power. A focus on revealing contingency also makes it hard to grapple with global conditions and infrastructure that don't typically operate 'eventually': the terrain of what we might call non-events. An orientation towards unearthing contingency in international law thus leaves undisturbed and uninvestigated a very large range of distributive and normative operations on the global plane. I will offer some examples below, as I flesh this out.

After having sketched something of what the revelation of contingency tends to leave untouched, the third and final section of this chapter will attempt a little speculative rummaging around at these margins. If the conditions required to sustain the idea that contingency – together with knowledge of contingency – are predicates of action in the international legal field seem unacceptable for one reason or another (because they either require too much, or too little, of those meant to give effect to them), then what other conditions might we try to leverage critically? What is a 'what if?' that one could direct against the standard versions of the 'what if?' in international legal writing? How contingent are the knowledge-freedom associations in which analyses of contingency tend to trade? How might one engage with configurations of power in which contingency is imbricated, or in relation to which contingency seems beside the point? In short, what

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might be done about the following worry: that international lawyers might now be spending a little too much time identifying particular crossroads and turning points in international legal history and imagining those moments as relivable, while leaving more or less untouched vast swathes of the densely patterned terrain transected by these imaginary paths.

## I The Cogency of Contingency

I want to acknowledge, first, something that the other contributors to this volume already make plain: that many brilliant people are today fruitfully engaged in telling compelling stories about international law's contingency. They are, in earlier words of the editors of this volume, seeking to 'question the present state of international law by challenging its pretense to necessity' and 'draw out...what could [or could not]... have been' along its 'course'.<sup>5</sup>

To foreground contingency in this context is to highlight the extent to which worldly things and conditions that seem unavoidably what and how they are, became so, at least in part, through a combination of action and accident. Above all, it is to engender a sense of possibility and, often, to inspire action towards realization of some of the possibilities so recognized. In the study of law and legal institutions, the aim is to 'sinter' the bars of the

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<sup>5</sup> Kevin John Heller and Ingo Venzke, 'Call for Papers: Contingency in the Course of International Law' (*Opinio Juris*, 24 August 2017) (<<http://opiniojuris.org/2017/08/24/workshop-cfp-contingency-in-the-course-of-international-law/>> accessed 8 October 2019)

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'iron cage' of Max Weber's account, or to counter other influential accounts read as narratives of entrapment or inevitability.<sup>6</sup>

With important variations, this contingency-quarrying pattern in international legal work tends to go something like this: Institution, rule, or thing C is often said to have evolved, in a reasonably coherent way, from predecessors A and B towards which it is said to have been reactive or corrective. There was, however, a moment or moments in C's history when it was expected to take, could have taken, or did take, a very different form. Proceeding from the unearthing of this historical moment, one learns that C's current configuration cannot be explained by preference to progress, logic, or the rational alignment of interests. Rather C's current condition could equally be understood as an outcome of quite incidental factors, marginal interests, or momentary conflagrations of power and desire. In other words, C's current form could be attributed to contributors and catalysts of which relatively little notice has been taken. Alternatively, the factors to which C's emergence has been attributed may be seen sitting alongside other contributors and catalysts which had the potential to exert causal force in relation to C, but did not do so, or did not do so decisively at the time. All that is said to proceed naturally, logically and non-negotiably from the sequence A to B to C might, accordingly, be open to question. C could – even yet – be made otherwise.

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<sup>6</sup> Stewart Clegg and Michael Lounsbury, 'Weber: Sintering the Iron Cage. Translation, Domination, and Rationality' in Paul Adler (ed), *The Oxford Handbook of Sociology and Organization Studies: Classical Foundations* (OUP 2009). As Terry Maley highlights, however, Max Weber's work did not in fact put forward an account of history as 'determined or closed'; rather, Weber cast '[l]ife, with its irrationality and its store of possible meanings, [as] inexhaustible': Terry Maley, 'Max Weber and the Iron Cage of Technology' (2004) 24 *Bulletin of Science, Technology & Society* 69, 75 (quoting from Max Weber, 'Objectivity in Social Science and Social Policy' (1949))

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Now I take it that the motif to which I allude is familiar enough for me to spare you the recitation of specific examples of it. I had thought, at some point, to present a collage of quotes from articles voicing the kind of ambition to which I am referring, but that would entail a cheapening of the work in question. Contingency-unearthing work invariably does much more, and varies much more, than such a short-shrift, formulaic account would suggest. So, let me take it as read that, as Susan Marks observed so trenchantly in 2009, '[t]here is a great deal of talk about how things that are contingent are made to seem as if they were necessary, in virtue of being natural, universal, rational, eternal'.<sup>7</sup>

In that 2009 article, Susan Marks' primary target was the falsity of the contingency about which there has been so much talk. By that she meant 'what it leaves unsaid, in its unarticulated assumptions, implications and effects'.<sup>8</sup> In particular, Marks focused our attention on the way in which an emphasis on the contingency of historical events often served to delink the study of those events from analysis of 'wider processes, tendencies and dynamics at work in the world' by which those events were conditioned.<sup>9</sup>

Aiming to build, here, upon Marks' work, I want to initially focus not so much on what gets cut away when we dwell on contingency so much as what tends to get smuggled in to the analysis of contingency in international law. Marks acknowledged these smuggled goods when she alluded to the 'voluntarist mystifications' in which analyses of contingency tend to trade.<sup>10</sup> Among these voluntarist mystifications, I contend, is a particular account of the

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<sup>7</sup> Susan Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1, 14 (hereafter Marks, 'False Contingency').

<sup>8</sup> *Ibid*, 17

<sup>9</sup> *Ibid*, 17

<sup>10</sup> *Ibid*, 14



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relationship between consciousness and action, vision and capacity, awareness and agency. This presumed connection – and the idea of power on which it rests – is that with which I first take issue in this chapter.

What tends to get reproduced in the pattern that I just sketched is an idea that knowing, recognizing and seeing contingency in international legal affairs adds to the freedom and potential of those who are instilled with this knowledge, recognition or insight. This is, as I earlier noted, a version of an idea strongly associated with the Enlightenment, albeit with a far older and longer provenance: namely, that knowledge and visibility enlarge transformative, emancipatory possibility in people and in human-made institutions.<sup>11</sup> I do not think it is an overstatement to say that there remains a tremendous investment in this idea at all scales, in all fields and in many modes of law and politics, including in international law.

Now, it would be a bit absurd for me to try to disprove this credo wholesale. A claim that recognizing the role of contingency in world-making, and otherwise learning more about its processes, never, in fact, occasions fruitful effort towards change: that clearly does not sound right. It would be similarly silly for me to argue that greater knowledge – knowledge of contingency in particular – promotes unfreedom across the board. Instead, this chapter will take a side-swipe at this idea, or rather a series side-swipes. This chapter will record,

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<sup>11</sup> Immanuel Kant, 'An Answer to the Question: "What is Enlightenment?"' in *An Answer to the Question: 'What is Enlightenment?'* (first published 1784, H.E. Nisbet tr, Penguin 2013). Admittedly, the relationship between knowledge and freedom put forward in this text is more complex than I am portraying, a little cartoonishly, here, in the interests of avoiding digression.

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in a number of different ways, what may be problematic about this association of consciousness of contingency with unbridling, or resistant capacity.

