Contingencies in International Legal Histories
Origins and Observers

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I. Introduction

The so-called ‘turn’ to history and historiography in international legal scholarship\(^1\) puts in place, on the one hand, a return of history into the discipline as it can be found in traditional accounts already.\(^2\) On the other hand, however, it is also a turning away from the specific ‘use’ of history in traditional, earlier histories. Such traditional accounts of the history of international law are portrayed, exceptions notwithstanding, as lacking engagement with and reflections upon their mode of history production. However, the emerging body of new international legal histories does not only provide fresh accounts of international law’s past(s) but, as we are told, opens up, if done rightly, new avenues of critique and emancipatory futures. The more recent interest in international legal histories has motivated some scholars to tackle broader conceptual and theoretical themes as well.\(^3\)

This is where discussions about contingency and the history of international law might emerge. As Nicholas Onuf observed some time ago, international legal histories, old and new, are linked (often implicitly) to discussions of contingency: the history of international law can be reconstructed as a ‘long history of confronting contingency.’\(^4\) For Onuf, international law’s history is linked to contingency for two reasons. Firstly, international law exists under conditions of contingency. Onuf draws here on Hegel’s discussion (in the *Philosophy of Right*) of international law (äußeres Staatenrecht) and, in particular, Hegel’s critique of Kant’s idea of a federation of states. For Hegel, such a federation will hardly work as it ‘presupposes an agreement between states. But this agreement . . . would always be dependent on particular sovereign wills, and would therefore continue to be tainted by contingency [Zufälligkeit].’\(^5\) Within international theory, this theme has been explored

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\(^3\) This becomes visible, for example, in the publication of topic-related textbooks: cf Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012); Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).


\(^5\) Cited in ibid 359; GWF Hegel, *Elements of the Philosophy of Right* (HB Nisbet tr, CUP 1991) para 333R.
prominently (and been iterated) by various generations of political realists in their conceptualisation of the international as characterised by anarchy and the endless repetition of power politics, violence, and war. Yet, such a conclusion does not necessarily follow from Hegel’s original formulation, as for Hegel contingency outside of the sphere of the state is, as it would be framed in social theory from Parsons onwards, one of double contingency: the interaction and reasoning process between ego and alter (here, in the form of states). Such an understanding would make it possible to describe the international as a social situation—the core claim of Onuf’s version of constructivism in international relations theory.

Secondly, contingency is for Onuf inscribed in the international legal field itself, both in the way it reconstructs its history and in its underlying logic of history. In this aspect, international law is no exception to other fields. As Onuf notes, ‘every field of scholarship has a story about the field’s origins and the large contours of its development’. He continues:

Stories about fields emerge from within fields; they take on weight but not density. Without them scholars would be less certain of their field’s distinctive character and its place in the world of learning. This is the reason we hear simple stories, easy to learn and marked by a relatively high degree of consensus. We might even expect such stories to take mythical propositions.

In the case of international law, the story is usually linked to the story of modernity, particularly its Weberian version, where ‘universal reason gave way to instrumental rationality, and natural law to positive law’—as an attempt to come to terms with the contingencies of modernity.

There are, however, exceptions to the conventional Weberian narrative. Onuf presents David Kennedy’s reflections on the link between history and authority in international legal scholarship as one of these exceptions. Kennedy explores the link between history and authority by reconstructing the varying relationship of authorship and (legal) authority in the history of international law: while early (or ‘primitive’, as Kennedy puts it) international legal scholarship invokes authority through direct reference to authors, modern texts derive their authority through the absence—the writing-out—of the author. Moreover, Kennedy problematises how ‘mainstream international lawyers use history’ and identifies here two modes of argumentation, which he calls ‘history-as-provenance’ and ‘history-as-progress’: while the task of the former is to present, inter alia, a stable origin of the international legal enterprise, the latter argument unfolds in order to create the impression of its steady and linear progress. Put differently, both modes of argumentation,

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7 For a reconstruction of the link between contingency and constructivism, see Oliver Kessler, ‘The Contingency of Constructivism: On Norms, the Social, and the Third’ (2016) 45 Millennium 43. For a discussion of the role of international legal theory within different strands of constructivism, see Filipe dos Reis and Oliver Kessler, ‘Constructivism and the Politics of International Law’ in Anne Orford and Florian Hoffmann (eds), The Oxford Handbook of the Theory of International Law (OUP 2016) 344.
8 Onuf (n 4) 361.
9 ibid 363–364. The observation that modernity is characterised by contingency led Weber to develop his theory of action. For a reconstruction of Weber’s take on contingency, see Kari Palonen, Das ‘Webersche Moment’: Zur Kontingenz des Politischen (Springer 1998).
11 Kennedy (n 2) 88–94.
‘history-as-provenance’ and ‘history-as-progress’, are recurring topoi in the ‘long history of confronting contingency’ in international law.

In this chapter, I take this observation as my vantage point and explore the relationship between contingency and international legal histories on two levels. In the next section (II), I recast how arguments of contingency and origin work in international legal histories. Bearing in mind of telling too easy a story, I argue that we can identify two different, yet complementary, ways of conceptualising origin and contingency: contingency of origin and contingency as origin. To develop an analytical vocabulary and to get some conceptual grip, I turn to some basic ideas developed in the writings of Hans Blumenberg and, to a lesser extent, Niklas Luhmann. Both Blumenberg and Luhmann examine the relationship between contingency and origin. Yet they do so differently: while Blumenberg’s work is concerned with the ontotheological foundations of modern Western philosophical thought and the contingency of its origin, Luhmann’s theory of social systems conceptualises contingency as the origin of social order through the interaction of ego and alter, i.e., under conditions of double contingency. In other words, where Blumenberg emphasises the lack of determination of origins of our social world (as these origins could have been different), Luhmann reconstructs how the stabilisation of contingency is tied to communication processes—communication processes which are in particular mobilising (legal) norms. While most international legal histories are engaged in ‘finding’ the origin of international law (and here contingency is tied to the observation that this origin could have been different), some international legal histories take, in addition, the contingent encounter of ego and alter (in the form of, for example, peoples, states, and empires) as the origin—here contingency becomes a productive force in order to create the origin of an international (legal) order.