## **II Consciousness-Capacity Confusion and the Neglect of Vectorial Power**

To cast the revelation of contingency as an emancipatory intervention anticipates a particular way of understanding power on the global plane. It suggests that insofar as the world is unequal, violent, and noxious, it has been made so in large part through the negation of contingency. That is, well-meaning people with power refuse to acknowledge that they are exercising power amid uncertainty, and so permit themselves and others to continue on one-or-other ruinous, exploitative path. That path is experienced as either pre-determined, or as the best rational choice among only a very limited range of options. Alternatively, not-so-well-meaning people with power knowingly exercise that power in damaging ways. Meanwhile, others acquiesce in, or submit to, that harmful exercise of power because of a failure to recognize the contingency that surrounds these not-so-well-meaning people being invested with greater power in the first place.

Both of the foregoing accounts – which sometimes manifest in combination – evoke versions of relatively untrammelled and often un- or under-examined power: power that seems to trade on many people taking it for granted and paying little or no attention to its frailties, its paradoxical effects, or its potential alternatives. This kind of power is predicated on limiting people's sense of prevailing possibilities or denying those possibilities' existence. When Ambassador Nikki Haley, then U.S. Permanent Representative to the United Nations, addressing a UN Security Council meeting on the

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situation in Libya in January 2018, remarked that ‘[t]here is no alternative to the UN process’ and that the ‘one key issue’ to which attention should be paid was ‘respect for human rights and fundamental freedoms’, this is the kind of power she voiced.<sup>12</sup> There is certainly much of this kind of power in evidence amid global affairs today, and it definitely merits ongoing critical analysis.

Equally in evidence, however, are modes of power for which contingency is generative, indeed vital. An understanding of global institutions and operations as contingent is necessary to authorize and sustain those modes of power that lay claim to being self-sustaining, diffuse, and endlessly adaptable, rather than modes of power understood to emanate from particular sources or sites of authoritative decision.

It is in this mode that mechanisms of financialization operate, from which so much financial capital has accumulated in so few hands of late.<sup>13</sup> John Maynard Keynes and Hyman Minsky are among those whose work explored the centrality of contingency to the ‘normal’ operations of modern financial markets. Keynes observed that ‘the market will be subject to waves of optimistic and pessimistic sentiment... where no solid basis exists for a reasonable calculation’ and noted that the risk of ‘the predominance of speculation’ (which he defined as the ‘activity of forecasting the psychology of the market’ and

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<sup>12</sup> ‘Ambassador Haley Delivers Remarks at a UN Security Council Briefing on Libya’ (*US Mission to the UN Office of Press and Public Diplomacy*, 18 January 2018) <<https://ly.usembassy.gov/ambassador-haley-delivers-remarks-un-security-council-briefing-libya/>> accessed 8 October 2019

<sup>13</sup> Picketty and Saez’s work has showed that, in the United States and other English-speaking countries, ‘top executives (the “working rich”) replaced top capital owners (the “rentiers”) at the top of the income hierarchy during the twentieth century’: Thomas Picketty and Emmanuel Saez ‘The Evolution of Top Incomes: A Historical and International Perspective’ (2006) 96 *The American Economic Review* 200, 204. A number of researchers have attributed this and associated rises in income inequality to financialization: see, e.g., Ken-Hou Lin and Donald Tomaskovic-Devey, ‘Financialization and U.S. Income Inequality, 1970–2008’ (2013) 118 *American Journal of Sociology* 1284

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anticipating and trying to profit from associated shifts in market valuation) increases ‘[a]s the organization of investment markets improved’, such that ‘the capital development of a country [risks] becom[ing] a by-product of the activities of a casino’.<sup>14</sup> Minsky suggested, further, that over prolonged periods of prosperity, capitalist economies tend to become more and more dominated by forms of finance that are ‘deviation-amplifying’.<sup>15</sup>

It is in this mode, also, that uneven flows of digital data, and the machine learning increasingly involved in its collection, analysis, representation and dissemination, work to create and allocate value on the global plane. Reflecting on ‘the human experiences, routines, improvisations and accomplishments which implicate digital data in the flow of the everyday’ – at least in the Global North – Sarah Pink, Shanti Sumartojo, Deborah Lupton, and Christine Heyes La Bond highlight some of the many ways in which experiences of ‘digital living’ foster a preoccupation with trying to ‘deal with contingency, improvise in the face of uncertainty, adapt and move forward through the world’.<sup>16</sup> Shoshana Zuboff has described how the ‘behavioral surplus’ generated by these efforts has afforded a small number of technology firms immense

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<sup>14</sup> John Maynard Keynes, *The Collected Writings of John Maynard Keynes, Vol. VII: The General Theory of Employment Interest and Money* (3<sup>rd</sup> edn, MacMillan 1973) 154, 158-9

<sup>15</sup> Hyman P. Minsky, ‘The Financial Instability Hypothesis’ (1992) Levy Economics Institute Working Paper No. 74 <<http://www.levyinstitute.org/pubs/wp74.pdf>> accessed 8 October 2019. See further Susan Strange, *Casino Capitalism* (Blackwell 1983); Susan Strange, *Mad Money* (University of Michigan Press 1998) (hereafter *Mad Money*)

<sup>16</sup> Sarah Pink, Shanti Sumartojo, Deborah Lupton & Christin Heyes La Bond, ‘Mundane data: The Routines, Contingencies and Accomplishments of Digital Living’ (2017) 4 *Big Data & Society* <<https://doi.org/10.1177/2053951717700924>> accessed 8 October 2019

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power and wealth, while enmeshing those from whose behaviours it is extracted in what she describes as a ‘dispossession cycle’.<sup>17</sup>

It is in this mode, furthermore, that ‘development’ is cast as an endlessly moving target, towards which ‘developing’ states, and most of the peoples and individuals inhabiting such states, are expected to continually innovate. Clive Gabay and Suzan Ilcan have shown how the Sustainable Development Goals may be read to extend the ‘vitalising force’ of a ‘post-Second World War development orthodoxy’ with a view to ‘animating the capacities of Third World objects and turning them into active subjects’ – specifically, with creating ‘entrepreneurial citizens’ who might ‘fare well in a world full of risk’ amid contingency.<sup>18</sup> Ananya Roy has explored some of the ways in which the confluence of such ideals of ‘creative capitalism’ with those of ‘millennial development’ has fueled the creation and extension of debt relations: a process she characterizes as the ‘financialization of development’.<sup>19</sup> Paula Chakravartty and Denise Ferreira da Silva are among those who have explored how the “new territories” of consumption and

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<sup>17</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism* (2018). Admittedly, Zuboff’s account is, as Eugeny Morozov, observes rather ‘tunnel vision[ed]’ including in relation to contingency. As Morozov writes: ‘Are Zuboff’s surveillance capitalists interested in turning us into a uniform gray mass, as she posits? Maybe, but they seem as interested in keeping us diverse and eccentric. How else would they get fresh viral content to monetize?’: Eugeny Morozov, ‘Capitalism’s New Clothes’ (4 February 2019) <<https://thebaffler.com/latest/capitalisms-new-clothes-morozov>> accessed 8 October 2019

<sup>18</sup> Clive Gabay & Suzan Ilcan, ‘The Affective Politics of the Sustainable Development Goals: Partnership, Capacity-Building, and Big Data’, (2017) 14 *Globalizations* 468, 475-6, 482. On legal structures and accounts of ‘best practice’ designed to foster this developmental entrepreneurship on a larger scale, see Fleur Johns, ‘On Failing Forward: Neoliberal Legality in the Mekong River Basin’ (2015) 48 *Cornell International Law Journal* 347; Fleur Johns, ‘From Planning to Prototypes: New Ways of Seeing Like a State’ (2019) 82 *Modern Law Review* 833

<sup>19</sup> Ananya Roy, *Poverty Capital: Microfinance and the Making of Development* (Routledge 2010)

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investment’ that the global development project has sought to cultivate ‘have been mapped onto previous racial and colonial (imperial) discourses and practices’.<sup>20</sup>

Some or all of the scholarly accounts I have just mentioned could, of course, be wrong. All of these efforts and operations could, perhaps, be said to be moving ‘us’ (whoever ‘us’ may be in this context) in a positive direction, although it does not seem so to many. This is not the place to rule on the existence or gradient of global trajectories. Nonetheless, insofar as the complex global phenomena to which these three terms – financialization, datafication and development – rather obtusely allude, and the distributions of power and resources that they tend to favour, might be making the world more unequal, violent, and noxious, they are doing so through the amplification of contingency, not primarily through its negation. Legal techniques, artefacts and professional sensibilities imbricated in these phenomena tend, on the whole, to work to cultivate and curate contingency, not to cover it up. That they do so is not epiphenomenal. Rather, these phenomena are predicated on the pervasiveness of, and pervasive attunement to, contingency; that is how they work. They certainly interact and intersect with technologies of power that work otherwise, but this does not negate the role of contingency in their operation.

Alain Pottage draws this out beautifully in his article on power as an ‘art of contingency’, interpolating the work of Michel Foucault, among others.<sup>21</sup> Pottage observes that Foucault’s investigations of power and its modern transformation ‘describe two attitudes

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<sup>20</sup> Paula Chakravartty and Denise Ferreira da Silva, ‘Race, Empire, and the Crisis of the Subprime’ (2012) 64 *American Quarterly* 361, 368

<sup>21</sup> Alain Pottage, ‘Power as an Art of Contingency: Luhmann, Deleuze, Foucault’ (1998) 27 *Economy and Society* 1 (hereafter Pottage, ‘Art of Contingency’).

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to contingency, one which avoids or absorbs contingency...and another which presupposes, and thrives on, contingency'.<sup>22</sup> The latter entails social and historical operations 'hav[ing] to take responsibility for themselves' through mechanisms to which Foucault gave the name bio-power. The point is not that humans are no longer agents of history. Rather, people are enrolled in history in a mode in which uncertainty about the effects of their actions and decisions is presupposed, indeed demanded. History becomes a series of contingent outcomes of practices that take those outcomes – whatever they might be – as a basis for the iterative extension and reproduction of the practices in question. As Pottage puts it: 'however events actually turn out, the expectation, rather than the event which "fixes" it, serves as the reference point for the next operation'; 'contingent events [serve] only as an occasion or stimulus to move from one operation to the next'.<sup>23</sup>

What those modes of global power that are dependent on the ubiquity and expectation of contingency capture is the geometric sense of the word contingency. That is, the idea of contingency as a matter of touching or contact at a particular angle – part of its etymology.<sup>24</sup> More precisely, they recall something of an angle of contingency: that is, the angle through which a plane curve bends between its extremities. Far from suggesting historical trajectories flying off in all directions as a matter of chance, contingency of the kind implicated in the operations of bio-power follows a curved trajectory between the

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<sup>22</sup> Ibid, 9

<sup>23</sup> Ibid, 14

<sup>24</sup> 'contingency, n.' *OED Online* (September 2019)

<<https://www.oed.com/view/Entry/40247?redirectedFrom=contingency>> accessed 8 October 2019

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extremities of life and death.<sup>25</sup> Its motions tend to be circular rather than scattered; directional rather than riveting. In this context, the directionality of power, and the sense of regulative force, rhythm or momentum generated thereby, depend precisely on insistence on the unpredictability of power's effects.

Friedrich Hayek's understanding of the force of 'genuine' law is illustrative. Hayek argued that 'genuine laws... must... be intended to operate in circumstances which cannot be foreseen in detail' such that 'their effect on particular ends or particular people cannot be known beforehand'.<sup>26</sup> In Hayek's influential account, it was this predictably unpredictable quality of law (that is, the non-contingent contingency of laws' circumstances and effects) that would ensure that the law-making state would operate as a 'piece of utilitarian machinery' in the service of individuals' advancement, rather than as 'an institution that imposes on its members its views'.<sup>27</sup> It was only along this angle of contingency that Hayek could envisage law being reconcilable with freedom, with the latter understood as requiring 'renunciation of direct control' over individuals as well as 'the absence of coercion of a people as a whole'.<sup>28</sup> The course and outcome of individuals' efforts to advance themselves and their interests, respectively, would remain unknowable in this account (and could thereby be said to be uncoerced), but only people who continued to move along the vector of 'development' towards ever greater 'full[ness]' and interest-

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<sup>25</sup> Foucault explained bio-power as 'the set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power': Michel Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977-1978* (Graham Burchell tr. Picador 2007) 1 (hereafter *Security, Territory, Population*)

<sup>26</sup> Friedrich Hayek, *The Road to Serfdom* (first published 1944, Routledge 2001) 79-80

<sup>27</sup> *Ibid*, 80

<sup>28</sup> Friedrich Hayek, *The Constitution of Liberty* (first published 1960, Routledge 2014) 28, 14



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fulfilment might be understood to be acting in pursuit of freedom. It is by this kind of route that the expectation of people's contingent pursuit of 'the fullest development of their individual personality' has come to serve, in many settings, as both a vehicle and rationale for power in settings in which freedom-as-noncoercion is a vociferously defended value.<sup>29</sup>

Let us consider another example of this kind of power, expressed in material rather than textual or ideal form. Take the process of commodification.<sup>30</sup> That is, the making of a thing – a bale of wool, or a billable hour of a lawyer's time – that gives summative, objective expression to the social relations occasioning its production. This is an example of a process that has to be understood as contingent in order to operate. The global circulation of commodities – their purchase and sale – depends on their being capable of valuation more or less without regard to the conditions of their production. The process of releasing a commodity's value from the value that might have been contributed or attributed to it during the course of its production requires that this value be treated as somewhat unknowable in the abstract or in advance – that it be subject, in other words, to the contingencies of the market.<sup>31</sup> Of course, commodification depends also upon a sense of non-contingency too – that is, a sense that certain conditions are natural or necessary. Belief in the sufficiency of the pricing signal, for example, entails necessitarian thinking.

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<sup>29</sup> Ibid, 80

<sup>30</sup> This account of commodification draws upon Karl Marx, 'The Fetishism of Commodities and the Secret Thereof' in *Capital Volume I* (Samuel Moore and Edward Aveling tr., first published in German in 1867, Progress Publishers, 1887) 76 – 78, 80 – 81

<sup>31</sup> Keynes wrote of valuation as a practice premised on 'knowledge' of 'extreme precariousness', often premised on an assumption (frequently not sustainable for long) 'that the existing state of affairs will continue indefinitely': John Maynard Keynes, *The Collected Writings of John Maynard Keynes, Vol. VII: The General Theory of Employment Interest and Money* (3<sup>rd</sup> edn, MacMillan 1973) 149, 152.