Section III explores then more briefly, and again with the danger of oversimplification, arguments of progress in international legal histories—arguments in the context of ‘history-as-progress’—by focusing on the interplay of what is observed and the position of the observer, and how this relate to contingency. In other words, I inquire into the observance of contingency—and the contingency of the observer—when it comes to writing international legal histories. Inquiring into the contingency of the observer means to problematise the role and position of the scholar when writing history. Inquiring into the observance of contingency means to problematise the contingency of history itself. To be sure, and this is what I seek to emphasise, both hang together. Here again, Blumenberg and Luhmann are helpful as both connect their discussions of contingency (the observance of contingency) with a problematisation of the position of the observer (the contingency of the observer).

I argue that in the work of more traditional international legal scholars (including both the more positivist and naturalist inclined ones), the use of history is usually intertwined with the history of international law as, for example, knowing the history of international law helps to identify custom or to improve treatises. Moreover, for these accounts, being part of the project of international law results in telling the history of international law as a linear and (quasi)teleological history of success and progress. In the end, contingency can be excluded by making international law ‘better’. More recent historical studies in international law take this as their starting point and seek to destabilise this narrative of

12 I take this distinction from Rüdiger Campe, ‘Contingencies in Blumenberg and Luhmann’ (2012) 158 Telos 81.
steady progress by, for example, reflecting upon the Eurocentric nature of their field or by foregrounding events instead of linearity and historical structures. In other words, these accounts use history in order to show the contingency of international law. What remains nevertheless often unconsidered—even in ‘critical’ international legal histories—is the contingency of the observer of these histories, ie, the contingent position of who writes these histories.

Section IV concludes the chapter with a brief discussion of what it could mean to open international legal histories for different conceptualisations of origin, and to give up the idea of progressive history and the firm standpoint of the observer at the same time, namely to conceptualise origin, observer and observed as contingent.

II. Contingency of origin, contingency as origin in international legal histories

The question of international law’s historical origin(s) has attracted much attention during the history of international law itself. International legal histories, new and old, have devoted much energy ‘finding’ the right answer. The identification of origins helps not only to legitimate (or criticise) the project of international law as it creates narratives of adequate (or questionable) provenance, but is also intertwined with such fundamental questions as when is international law ‘law’ and when is law ‘international’. Put differently, histories of and debates about the origins of international law are concerned with the ontological status of both the ‘international’ and ‘law’ in ‘international law’. Their function is to provide a stable ground(ing) for subsequent, more systematic inquiries into the field. This makes them very much debates and histories of the present, of today’s politics of international law.

It is the question of origins, and how origin relates to contingency, that concerned much of the work of the German philosopher Hans Blumenberg. Blumenberg’s approach is historical, with a core interest in the epochal change of worldview that came along with the emergence of the modern age (Neuzeit). For Blumenberg, contingency ‘is one of the few concepts of specifically Christian decent in the history of metaphysics’. Whereas the medieval cosmology was characterised by necessity and the idea that a Christian God guarantees the homogeneity of reality, this has shifted fundamentally with the emergence of the modern world. The omnipotence of a late-medieval God is not available anymore. This shift is a ‘stepping-out of the “universe of taken-for-grantedness”’; it is a ‘turning of all characteristics of taken-for-grantedness of reality into contingency’. Thus, as Blumenberg writes, the ‘post-Christian age’ is characterised by a ‘culture of contingency’: the ‘basic idea’ is now

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13 cf Craven (n 1). Moreover, the ‘search for origins’ is part boundary drawing exercises between different strands of international law. For a discussion of what this means in the context of international criminal law, see Immi Tallgren, ‘Searching for the Historical Origins of International Criminal Law’ in Morten Bergsmo, Yi Ping, and Cheah Wui Ling (eds), Historical Origins of International Criminal Law, vol 1 (Torkel Opsahl Academic EPublisher 2014) xi.


16 Hans Blumenberg, Wirklichkeiten in denen wir leben (Reclam 1986) 46.
‘that it has not to be, what is’. Or, as Blumenberg defines contingency elsewhere, it is the ‘judgment of reality from the standpoint of necessity and possibility’. Contingency makes it possible and necessary for humans to construct their own reality (eg, through technology); a reality that could have been constructed differently. Blumenberg explains:

The awareness of the contingency of reality is, however, the foundation of a technical attitude towards the given: if the given world is only an accidental instantiation from the infinite range of the possible, if the sphere of natural facts no longer produces higher justification and sanction, then the factuality of the world becomes the primary impulse not only to judge and criticize the real from the possible, but it becomes possible, by realizing what is possible and by using the range of what is possible to invent and construct, to justify the cultural world as consistent and necessary.

It is the construction of reality where, as Campe recently summarised, the contingency of origin becomes central in Blumenberg, as ‘the world may be structured this way or another; there can be this world or a different one; the world might even emerge or not’. In the end, reality has multiplied; the modern age is composed of ‘realities we live in’.

Stories of and debates about the origin of international law have multiplied. In this section, I reconstruct several exemplary attempts of ‘finding’ international law’s origin and how these debates are tied to different understandings of international law’s history. Moreover, these stories are often encapsulated in larger controversies over the nature of the field. In particular, I identify and discuss in this section the following international legal histories and how they study the origin of international law: the traditional international legal histories of Arthur Nussbaum and James Brown Scott and the question of international law’s founding figures; the early controversy between Wilhelm Grewe and CH Alexandrowicz on international law’s Eurocentric origin; David Bederman’s and Onuma Yasuaki’s diverging attempts to decentre the origins of international law by pointing to multiple origins in time and space; and finally more recent inquiries of international law’s Eurocentric origin as formulated by Antony Anghie and Arnulf Becker Lorca.