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Nonetheless, it is primarily through insistence upon contingency, and the ubiquity of choice under circumstances of contingency, that the thinking required for commodities' circulation gets reproduced. The operation of the global market in commodities (including the market in commodified labour) depends on the continued evocation, generalization and curation of contingency.

Brief recapitulation may be useful at this point. Recall that this chapter seeks to explain what might be problematic about the idea – implied in much international law work – that increasing consciousness of contingency is likely to enlarge transformative, emancipatory possibilities on the global plane. What I have suggested, in this section, is that greater consciousness of contingency is likely to be beside the point for many operations of global power, namely those that depend in large part on a sense of human and nonhuman actions and interactions taking place under circumstances of contingency and having contingent effects. To this extent, orienting critical effort towards the revelation of contingency might be misguided in so far as the possibilities that it promises seem to hinge on the ubiquity of more or less one style of power: determined and determinative power. Setting aside whether countervailing consciousness and knowledge are likely to defuse that style of power – which is a question worth pursuing in its own right – it is far from clear that recognizing contingency afresh could ever defuse, counteract, or re-route the vectorial modes of power to which I have just alluded. What is more, those vectorial, contingency-dependent, contingency-curating modes of power are especially prevalent in the global markets on which so much of the world's living and dying now depends.

### **III Discontinuous Systematics and Non-events**

A second reason why an orientation towards unearthing contingency in international legal histories is problematic lies closer to the sorts of concerns to which Susan Marks has already drawn attention. It is, moreover, related to the problem that I just raised. Marks wrote: 'current arrangements are not simply arbitrary or accidental, but belong with the logics of a system which must also be brought within the analytical frame'.<sup>32</sup> A number of 'analytical frame[s]' might be brought to bear upon the 'systemicity' to which Marks drew attention, among them Foucault's 'theory of discontinuous systematics'.<sup>33</sup> In Foucault's works, this was never just a matter of logic, or language, but also of stuff. The 'systematics' of Foucault's writings were, in part, material.<sup>34</sup> They were also discernible only as conditions under which certain phenomena emerged, rather than being knowable, with any certainty, in advance. Yet they were, nonetheless, regular and recurrent. As Foucault wrote: 'though it is true that these discontinuous discursive series each have within certain limits, their regularity, it is undoubtedly no longer possible to establish links of mechanical causality, or of ideal necessity between the elements which constitute them'.<sup>35</sup> It is, Foucault explained, 'in... practice that the events of discourse find the principle of their regularity'.<sup>36</sup> This regularity or seriality emerges, Foucault continued, not from some 'hidden nucleus' of 'thought or signification' of a kind that contingency-unearthing might ramify, but instead by 'go[ing] towards its external conditions of

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<sup>32</sup> Marks, 'False Contingency' (n 7) 10

<sup>33</sup> Michel Foucault, 'The Order of Discourse' (Ian McLeod tr) in Robert Young (ed), *Untying the Text* (Routledge 1981) (hereafter 'Order of Discourse')

<sup>34</sup> Mark Olssen (2014) 'Discourse, Complexity, Normativity: Tracing the Elaboration of Foucault's Materialist Concept of Discourse, (2014) 1 *Open Review of Educational Research* 28

<sup>35</sup> Foucault 'Order of Discourse' (n 33) 69

<sup>36</sup> *Ibid* 67

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possibility, towards what gives rise to the aleatory series of [the world's] events, and fixes its limits'.<sup>37</sup>

Among the 'external conditions of possibility' by which this 'aleatory series' may be 'limit[ed]' (as well as enabled) is the physical, representational and communicative infrastructure in operation (or latent) all around the global plane, including on the terrain of international law. There is simply so much legacy infrastructure with which international law and lawyers work that exhibits serial persistence and is, as a consequence, hard to activate as amenable to contingent recasting.<sup>38</sup> Much of this infrastructure is at stake in the kinds of operations to which I alluded earlier: the transmission and storage of data and stuff around the world; the allocation and accumulation of value; the formats and fixtures of development programming and funding. The operations channeled through this infrastructure depend on an expectation of contingency. Yet the infrastructure itself is hard to experience in these terms.

For instance, if one is looking at the transmission of data around the Asia Pacific region for diplomatic, governance, development and humanitarian purposes among others, as I have been doing in my own research of late, one needs to take account of the SEA-ME-WE 3 optical submarine telecommunications cable and its various upgrades and successors.<sup>39</sup> One might focus on the arrangements surrounding its development in the

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<sup>37</sup> Ibid

<sup>38</sup> Fleur Johns, Richard Joyce, Sundhya Pahuja, 'Introduction' in *Events: The Force of International Law* (Routledge 2011) 1, 4 ('In the reduction of the past and the future to a narrative of unfolding progress, it often seems that nothing could happen... which [international law] has not either anticipated or claimed the ability to capture: nothing surprising, nothing confronting, nothing, perhaps, capable of constituting an "event" in "the strong sense"')

<sup>39</sup> 'SEA-ME-WE3' <<http://www.smw3.com/smw3/SignIn.aspx>> accessed October 2, 2019; 'SEA-ME-WE3' <<http://www.seamewe3.net/>> accessed October 2, 2019

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mid-1990s, and its commissioning in 2000, under a consortium led by France Telecom and China Telecom. One might revisit the decision to contract out its administration to Singtel, a telecommunications operator owned by the Government of Singapore. One might focus on the contingent events of its failure and repair – some such incidents having been quite highly publicized – and the unconfirmed event of it having been tapping for surveillance purposes.<sup>40</sup> Yet no such event-oriented investigation would touch the matter and effects of this undersea cable still being there, transmitting multiple terabits per second of data, most of the time.<sup>41</sup>

Recuperation of the contingencies of human decision seems likely to have little if any bearing on the ‘elaborate’ structures of insulation and interconnection in which this and other undersea cables are encased: comprising ‘fixed structures that shelter [their] power from natural and social threats, and... make[ ] it preferable to link systems with existing networks rather than branch out to new sites’.<sup>42</sup> It would be difficult, also, for investigations of contingency to engage the many automated and mechanical dimensions of undersea cables’ operation, and yet these infrastructures remain utterly vital to the direction, resourcing, sequencing and interruption of international legal work.

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Nicole Starosielski, *The Undersea Network* (Duke University Press, 2015) 45, 158, 242 (n 89) (hereafter *Undersea Network*). See generally Adam Satariano, ‘How the Internet Travels Across Oceans’ *The New York Times* (New York, 10 March 2019) <<https://www.nytimes.com/interactive/2019/03/10/technology/internet-cables-oceans.html>> accessed 8 October 2019

<sup>40</sup> James Griffiths, ‘The Global internet is Powered by Vast Undersea Cables. But they’re Vulnerable’ *CNN* (26 July 2019) <<https://www.cnn.com/2019/07/25/asia/internet-undersea-cables-intl-hnk/index.html>> accessed 2 October, 2019; Olga Khazan, ‘The Creepy, Long-Standing Practice of Undersea Cable Tapping’ *The Atlantic* (16 July 2013) <<https://www.theatlantic.com/international/archive/2013/07/the-creepy-long-standing-practice-of-undersea-cable-tapping/277855/>> accessed 8 October 2019

<sup>41</sup> Yin-can YE, Xinmin Jiang, Guofu Pan, Wei Jiang, *Submarine Optical Cable Engineering* (Academic Press, 2018) 66

<sup>42</sup> Starosielski, *Undersea Network* (n39) 232

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There remains, of course, tremendous potential to generate supernumerary ‘evental’ moments and ‘evental’ sites out of what seems to have been done and dusted – or to ‘subtract the sheer “what happens” from the general determinations of “what is”’ (as Alain Badiou has written, with a very specific, mathematical valence).<sup>43</sup> Nonetheless, the degree to which one can render international legal histories in these terms, and the effects of so doing, are themselves contingent. It cannot be the case that this is the way to go for all critical international legal work, for all people, places, and times and all operations of power. Moreover, for certain modes of power, and certain infrastructural operations, it could well be not the way to go at all.