1. Origins in traditional international legal histories: finding founding figures

A first type of controversy can be found in more traditional accounts of international legal history. For decades, A Concise History of the Law of Nations by Arthur Nussbaum was probably the most-read history of international law. Formerly an expert in private international law and commercial arbitration, Nussbaum was forced to emigrate from Germany to the United States in the 1930s. The first edition of the Concise History was published in 1947, with a second edition coming in 1954. The book forms part of the international legal positivist tradition. It can be seen as an example of what Kratochwil described as at least on the

17 Hans Blumenberg, Die Sorge geht über den Fluß (Suhrkamp 1987) 57.
18 Blumenberg (n 16) 47.
19 ibid.
20 Campe (n 12) 89.
21 Blumenberg (n 16).
first view ‘strange symbiosis’\textsuperscript{22} between legal positivism and political realism in the aftermath of the Second World War, where international legal positivists like Nussbaum follow the rather ‘grim’ picture of international politics of realist scholars like Hans Morgenthau and thereby accept a limited role to international law. As a result, for Nussbaum, ‘it is unwarranted to assume … something in mankind like an innate idea of international law.’\textsuperscript{23} International law is, instead, positive law, it is fabricated by states and ‘govern[s] relations among independent states as such.’\textsuperscript{24} Studying the history of international law can help to determine the scope and potential of international law as it would ‘indicate the presumable line of evolution and eliminate extreme assumptions.’\textsuperscript{25} Nussbaum focuses here mainly on treaties between states as well as diplomatic and doctrinal developments. Historical progress is presented as a long detachment of international law from morality and, importantly, religion. It is for this reason that Nussbaum attributes the origin of international law to Hugo Grotius, as Grotius ‘made an important step toward the emancipation of international law from theology [as] his system was designed as one of secular and juristic international law. And international law can only be secular.’\textsuperscript{26}

To conceptualise the origin of international law in terms of secularisation was further developed in the second edition of the \textit{Concise History}, in which Nussbaum included an appendix discussing whether international law originated with Grotius or the Spanish scholastics.\textsuperscript{27} Nussbaum’s primary opponent in this regard was James Brown Scott, one of the central figures of international law in the United States during the first half of the twentieth century. Scott argued in a series of publications during the 1920s and 1930s that international law is of Spanish (and Catholic) origin, with the Dominican theologian Francisco de Vitoria as the ‘founder of the modern law of nations.’\textsuperscript{28} As Scott writes, ‘Vitoria was a liberal. […] He was an internationalist by inheritance. And because he was both, his international law is a liberal law of nations.’\textsuperscript{29} For Scott, Vitoria is a liberal thinker as he included

\textsuperscript{22} Friedrich Kratochwil, ‘How Do Norms Matter?’ in Michael Byers (ed), \textit{The Role of Law in International Politics: Essays in International Relations and International Law} (OUP 2000) 254. This observation is, of course, only strange on the first view as legal positivism and political realism have much in common. This observation also mirrors what Judith Shklar had suggested earlier in her seminal study of ‘legalism’. As Shklar notes, the ‘realistic picture of politics is […] that of legalism gone sour’. For Shklar, this is the case as a closer look reveals that realist scholars are using the same method as international legal positivists, their ‘professed opponents’, as they ‘have simply applied the same type of arguments that legal theorists have used in separating law from morality to the task of preserving politics from both law and morality’. One consequence of this development consists for Shklar in an impoverished picture of both the concept of politics as well as the concept of law as ‘politics’ gets reduced to a permanent war-like struggle for power while ‘law’ is boiled down to an image of extreme formalistic legalism, Judith N Shklar, \textit{Legalism: Law, Morals, and Political Trials} (Harvard University Press 1986) 126, 122–123. See also Tanja Aalberts and Ingo Venzke, ‘Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice’ in Jean d’Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner (eds), \textit{International Law as a Profession} (CUP 2017) 287.


\textsuperscript{24} ibid 19.

\textsuperscript{25} ibid 1.

\textsuperscript{26} ibid 105. For further discussion on Grotius and secularism see John D Haskell, ‘Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial’ (2011) 25 Emory International Law Review 269.


\textsuperscript{29} Scott, \textit{The Spanish Origins of International Law} (n 28) 280.
the ‘American principalities—as equals of Christian States’ in the ‘international community’.\(^{30}\) It is this international community, and not states, which is central in Vitoria’s (and Scott’s) conception of international law. ‘The international community’ of Vitoria is, as Scott explains, ‘not a superimposed State; it is coextensive with humanity—no longer merely with Christianity.’\(^{31}\) In the international community, ‘law and morality should be one and inseparable.’\(^{32}\) To re-coin international law in terms of natural law brings Scott to the conclusion that Hugo Grotius should be ‘considered as a member of the Victorian or, as it is usually termed, the Spanish school’, but not as the founder of international law.\(^{33}\) Moreover, it helped Scott, as one commentator pointed out, to envision Vitoria ‘as the perfect ideologue for the US’s emergence on the international stage… by arguing that the communality of an international legal order was inextricably tied to its claim to offer “a single moral standard” applicable to all humanity, contrasting it against the colonial division in the global order established by the European empires’.\(^{34}\) Thus, tracing the origins of international law back to Vitoria or Grotius has substantial implications as it not only renegotiates the relationship between (international) law, morality, and religion but also situates the foundation of international law either in the religious wars in Europe or the ‘discovery’ of America.

### 2. Origins and Eurocentrism: early debates

A second change, which Nussbaum introduced with the second edition of his *Concise History*, was the divisions of chapters into epochs instead of centuries, as it was still the case in the first edition. Nussbaum adopted this mode of periodisation from Wilhelm Grewe. Grewe, a German international lawyer and diplomat, published several articles in the first part of the 1940s, culminating in an extensive monograph on *The Epochs of International Law* in 1944. The book remained unpublished until 1984.\(^{35}\) However, after its publication, it would become ‘the standard book on the history of international law’, a book of ‘exceptional importance and influence’\(^{36}\). Grewe’s history of international law is inspired by Carl Schmitt’s *Großraumlehre* and adopts from Schmitt, among other things, the idea that international law is embedded in concrete orders (*konkretes Ordnungsdenken*).\(^{37}\) ‘An international legal order’, Grewe argues, ‘is a plurality of relatively independent (although not necessarily equal-ranking) bodies politic which are linked to each other… and which are not subject to a superimposed authority having comprehensive law-making jurisdiction and executive competence.’\(^{38}\) As such, the concept of international legal order is not

\(^{30}\) ibid 282.
\(^{31}\) ibid 283.
\(^{32}\) ibid 11a.
\(^{33}\) ibid 9a–10a. It was this idea, which Nussbaum should refute when he wrote in response to Scott ‘that there is not the least proof for the assertion that the Spaniards of the “Golden Age” were the founders of international law’, Nussbaum (n 27) 306.
\(^{34}\) Kojo Koram, ‘The Vitorian Recovery and the (Re)Turn towards a Sacrificial International Law’ (2018) 6 London Review of International Law 443, 447; see also Orford (n 14).
\(^{35}\) The English translation was published in 2000: Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers tr, de Gruyter 2000).
\(^{38}\) Grewe (n 35) 7.
restricted to modernity and the ‘inter-State law of a society of sovereign and equal States is only one possible configuration of an international legal order’.

According to Grewe, we can find various international legal orders in antiquity and outside of Europe. Yet Grewe does not further explore these orders as they did not have a direct line of continuation to modern international law. This is different in relation to medieval law—in particular, late-medieval law—and it is important, as Grewe claims, to understand the ‘medieval foundations and origins of modern international law’. According to Grewe, the Middle Ages were not, as is often assumed in the literature, dominated by the universal powers of Pope and Emperor—their authority being for Grewe rather symbolic than effective—but by a plurality of independent political communities and a non-hierarchical notion of law. Nevertheless, Grewe observes a clear break between medieval and modern international law. Modern international law emerged simultaneously with the modern state system and its two major innovations of diplomacy and balance of power thinking. Grewe understands the history of the modern state system, in turn, as a sequence of empires, which can be grouped into ‘three political systems, which are referred to herein an abbreviated fashion as the Spanish, the French, and the British system, produc[ing] its own unique, self-contained international legal order’. It was only during the British epoch in the nineteenth century that the originally European international law became a legal order of worldwide and, thereby, universal scale. The twentieth century, Grewe’s own century, was at initially characterised by an American epoch and later by the confrontation between the two blocs of the Cold War. Read differently, international legal orders are for Grewe the direct outcome of political struggles and different international legal orders stand, in the end, not only for different (historical) epochs but also for different traditions of hegemony, expansion, and empire. Importantly, these different traditions are all Western traditions, expanding from (medieval) Christian-Europe to the ‘rest’ of the world, where this ‘rest’ is conceptualised as a passive recipient of universalised European ideas.

Grewe contrasts his view of modern international law originating in Europe and expanding and diffusing into a universal international legal order with the approach of CH Alexandrowicz, who presents, as Grewe puts it, a ‘striking oppositional thesis’. Alexandrowicz, a Polish international lawyer who spent a considerable time of his career in India and Australia and who would influence the first generation of ‘Third-World Approaches to International Law’ (TWAIL) scholars, developed a distinctively non-Eurocentric conception of international law. Alexandrowicz did so by turning to the history of international law and argued that international law was, until the rise of international legal positivism in the nineteenth-century, universal law. Thereby, Alexandrowicz inverts Grewe’s argument that international law was initially particular and became universal in the nineteenth century only. To prove his point, Alexandrowicz reconstructs non-European origins and notions of such a universal international legal such as, for example, in the Kautilyan tradition in East Asia, and focuses on the encounters of Christian-European

39 ibid 8.
40 ibid 39. See also ibid 37–136.
41 Grewe (n 35) 23.
rulers with their periphery—for example, the controversy between the Teutonic Order and the Kingdom of Poland at the Council of Constance (1414–18) over Poland’s relations to pagan communities in Lithuania as well as the ‘confrontation’ between European sovereigns and their counterparts in Africa and, in particular, East Asia from the sixteenth century onwards.\footnote{As a result, Alexandrowicz directs our attention away from the European ‘discovery’ of the Americas (and related discussions of Vitoria) in two ways. He shows, first, that discussions on the relationship between Christian and non-Christian communities did not originate with the ‘discovery’ of the Americas but can be found prior \textit{inter alia} in Eastern Europe and he emphasises, second, the importance of Africa and, in particular, East Asia for international legal controversies during the first wave of the European expansion. See CH Alexandrowicz, ‘Paulus Vladimiri and the Development of the Doctrine of the Coexistence of Christian and Non-Christian Countries’ (1963) 39 British Yearbook of International Law 441; Alexandrowicz (n 43); CH Alexandrowicz, \textit{The European-African Confrontation: A Study in Treaty Making} (AW Sijthoff 1973).}