Let us, at this point, register the surfacing of an apparent contradiction. I suggested earlier that many modes of power thrive on contingency. Now I raise a concern about those modes of power having patterns, regularities and bearings and being conditioned by enduring, relatively immovable forms of infrastructure. The latter words suggest not so much contingency as the laying down of predetermined paths. There is a difference, however, between submission to the necessarily constraining power of circumstances (that contingency-unearthing work tries to counter) and observation of the patterning of contingency (that contingency-unearthing work tend to miss). The contingency of the commodity’s circulation and valuation in the market is a routed, paced and serialised contingency. It depends on a sense of continual motion, as well as the sequencing of that motion, and support for and reproduction of these properties is a feature of the infrastructure through which commodity circulation works. Again, Alain Pottage is helpful

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<sup>43</sup> Alain Badiou, *Badiou: Theoretical Writings* (Ray Brassier and Alberto Toscano tr. Continuum, 2004) 100

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here when he observes, writing of Foucault's account of power taking the form of 'action upon actions' that:

It is emergent in the sense that it originates neither in its protagonists nor in an abstract social-structural function. So, although a power relation presupposes a particular historical configuration of forces and discourses, it does not actualize or stabilize latent possibles or probables. Rather, it is produced in the relation sculptured by its exercise...<sup>44</sup>

Another mixed message could have been received from the preceding paragraphs; let me deal with that too. It might be possible to hear some of this as a story of power shifting locales – of global power moving, say, from the visible domain of the public to the invisible domain of the private, and the failure of international legal scholarship to follow. That is, however, not at all what I am trying to highlight. My concern is not with the location of power so much as the patterns characteristic of its operation. As indicated earlier, I am worried that international lawyers might now be spending too much time identifying particular crossroads and turning points in international legal history and imagining those moments as relivable, while leaving more or less untouched vast swathes of the densely patterned terrain transected by these imaginary paths. To recast my concern in the positive, we might – public international lawyers, that is – do well to recall the tactical advice offered by Foucault in *The History of Sexuality* – when he put forward some '[r]ules of continual variations':

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<sup>44</sup> Pottage, 'Art of Contingency' (n 21) 22

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We must not look for who has the power...and who is deprived of it...nor for who has the right to know and who is forced to remain ignorant. We must seek rather the pattern of the modifications which the relationships of force imply by the very nature of their process.<sup>45</sup>

#### **IV 9/11 and Some Patterns of Modification**

What could this entail, this seeking ‘the pattern of the modifications which the relationships of force imply by the very nature of their process’? Power, in this account, is intransitive. It is not possessed by subjects and objects, or set against or cast over them, so much as expressed through them. It cannot be located definitively; it may be grasped only obliquely and in relational terms: as a ‘pattern of... modifications’ that is ‘impl[ied]’ by the ‘process’ through which ‘relationships of force’ become apparent.

Perhaps one could take a scrap, familiar from among international laws’ most oft-told histories, and retell it in this intransitive mode by recourse to a brief and rather audacious counter-factual. What if one were to speculate that the terrorist attacks of 9/11 might not have happened, or might have happened differently? Let me be clear that this is no voicing of conspiracy theory. Consider it, rather, a little thought experiment. Its purpose is to try to see what might become discernible if one were to redact, from one of the most familiar scenes and dates of recent history, the contingent event by which it has come to

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<sup>45</sup> Michel Foucault, *The History of Sexuality: An Introduction (Vol. I)* (Robert Hurley tr, Vintage 1990) 99 (hereafter ‘History of Sexuality’)



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be defined, and to turn attention away from some of that scene's most notorious protagonists.

Can you contemplate 9/11 never having happened? Imagine several of the key figures in those attacks being stopped at the airport, their plans foiled. And now let us cast our minds back to how global affairs were tracking in 2001 before that event and consider what might have been different if those trajectories had continued uninterrupted. To open a small window into that time, and because my own memories of that day (out the front of my apartment in Lower Manhattan, looking down Greenwich Street at the burning towers) are a little blurry, let us consider the front page of the New York Times' online edition for 11 September 2001, as it stood at 12.05am on that morning, New York time.<sup>46</sup>

Headlines from that morning edition remind us that the US economy was weakening and that the Bush administration was under pressure. (The so-called 'Dot Com Bubble' had been bursting since 11 March, 2000 and the Nasdaq Composite – the home of most of the US's publicly traded tech companies – was already well into a slide that would see it lose 78% of its value by 2002.) Another headline story reported the Middle East having 'explode[d]' in 'all-but-declared war', as Shimon Peres, then Israeli foreign minister, and Yasir Arafat, then-leader of the Palestinian Authority, struggled to revive peace talks amid 'widespread pessimism' and 'growing militancy'. A third frontpage story recounted New York City voters being deluged with digital robo-calls in the primary campaign for city

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<sup>46</sup> 'A Snapshot of the World, Hours Before It Changed Forever' *The New York Times* (New York, 10 September 2011) <<https://cityroom.blogs.nytimes.com/2011/09/10/a-snapshot-of-the-world-hours-before-it-changed-forever/>> accessed 8 October 2019 (hereafter 'Snapshot of the World')

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mayor. In the face of these, the Times reported, many voters ‘ha[d] still not paid attention, ha[d] become wary, or ha[d] just fallen into a defensive stupor’. And in more frontpage stories from the New York region, a teacher and youth-worker and father of two in Westchester County, Patrick Dolan Critton, was reportedly charged for having ‘hijacked a jetliner from Ontario to Cuba’ in ‘a black-power revolutionary’ act some thirty years earlier. The 54-year old allegedly worked, in the early 1970s, in ‘a covert explosives factory’ making ‘pipe bombs with other members of a black liberation group, the Republic of New Africa’. Further down the front page of the online edition, under ‘international’, there was also a report about U.S. blacklisting paramilitary groups as ‘terrorist organizations’ in Colombia. And the lower front page featured, too, inconclusive and conflicting reports of the outcome of a suicide bombing in Kabul aimed at Ahmed Shah Massoud, the leader of the Russian- and Iranian-backed United Front, described as the last remaining opposition to the ruling Taliban in Afghanistan. There was even a story about growing US sensitivity to Russian threats, and new surveillance efforts designed to counter them; ‘Though Mr. Bush and Mr. Putin have declared that the United States and Russia are no longer enemies, military leaders in both countries have said they are taking steps that reflect a decline in trust’ the *Times* reported.