Alexandrowicz studies mainly treaty-making and diplomatic relations and reconstructs that, for instance, East Asian and European empires formed a universal and non-discriminatory international law. East Asian sovereigns had considerable agency in the making of treaties and the conduct of diplomatic relations, and they could become full members of the family of nations. As Alexandrowicz argues ‘[n]either is it possible to subscribe (from the legal point of view) to the idea of “colonialism” as explanatory of European-Asian relations prior to the nineteenth century.’\footnote{Alexandrowicz, \textit{An Introduction to the Law of Nations} (n 43) v.} Alexandrowicz draws a similar picture of the relations between European and African rulers as treaties ‘had to be negotiated and concluded on the basis of legal notions which prevailed at the time of their negotiation and conclusion.’\footnote{Alexandrowicz, \textit{The European-African Confrontation} (n 44) 6.} It is only the rise of international legal positivism in the nineteenth century, particularly after the Congress of Vienna, that brought this regime of equal treaty-making to an end as positivism ‘discarded some of the fundamental qualities of the classic law of nations, particularly the principle of universality of the Family of Nations irrespective of creed, race, colour and continent (non-discrimination)’ and it is with positivism that international law ‘shrank into an Euro-centric system’—becoming a \textit{Jus Publicum Europaeum} and running in ‘parallel lines with colonialism as a political trend’.\footnote{ibid.} Alexandrowicz conceives this notion of a Eurocentric international law as an anomaly—an episode in the long course of international law—which, as he hopes, can be overcome by including the new states of the decolonial era. This would then recover a universal notion of international law. Alexandrowicz differs here not only from Grewe, but also, as we will see below, from other critical inquiries into international law’s Eurocentrism.

3. Multiple origins: decentring in time and space

Some of the more recent international legal histories seek to radicalise or even move beyond previous ideas. For instance, one stream of scholarship attempts to locate the origin of international law radically outside of Western modernity by narrating the history of international law in terms of multiple centres and, subsequently, multiple origins. In this regard, David Bederman has extended the history of international law into antiquity, challenging thereby the assumption that ‘international law is a unique product of the modern, rational mind’.\footnote{David J Bederman, \textit{International Law in Antiquity} (CUP 2004) 1.} Bederman is able to date the origin of international law back into antiquity.
by anachronistically employing and broadening concepts, ideas, and practices such as sovereignty, state, state system, balance of power, customary law—and international law. For Bederman, international law presupposes what the English school tradition in international relations theory, particularly Hedley Bull, understood as a system of states (or international society). 49 By reviewing the three institutions of diplomacy, treaty-making, and warfare, Bederman identifies three such systems, namely in the Near East (2800–700 BCE), the Greek city-states (500–380 BCE), and the Roman empire (358–168 BCE)—each of them based on a different kind of rule of law.

Bederman opposes, thereby, two sets of arguments. Firstly, instead of being governed by one ‘single, cohesive body of rules for a law of nations, recognized by all States in antiquity’, antiquity was composed of a plurality of different bodies of international law. 50 This plurality was facilitated by the widespread idea that relations between these states need to be based on a rule of law. It means that a certain problématique (inter-state relations in a system of states) created its own solution (rule of law). Secondly, the different variations of international law of antiquity are not only spatially disconnected but also temporally. Thus Bederman avoids telling a story of continuity between antiquity and modernity. Instead, one has ‘to accept the ancient law of nations in its own terms’. 51 Bederman’s story is, however, not the only one of multiple origins and multiple centres.

Another important intervention is the ‘intercivilizational perspective’ developed by the Japanese jurist Onuma Yasuaki. 52 Compared to Bederman, Onuma’s work is considerably more reflective in terms of the transhistorical and transregional transferability of core concepts of international law and politics. The ‘intercivilizational perspective’ criticises Eurocentric accounts of the history of international law as it ‘assumes the coexistence of plural civilisations, each of which had a normative system’, each ordering its own ‘world’, and each based on its own ‘egocentric universalism’. 53 Onuma identifies three self-contained regional civilisations, namely the Sinocentric tribute system in East Asia, the Islamocentric system of the Muslim world, and the Eurocentric system of Christianity. For many centuries, these regional civilisations coexisted mainly in isolation. From the eighteenth century onwards, however, the Eurocentric system extended and confronted the Sinocentric and the Islamocentric systems. As a result of the collision of worlds, the Islamocentric system collapsed in the eighteenth century, with the Sinocentric system following one century later.

Moreover, towards the end of the nineteenth century, international law became complicit with European colonialism, with the Berlin Conference as its most striking example. It is only in this period that the previously regional normative system of (European) international law became the one governing the world, something coinciding with the expansion of the (European) international society. 54 ‘International society covering the entire globe with international law valid in such a global society did not exist until the nineteenth century’. 55 This Eurocentric idea of international law gained authority, inter alia, through

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50 Bederman (n 48) 267.
51 ibid 15.
52 See, in particular, Onuma (n 14).
53 ibid 7, 6.
54 Like Bederman, Onuma follows mainly Hedley Bull’s notion of international society: Bull (n 49); see Onuma (n 14) 57.
55 Onuma (n 14) 63 (emphasis in the original).
a presentist reading, starting in international legal histories from the nineteenth century. As Onuma explains: ‘What appeared … was a projection of the predominant [Eurocentric] view onto the past by assuming that such a reality had been existing during the period of Pope Alexander VI, or even much earlier. In this projective interpretation of history, what Europeans believed to be universal in those days … were assumed to be actually universal.’ However, to be aware of the construction of such universals might help, as Onuma hopes, to come to terms with the situatedness of the European perspective and open up other, non-European perspectives, thereby creating an ‘intercivilizational perspective’—a perspective that different civilisations come with different world views—as the basis of a truly global international law.

4. Origins and Eurocentrism: recent debates

Finally, an increasing number of studies seek to develop explicitly non-Eurocentric histories of international law by locating the origin of international law at the (semi)periphery of Europe and within the encounter between the European and non-European world. Antony Anghie has been the most prominent exponent of such a position. For Anghie, international law ‘was created out of the unique issues generated by the encounter between the Spanish and the Indians’ in the fifteenth century, with Francisco de Vitoria as the founding figure of international law. However, in contrast to Scott, who identified (with) Vitoria as a liberal internationalist, Anghie considers the Dominican theologian a pivotal figure in the legitimisation of European colonial rule over non-European peoples. According to Anghie, Vitoria was confronted with the ‘novel problem of the Indians’.

While Vitoria argued that universal natural law applies to the Indians as he characterises them as human and in possession of reason, he conceptualised them at the same time as culturally different. This includes practices, shaped by their culture, which violate Vitoria’s notion of universal international law. These violations, in turn, provide the Spaniards and other Europeans with a just cause for waging war against the Indians and, in the end, colonial conquest. However, Anghie claims that these ‘colonial origins of international law’ are often overlooked, sometimes even written out of the history of international law. This silence is in particular problematic as, for Anghie, ‘imperialism is a constant’ throughout the whole history of international law, whether it concerns sixteenth-century natural law, nineteenth-century positivism, or the pragmatism of the late twentieth century. Thus, in contrast to Alexandrowicz, who saw colonialism as a nineteenth-century exception of an otherwise universal international law, Anghie insists that colonialism has been the normal condition in the course of international law and that the root dichotomy between coloniser and colonised, which was introduced by Vitoria, structures—in different articulations (civilised vs uncivilised, developed vs undeveloped, etc)—the international legal discourse

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56 ibid 54.
58 ibid.
59 Anghie (n 57).
60 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (CUP 2004) 315 (emphasis in the original).
until the present day: ‘The colonial origins of the disciplines are re-enacted whenever the discipline attempts to renew itself, to reform itself.’ Attempts of renewal and reform are thereby ‘Vitorian moment[s],’ namely moments in which international law helps to re-establish an order of difference between core and periphery.

It is here where Arnulf Becker Lorca’s recent global intellectual history of international lawyers from the semi-periphery takes its vantage point. In contrast to Anghie, who studies the direct domination of the core over the periphery, Becker Lorca zooms into the role of the semi-periphery and the making of the global (or universal) legal order. Such a legal order originated rather late. According to Becker Lorca, ‘international law started to acquire a global geographical scope’ only from the mid-nineteenth century onwards. On the one hand, this has been facilitated by the first wave of economic, military, and political globalisation, which had occurred during the nineteenth century; on the other hand, however, it is only from this period onwards that ‘non-European lawyers appropriated European international legal thought and established, along with Western international lawyers, a global profession that articulated a transnational legal discourse.’

Becker Lorca emphasises in this context the agency of semi-peripheral jurists and how they were able to change international law through an immanent critique of Western rules: ‘Semi-peripheral jurists internalized European legal thought in order to change rules. In changing rules, however, they also transformed international law. International law became universal … only when non-Western jurists internalized European legal thought.’ Concerning the origins of international law, this has two significant consequences. First, Becker Lorca refrains from discussing ‘international law’s deemed founding fathers, be they Vitoria, Grotius or Vettel, in the sixteenth, seventeenth and eighteenth centuries’ and focuses instead on the ‘work and life of non-Western jurists.’ Second, it becomes possible to tell a ‘history of an international law with hybrid origins and multiple sites of articulation.’ While Becker Lorca still assumes a privileged Western position in the international legal discourse, he is able to excavate the agency of semi-peripheral lawyers from such diverse places as Russia, Greece, Morocco, China, Japan, Ethiopia and, in particular, Latin America. Eventually, it is only this plurality that creates a single global legal order.

5. Conceptualising contingency and origins

By introducing the innovative work of the German philosopher Hans Blumenberg on the link between contingency and modernity, this section reconstructed how international legal histories identify the origin of international law in various ways. Different authors, with different projects within the discipline of international law, situate international law within a range of different origins. Sometimes authors with different projects even use a similar origin: as we have seen, for instance, both Scott and Anghie present Vitoria as international

61 ibid 313.
62 ibid 305.
64 ibid 10.
65 ibid 138.
66 ibid 45.
67 ibid 10.
68 ibid 22.
law’s founding father—yet, their ‘use’ of Vitoria could hardly be more different as Vitoria is presented either as a liberal internationalist (Scott) or as a supporter of European colonialism (Anghie). Consequently, the origin of international law is not ‘found’ by referring to neutral facts ‘out there’, but is rather encapsulated in narratives linking past origins with present projects.

In addition, and this is the case particularly in the context of the various (and variegating) attempts of crafting non-Eurocentric international legal histories, a second notion of contingency operates in the background—a notion of contingency as origin of international law. To recapitulate, Alexandrowicz reconstructs the confrontation between European and non-European (Asian and African) sovereigns through the lens of treaty-making as the origin of universal international law; Onuma conceptualises the translation process between different civilisations as the origin of a truly global international law; Anghie points to the encounter between Europeans and non-Europeans as origin of (colonial) international law; and, finally, Becker Lorca retrieves struggles between peripheral and semi-peripheral jurists as origin of a simultaneously global and hybrid legal order. In other words, international law can only originate under and through confrontations, translations, encounters, and struggles of its various actors under conditions of contingency.