It is remarkable just how much of what tends to be understood, to varying degrees, as a direct or indirect legacy of 9/11 is already there, on the New York Times front page, some eight hours before the first plane hit the World Trade Centre. Rising militancy in the Middle East. Terrorist hijacking and suicide bombing, both near the US ‘homeland’, and much further afield, cut through by experiences of racialized violence, alienated youth, and long-

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lasting histories of occupation, clientism and colonialism. The expansion of a discourse of terrorism and a practice of undeclared war, together with associated techniques of blacklisting and surveillance. A global economy starting to pivot away from the United States, and vice versa, heightening a growing sense of U.S. vulnerability. Digital technologies becoming ubiquitous and arousing both suspicion and apathy. So many dimensions of the shift in global logic that 9/11 is supposed to have introduced or intensified – unexpectedly, contingently – are there, in plain sight, before jet stream ever scored the Lower Manhattan sky.

One could say, perhaps, that this confirms the value of unearthing contingency. All that we are now inclined to read as a prequel to 9/11 might just as easily have become groundwork for some other history-defining event lurking latently amid the detail on this front page. The ‘war on terror’ might have been otherwise, or not at all. That the U.S. and its allies invaded Iraq and Afghanistan, with devastating repercussions, seems all-the-more questionable when one contemplates that the U.S. was already grappling, in roughly routine ways, with at least some of the threats that those invasions ostensibly sought to counter. That is, if the morning of 9/11 dawned with a conviction in place that conventional tools of diplomacy and criminal law would (more or less) suffice to deal with known threats of terrorism and violent religious extremism, it seems all the more contingent, and indefensible, that those tools were so readily dispensed with in favour of war.

What the front cover of the New York Times on the morning of the event might also suggest, however, is that the process of redirecting, repurposing and renaming those conventional tools and threats was already well under way, and the techno-material

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conditions for that re-routing were already in operation, before 9/11 ever happened. The ‘pattern of...modifications’ that seem to underpin all that 9/11 would later become may require some mode of explanation or engagement *other* than that afforded by stories centred on individual consciousness, such as those of Dick Cheney’s ‘imperial presidency’, to recall the title of a 2005 New York Times editorial.<sup>47</sup> In a grotesque rendering of the kinds of emancipatory possibility that contingency-unearthing is meant to unleash, that 2005 editorial invested Cheney with a kind of über-consciousness of contingency and of the potential embedded within it, claiming that 9/11 ‘was a chance Mr. Cheney...[had] been dreaming about for decades’ and describing an array of ‘secret meetings’ in which he had engaged. In other words, it sought to pinpoint, in Foucault’s words, ‘who has the power...and who is deprived of it...who has the right to know and who is forced to remain ignorant’.<sup>48</sup>

That *Times* editorial also rehearsed a familiar expectation of public consciousness-raising potentially diminishing this backroom power. Much international law scholarship has done likewise, albeit in far more nuanced versions. Yet the interlocking trajectories set out on front page of the early edition of the New York Times that September day suggest that the aftermath of 9/11 need not have hinged upon Cheney’s masterful intervention, nor on whether we knew about it (or not). Those pre-existing trajectories, apparent on the front page of the *Times*’ early edition for 11 September 2001, make it harder to contend, also, that but for the iniquity and secrecy of Cheney and colleagues, heightened public

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<sup>47</sup> Editorial: ‘My Cheney’s Imperial Presidency’ *The New York Times* (New York, 23 December, 2005) <<https://www.nytimes.com/2005/12/23/opinion/mr-cheney-imperial-presidency.html>> accessed 8 October 2019

<sup>48</sup> Foucault, ‘History of Sexuality’ (n 44)

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consciousness might have afforded relatively untrammelled access to new horizons of possibility.

What exactly are some of the techno-material conditions or patterns to which this account gives short shrift, beyond the broad trends to which I've alluded? And how might we hope to engage those conditions and patterns, if not through knowledge-making and awareness-raising? I have suggested that many contemporary operations of power on the global plane work vectorially. That is, they take effect directionally, by orienting how and where resources, material aspirations, expectations and attention flow and the velocity and rhythms at which they do. If that is the case, then it is vital to investigate these operations directionally, in transit. They must be understood and investigated in action, as that is how they manifest.<sup>49</sup> Patterns and bearings of power – including those of power's transmission, leakage, incremental accumulation, drainage and so on – are as important to study as the sites where strategies may or may not contingently originate or ultimately 'land'. Yet studies of contingency that work on the assumption that contingency has been covered up, and must be recovered or re-announced, do not tend to be concerned with bearings. They are attuned to the origination and sedimentation or docking of power, not to its vectorial operations.

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<sup>49</sup> For other versions of this claim, see Gunther Teubner (ed), *Global Law Without a State* (Ashgate 1997) 286 (n 2) referencing the theory 'Materia est in actu set nullius et actus' as one 'created' by Late Scholasticism and 'held by followers of Duns Scot in Paris during the second half of the fourteenth century'; Michel Foucault, 'The Subject and Power' (1982) 8 *Critical Inquiry* 777, 788: 'Power exists only when it is put into action'; Karl Marx, *Capital Volume II* (David Fernbach tr., Penguin 1978) 185: 'Those who consider the autonomization... of value as mere abstraction forget that the movement of industrial capital is this abstraction in action'.

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I recalled earlier that Foucault wrote that ‘relationships of force’ imply a ‘pattern of the modifications’ and that this pattern is discernible by ‘the very nature of their process’.<sup>50</sup> Patterns indicative of shifts in power relations are, in this account, only ever implied in their processes of operation. That is, they are enfolded or entangled in those processes; they do not precede or succeed them. Let us explore this further by reference to one example of a force-laden process also on display on the front page of *The New York Times* on 11 September, 2001: the formulation of tax policy – specifically, the lead story about tax cuts.<sup>51</sup> Here, once again, we encounter contingency in a mode configured to align with the accumulation of power and resources, rather than countervailing that accumulation or calling it into question.

Responding to a ‘darkening economic outlook’, and rising unemployment, both Republican and Democratic leaders were, in September 2001, talking tax cuts. Both parties contemplated spending an ever-greater proportion of Social Security receipts in order to fund these. And the Republican minority leader in the Senate, Trent Lott of Mississippi, insisted that any such package should include a cut in capital gains tax. What was clear, then, at the time, is the extent to which economic policy-making was poll- and mood-driven and framed at a national scale. What was prompting policy ‘move[ment]’ was the experience of being ‘[c]onfronted with polls showing that support for Republicans was eroding’.<sup>52</sup> Also noteworthy is the limited range of options that were then under

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<sup>50</sup> Foucault, ‘History of Sexuality’ (n 44)

<sup>51</sup> Alison Mitchell and Richard W. Stevenson, ‘Key Leaders Talk of Possible Deals to Revive Economy’ *The New York Times* (11 September, 2001) <https://www.nytimes.com/2001/09/11/us/key-leaders-talk-of-possible-deals-to-revive-economy.html>> accessed 8 October 2019

<sup>52</sup> *Ibid*

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consideration. Looming especially large was the reflex assumption that the combination of more allowance for capital accumulation plus innovation would yield broad-ranging economic benefits. The story mentions Bush's national energy plan being 'geared toward economic growth'.<sup>53</sup> A few months earlier, announcing that plan, Bush made clear what he saw as the engine of that growth, remarking that '[o]ne thing we're not in short supply of is an entrepreneurial spirit'.<sup>54</sup>