Thus, rather than taking the contingency of international law’s origin as a problem—as something that needs to be tamed through a new, yet impossible, attempt of providing a more stable grounding—such a notion conceptualises it as the condition of possibility of a (hierarchical) international order. With this notion, we are now able to complement—when linking contingency and origin—the notion of the contingency of origin through an understanding of contingency as origin. While the former notion of contingency foregrounds the lack of determinacy (as contingency) of modern social order(s), the latter reconstructs how social order(s) emerge and stabilise when facing contingency.69

Within social theory, such a notion of contingency has been developed most comprehensively in Niklas Luhmann’s theory of social systems. Luhmann defines the concept of contingency as simultaneously ‘excluding necessity and impossibility. Something is contingent insofar as it is neither necessary nor impossible; it is just what it is (or was or will be), though it could also be otherwise.’70 This is encapsulated in the idea of ‘double contingency’, i.e., the encounter between ego and alter where (contrary to Mead) ‘both partners experience double contingency and that the indeterminability of such a situation for both partners in any activity that then takes place possesses significance for the formation of structures’.71

Put differently, Luhmann is able to conceptualise contingency as origin because norms are the result of the evolutionary communication process between ego and alter; they do not (contrary to Parsons) exist prior to the interaction itself. Thereby, the emergence of norms (and a legal system) is one solution to the problem of double contingency, as ‘norms restrict the contingency of the restriction of contingency, namely as they consolidate a proven consolidation of the arbitrary use of signs’.72 Normative expectations ‘bind’ contingency in a certain way since norms remain valid even in the case of non-compliance. Hence, norms (and, in particular, the normative expectations of law) are part of an evolutionary process.

69 Campe (n 12).
71 ibid 108. I limit my analysis here to double contingency. For a discussion of ‘triple contingency’, namely that ego and alter are observed during their interaction by a ‘third’ in the form of social imaginaries, see Kessler (n 7) 57.
III. Observing progress, observing contingency in international legal histories

Within international legal discourse, the consolidation of norms is usually linked to a progressive history of international law. In this section, I recast arguments in the context of what David Kennedy has coined 'history-as-progress' by reconstructing the interplay of the observance of contingency and the contingency of the observer in international legal histories. Thus, I seek to problematise how and from where contingency is observed in international legal histories. I turn first to traditional international legal histories—and here Lassa Oppenheim’s canonical account will serve as my example—and argue that this kind of scholarship separates and isolates the observer from what is observed: a ‘neutral’ observer analyses and finally tames the contingent course of international law. I then examine strategies of more recent international legal scholarship to destabilise narratives of international law’s linear progress.

1. Progressive narratives of international law

As was the case with the question of international law’s origins, Blumenberg and Luhmann provide us with conceptual tools when it comes to reconstructing how contingency is observed (and tamed) in progressive narratives of international law, as both theorise the role and figure of the observer by relating it to contingency. Blumenberg discusses the relationship between observance and contingency in particular in his essay Shipwreck with Spectator. In this short, innovative piece, Blumenberg studies different actualisations of the seafaring metaphor throughout the history of Western philosophical thought. In this metaphor, the sea stands in principle for the space of contingency, as it represents, on the one hand, the ‘naturally given boundary of the realm of human activities’ and, on the other hand, ‘the sphere of the unreckonable and lawless’. Thus, for example, in antiquity seafaring stands for a transgression of boundaries where a fixed observer (or ‘spectator’) on land observes the struggle of sailors against the shipwreck on a contingent sea. In the modern age, in turn, the observer attempts to transform the sea into land by constructing a ship, which seems protected against shipwrecks and provides thereby a stable and neutral position for the observer. With Nietzsche, however, this position becomes destabilised, and the observer becomes stuck in permanent shipwrecks, where no stable position can be found and where the position of the observer itself renders contingent in the end.

What is important here is that Blumenberg draws our attention on the different ways the position of the observer is constructed vis-à-vis contingency. Similarly to Blumenberg, Luhmann conceptualises the relationship between what is observed and the observer as dynamic. Luhmann couples observation with contingency through the notions of first and second-order observation. For Luhmann, observation means to make a distinction and to indicate one side (and not the other side) of the distinction. Thereby, every observation includes and excludes—and creates a blind spot. While first-order observation presupposes

73 Hans Blumenberg, Shipwreck with Spectator: Paradigm of a Metaphor for Existence (Steven Rendall tr, MIT Press 1997).
74 ibid 8.
its distinction when describing, second-order observation (as the observation of observation) reflects these distinctions—but only from a social or temporal distance. This also signifies that first-order observation is not able to observe the contingency of making a distinction, while second-order observation is so (through distance). Through second-order observation, as Luhmann puts it, 'everything becomes contingent, when what is observed depends on who is being observed.'

A good example of the construction of a seemingly non-contingent observer, who attempts to tame the contingency of international law, is the canonical work of the British legal positivist Lassa Oppenheim. Oppenheim argued more than a century ago in his contribution on the 'task and method' of the ‘science of international law’ that the science of international law is not an 'end in itself'; meaning that its purpose is not restricted to academia, but that its task is to identify legal rules. In Oppenheim’s view, this task is crucial as international law, compared to its domestic (‘municipal’) counterpart, presents a relatively low degree of codification: important international legal rules are not codified but ‘merely’ exist as rules of customary law. In this context, one of the main tasks of international legal scholars concerns, according to Oppenheim, engaging in historical research. Writing in 1908, Oppenheim notes that the ‘history of international law is virgin land which awaits its cultivators’ and, therefore, ‘a master-historian of international law has still to come.’ Such a ‘master-historian’ would help to identify, on the one hand, customary rules as s/he would help to ‘know of each rule of international law how it originated and developed, who first established it, and how it gradually become recognised in practice’ and, on the other hand, serve as a ‘master-builder’ for the international law of the future.

For Oppenheim, to write the history of international law would even be part of a larger project, as it would be part and parcel of the ‘history of Western civilization.’ This is possible as:

All important events in the development of the state system of Europe from the last part of the Middle Ages downward to the French Revolution have had their bearing upon the development, the shaping, and the ultimate victory of international law over international anarchy, and so have all important events in the development of the state system of Europe and America since the French Revolution. And the master-historian, to whose appearance we look forward, will in especial have to bring to light the part certain states have played in the victorious development of certain rules and what were the economic, political, humanitarian, religious and other interests which have helped to establish the present rules of international law. Thereby the factors will be laid bare which have driven the different states into the community called ‘family of nations’ that will comprise in time the whole of humanity.