The pattern discernible, looking back, is one of growing investment – both material and psychic – in entrepreneurship. Also evident in retrospect is an appetite, within US politics, for trying to unhinge national economic policymaking somewhat from the domain of the global, alongside conviction that the global circulation of an 'entrepreneurial spirit' might nonetheless redeem and empower a nation trying to stand apart. Positive enablement of capital on the part of the national government (through policy-making, including tax cuts, supposed to favour entrepreneurship and investment in entrepreneurship, and thereby to drive wealth- and job-creation) was being actively championed as a way of unshackling the seemingly spontaneous force of 'entrepreneurial spirit' to traverse the globe.<sup>55</sup> The regulatory embrace of contingency – through governmental championing of the risk-taking entrepreneur – was cast as a way of rejuvenating the national economy. And this legislative embrace of contingency seems to have been well in train by the early morning

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<sup>53</sup> Ibid

<sup>54</sup> 'Bush Energy Plan Looks to Future. Critics Say Help is Needed Now' *CNN Inside Politics* (17 May, 2001) <<http://edition.cnn.com/2001/ALLPOLITICS/05/17/bush.energy.plan/>> , 2001) <https://www.nytimes.com/2001/09/11/us/key-leaders-talk-of-possible-deals-to-revive-economy.html>> accessed 8 October 2019

<sup>55</sup> See, e.g., William M. Gentry and R. Glenn Hubbard, 'Tax Policy and Entrepreneurial Entry' (2000) 90 *The American Economic Review* 283; Robert Carroll, Douglas Holtz-Eakin, Mark Rider and Harvey S. Rosen, 'Income Taxes and Entrepreneurs' Use of Labor' (2000) 18 *Journal of Labor Economics* 324

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of 11 September, 2001. Any decision to enact tax cuts may be treated after the fact as contingent, but the broader orientation towards contingency as a means of accumulating resources and shoring up power seems harder to trace to singular choice-events. In this context, the idea that contingency-unearthing tends to amount to counter-conduct seems worthy of question.<sup>56</sup>

## V What May Have Been Missed

If patterned contingency and its embrace have indeed become more or less a matter of rule, then this poses very real challenges for international law's standard recuperative response to injustice: a response that seeks to recover and rebuild foundations. Studies of contingency in international law tend to be oriented around the design and construction of global order, and how its formative architectures might have been, and might yet be, made otherwise, in some improved or simply another way. However, attention tends not to be drawn to places like the nondescript former eyeglass factory in Secaucus, New Jersey, where the 'colocation provider' Equinix houses its NY4 data centre – one of a string of Equinix data centres encircling New York, including several at Secaucus.<sup>57</sup> It is through these centres that a very significant amount of US stock trading activity gets executed in the mode of 'high-frequency trading'.<sup>58</sup>

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<sup>56</sup> On the notion of immanent 'counter conduct' in Foucault's writing, see Arnold I. Davidson, 'Introduction' in *Security, Territory, Population* (n 25) xviii, xx-xxi

<sup>57</sup> 'Inside the Equinix NY4 Financial Trading Hub' *Data Center Knowledge* (14 October 2013) <<http://www.datacenterknowledge.com/inside-the-equinix-ny4-financial-trading-hub/>> accessed 8 October 2019; Paolo Gorgo, 'Equinix Opens New NY5 Facility – Expect Accelerated Revenue Growth' *Seeking Alpha* <<https://seekingalpha.com/article/784831-equinix-opens-new-ny5-facility-expect-accelerated-revenue-growth>> accessed 8 October 2019

<sup>58</sup> Graham Bowley, 'The New Speed of Money, Reshaping Markets' *The New York Times* (2 January 2011) BU1



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This chapter is not the place to try to examine precisely what kinds of change that high-frequency securities trading might, and might not, have brought about in global economic and social relations, nor its relationship to broader processes of financialization.<sup>59</sup> The point of this sudden relocation from a singular location in Manhattan to ‘colocation’ in Seacaucus is this: international lawyers’ habitual concern with the making of governance architectures at their headquarters – and the consciousness or blindness of their most prominent architects – led most international legal scholars to more or less miss the matter of the global financial markets’ profound reshaping during the years just before and after 9/11. While one can point out a series of regulatory changes made in the late 1990s and early 2000s that helped new automated trading outfits and private exchanges get off the ground, the making of these automated markets may perhaps be better understood through attention to distribution than through the study of design and construction. And the infrastructures and practices on which their growth has depended are not likely to have been captured by attention to that which announces itself as globally significant. Perhaps if international lawyers had been tracking transmission, as much as they (or we) have been captivated by tragedy, they (we) would have been more engaged with the kinds of shifts of which high-frequency trading is illustrative.

A second, and related point is that expanded consciousness and improved visibility offer little bite on the kinds of contingent operations at work in high-frequency trading since

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<sup>59</sup> Maureen O’Hara ‘High Frequency Market Microstructure’ (2015) 116 *Journal of Financial Economics* 257 (‘set[ting] out some important aspects of this high frequency transformation’ and surveying some of the regulatory and policy changes that ‘ushered in the high frequency era’). On financialization, see Strange, *Mad Money* (n 15); Randy Martin, *Financialization of Daily Life* (Temple University Press 2002); Gerald Epstein, ‘Introduction’ in Gerald Epstein (ed), *Financialization and the World Economy* (Edward Elgar 2005)

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around the time of 9/11. Learning about the phenomenon's existence, and its growing economic significance (over the past decade especially), opens no route at all to figuring out how to engage with these operations in the present. Recognizing that these operations are highly contingent and internally contestable – being prone to contribute to 'flash crashes', in which broad stock market indices collapse and rebound with incredible velocity – adds nothing to their negotiability. Even the contingencies of policy reaction or nonreaction to high-frequency trading – such as the fate of various measures or proposals for taxation and 'throttling' around the world – seem, at times, to be fairly incidental to the broad changes that these activities signal are underway.<sup>60</sup> Declining volumes, regulatory changes and increased costs may have slowed high-frequency trading markets of late, but there is likely much more to come.<sup>61</sup> As Matt Haraburda, president of Chicago-based XR Trading, was reported to have said in January 2018: 'Maybe we are coming to the end of automating the things that were easy to automate... Now the real fun starts'.<sup>62</sup>

What has made it hard for international lawyers to take account of these shifts in tempo, technique, technology and terrain? Fixations on necessity could perhaps have something to do with it – say, the tendency to accept the necessity of growth and the imperative of technological progress – but fixations on contingency also seem to have played a role.

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<sup>60</sup> For discussion of various regulatory techniques used in different jurisdictions to try to temper the volatility associated with high frequency trading, see Imtiaz Mohammad Sifat and Azhar Mohamad 'Circuit Breakers as Market Stability Levers: A Survey of Research, Praxis, and Challenges' (2019) 24 *International Journal of Finance & Economics* 1130; Kjell Jorgensen, Johannes Skjeltorp, Bernt Arne Odegaard 'Throttling hyperactive robots - Order to Trade Ratios at the Oslo Stock Exchange' (2018) 37 *Journal of Financial Markets* 1

<sup>61</sup> Gregory Meyer, Nicole Bullock and Joe Rennison, 'How High-frequency Trading hit a Speed Bump', *Financial Times* (New York, 1 January 2018) <<https://www.ft.com/content/d81f96ea-d43c-11e7-a303-9060cb1e5f44>> accessed 8 October 2019 (hereafter 'Speed Bump'). See further Alexander Osipovich, 'More Exchanges Add "Speed Bumps," Defying High-Frequency Traders' *The Wall Street Journal* (29 July 2019) <<https://www.wsj.com/articles/more-exchanges-add-speed-bumps-defying-high-frequency-traders-11564401611>> accessed 8 October 2019

<sup>62</sup> Meyer et al, 'Speed Bump' (n 61)

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Regardless of the reason for international lawyers' past inattention to significant economic and financial changes (of which high-frequency trading is emblematic), continuing to challenge the pretense to necessity in these contexts seems, even now, to yield little by way of possibility. A more fundamental rerouting of the international legal endeavor seems called for.

Could it be that international lawyers' orientation towards salvation is a good place to start? So much critical scholarly effort has been put into bemoaning what international law has helped to destroy. So much work has been done trying to recover international law's costs, and to save its victims. So much labour is being directed towards recovering lost and little-known histories and showcasing international law's many strange, sometimes malformed constructions. Almost no time is being spent questioning the routine international legal impulse to minimize destruction. Yet on a global scale, salvation is not working. So much on the global plane is being discarded and degraded. Extinction rates are around 1,000 times pre-human rates.<sup>63</sup> Freshwater vertebrates lost 83 percent of their global population between 1970 and 2014.<sup>64</sup> Life expectancy in the U.S. – higher than any other country's in 1960 – is on the decline.<sup>65</sup> One 2018 study in the *British Medical Journal* blames substance abuse, despair, and the effects of long-term structural disadvantage.<sup>66</sup>

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<sup>63</sup> Jurriaan M. De Vos, Lucas N. Joppa, John L. Gittleman, Patrick R. Stephens, and Stuart L. Pimm, 'Estimating the Normal Background Rate of Species Extinction' 29 (2015) *Conservation Biology* 452

<sup>64</sup> Monique Grooten, and Rosamunde E.A. Almond (eds). *World Wildlife Fund. Living Planet Report - 2018: Aiming Higher* (WWF, 2018) 7, 95

<sup>65</sup> Grace Donnelly, 'Here's Why Life Expectancy in the U.S. Dropped Again This Year' *Fortune* (9 February 2018) < <https://fortune.com/2018/02/09/us-life-expectancy-dropped-again/> > accessed 8 October 2019  
<http://fortune.com/2018/02/09/us-life-expectancy-dropped-again/>

<sup>66</sup> Steven H. Woolf and Laudan Aron, 'Failing Health of the United States' (2018) 360 *BMJ* 496

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Could it be that international lawyers need to reflect less on salvation, and more on what to abandon, or set aside, including within their own critical repertoire, and how to do so? Another version of this suggestion might be the following: international legal scholarship would do well to assume a starting point of complicity, rather than cleanliness – to try to probe inside some operations of power in action, rather than try to arrest or arraign those operations from afar. This has long been the approach taken by some international humanitarian lawyers – those traveling on aircraft carriers, say – but sits less comfortably in other areas of doctrine and practice.<sup>67</sup> Assuming such a posture of complicity, it becomes important to ask: what ideas prevalent in international legal scholarship might warrant targeting? What could be dislodged and jettisoned in the patterns I've been describing? Could it be, for instance, that the idea that consciousness of contingency begets freedom is an idea worth setting adrift?

## **VI Conclusion: Setting Critical Consciousness-Raising Aside?**

The question above might sound glib. It is far from clear, of course, how one would go about destroying such an idea, or dispensing with it in practice. Reasoning against it seems unlikely to do the trick. Nonetheless, there *is* a vibrant tradition of internal critique in international law oriented towards unraveling or, broadly speaking, setting things aside,

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<sup>67</sup> David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press 2011) 329 (“There is apparently something scandalous about an aircraft carrier sailing off to war as the *realization* of international humanitarianism...We prefer to think of humanitarians as gentle civilizers, lawyers whispering in the admiral's ear...”)

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and it's a lineage worth recalling.<sup>68</sup> This is the tradition in which some international lawyers have dwelled upon grammar, sign and erasure. This is the tradition in which some have cast legal order as an emanation of the unconscious. This is the tradition in which international lawyers have provincialised and fragmented legal consciousness. This is the tradition in which some have taken death rather than life, killing rather than birthing, waste rather than salvage, as the starting point for international legal work.<sup>69</sup> Writing on the ubiquity of contingency and its relationship to power in the key of this tradition is likely to yield accounts far more discomfiting than accounts of contingency oriented towards recovery and redemption – an international law less ripe with possibilities than littered with remarkably resilient dead ends.

It would, however, be rather ungracious of me to conclude this chapter on such a note. The dead end is no place to take fellow travelers at the end of a short chapter such as this. Let me re-route and re-state with a more upbeat modulation, out of deference to the social norms of the international legal scholarly genre. Those radical counterfactuals that reside within the international legal tradition remain exhilarating to unearth. Following

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<sup>68</sup> It may be especially so in the face of the apparent forgetting of the richness of this tradition. I was rather taken aback when a talented and well-read researcher in the later stages of a doctorate at a world-leading university in the UK remarked to me, in early 2016, that she thought that writing international legal histories was simply how critical international law was done. David Kennedy's note of lamentation and surprise is worth recalling in this context: 'I continue to be struck... by the relative scarcity of work picking up, reworking, extending, or contesting the broad argument of *From Apology to Utopia*—or, for that matter, of my own *International Legal Structures*. Although often cited, Martti's book is rarely challenged or deeply engaged.': David Kennedy, 'The Last Treatise. Project and Person (Reflections on Martti Koskenniemi's *From Apology to Utopia*)' in Russel A. Miller and Peer Zumbansen, *Comparative Law as Transnational Law: A Decade of the German Law Journal* (Oxford University Press 2011) 75, 82

<sup>69</sup> See generally Fleur E. Johns, 'Critical International Legal Theory' (May 30, 2018) in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, forthcoming), UNSW Law Research Paper No. 18-44 <<http://dx.doi.org/10.2139/ssrn.3224013>> accessed 8 October 2019

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through on some of these, whether speculatively or programmatically, seems worthwhile doing in many instances. Yet, there are perils. Many mechanisms of power that prevail on the global plane thrive on contingency, rather than negate it. It is not clear that drawing out unacknowledged contingencies in international law's past can speak any kind of truth to this power. There is also the problem of engaging certain material dimensions of 'systemicity', or what I have called legacy infrastructure, and making this seem actionable, renegotiable. Pinpointing contingent events often seems rather incidental to the ongoing operations of one or other infrastructure channel. Not all dimensions of the actual are pliable to the critical touch. Much gets missed when international law scholars focus only on making that which seems fixed and unavoidable somewhat less so. Perhaps, in the face of one or other unequal or otherwise misshapen system of power, international law would do better to focus on patterns of transmission and superfluity, rather than trying to revisit or restage moments of origination. Perhaps international lawyers need to think about infiltrating and overloading some systems going forward, rather than trying so insistently to dial them back towards some earlier point of supposedly neglected opportunity. Fortuitously, there is much still left to do in this field, and many people around to do it with.