76 ibid 100.
78 Oppenheim (n 77) 316.
79 ibid 316, 317.
80 ibid 317.
More generally, Oppenheim’s work is illustrative for the way traditional scholarship uses ‘history-as-progress’ arguments—arguments which are not restricted to the international legal positivist tradition but can also be found in various other projects of international law.\(^8^1\) Here, a non-contingent observer seeks to construct a non-contingent international law within the contingencies of international politics and anarchy. These attempts of construction are then tied to a linear history (sometimes told with a number of drawbacks) of human progress (often told in Eurocentric terms).\(^8^2\)

2. Critical voices and the question of progress

More recently, ‘critical’ international legal histories have started to question the linear and progressive history which dominated the field for so long. Here, in particular, two strategies stand out.\(^8^3\) First, there is a growing scholarship problematising the Eurocentric nature of traditional international legal histories. In the words of Martti Koskenniemi, ‘traditional histories [of international law] are terribly Eurocentric.’\(^8^4\) As we have seen in the previous section, the critique of international law’s Eurocentrism can take different forms. What scholars such as Alexandrowicz, Onuma, Anghie, and Becker Lorca have in common, however, is the idea that the history of international law has multiple perspectives and trajectories—and that traditional international legal histories privileged only one of these perspectives and trajectories, namely the Western one or, more precisely, the one of a Western observer. Thus, excavating perspectives and trajectories of non-Western observers renders the contingency of Eurocentric international legal histories intelligible.

Second, various authors started to criticise linear progressive narratives of international law by treating its history as constituted by a sequence of contingent disruptive ‘events’\(^8^5\) As Derrida reminds us, ‘an event implies surprise, exposure, the unanticipated’ and, as such, ‘it must never be something that is predicted or planned, or even really decided upon.’\(^8^6\) Seen through events, history has no overarching structure or logic as ‘myriad localized contingencies determine history’s shape.’\(^8^7\) However, for international law, events are not only disruptive, but international law carries at the same time ‘an imperative to account for, respond to, contain, incorporate and overcome’ events and, as a consequence, these events then ‘become part of international law’s evolutionary narratives.’\(^8^8\) However, these

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\(^8^1\) For a discussion of progressive imaginaries within the natural law tradition, see Geoffrey Gordon, ‘Natural Law in International Legal Theory: Linear and Dialectic Presentations’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 279. For international law in general, see Thomas Skouteris, *The Notion of Progress in International Law* (Asser 2010).

\(^8^2\) Koskenniemi (n 82) 222.

\(^8^3\) For a systematisation of similar strategies of critique within (Historical) International Relations scholarship, see Joseph MacKay and Christopher David LaRoche, ‘The Conduct of History in International Relations: Rethinking Philosophy of History in IR Theory’ (2017) 9 *International Theory* 203.

\(^8^4\) Koskenniemi (n 82) 222.


\(^8^7\) MacKay and LaRoche (n 83) 214.

narratives remain unstable as they are exposed to the contingency and the disruptive force of (potentially) new events.

IV. Conclusion

This chapter explored how contingency is situated in international legal histories. In particular, it focused on how contingency relates to narratives of origin and progress. In both types of narrative, contingency is related to an idea of counterfactuality, namely, that the history of international law could also have been otherwise. Emphasising the contingency of international legal histories thereby redefines the borders of what can be thought and done; contingency becomes inextricably linked to politics.89

The chapter started with a reconstruction of how traditional and recent international legal histories locate the origin of international law. As it has attempted to show, different authors—pursuing different projects within the discipline—situate international law within a range of different origins. In the end, the origin of international law is contingent. Moreover, it is possible for some authors, particularly those problematising international law’s Eurocentric origin, to conceptualise the link of contingency and origin not only as the contingency of origin but as well in the form of a contingency as origin, as contingency becomes inscribed in the communication processes (as confrontations, translations, encounters, and struggles) of various actors of international law. In a second step, I have turned to the question of how international legal histories deal with the observance of contingency when they advance arguments in the context of ‘history-as-progress’. Here, more traditional international legal histories often rely on an understanding of a non-contingent observer, who seeks to create an international legal order that is able to tame the contingencies of international politics and anarchy. However, such narratives of international law’s linear progress have come under scrutiny more recently, as several interventions by ‘critical’ international legal histories direct our attention to the multiple perspectives and the multilinear trajectories in the making of the current international legal order or invite us to conceptualise the history of international law as a history of contingent disruptive events.

Yet, even in more critical international legal histories the contingency of the observer, ie, the contingent position of who writes international legal histories, remains rather under-considered; at least under-theorised. Here, it is worthwhile to come back to Blumenberg for the last time as he was well aware that attempts to fix the position of the observer—whether through science, norms, or language—might not bring durable solutions. In this context, however, the following observation from Blumenberg’s essay Shipwreck with Spectator might be one possible starting point for such a reflection:

Thus to think the beginning means […] to imagine the situation without the mother ship of natural language and, apart from its buoyancy, to ‘reperform’, in a thought experiment, ‘the actions by means of which we—swimming in the middle of the sea of life—could build ourselves a raft or even a ship.’ The demiurgical, Robinson Crusoe longing of the modern age is also present in the handiwork of the constructivist who leaves home and heritage

89 See also Filipe dos Reis and Janis Grzybowski, ‘The Matrix Reloaded: Reconstructing the Boundaries between (International) Law and Politics’ (forthcoming) Leiden Journal of International Law.
behind in order to found his life on the naked nothingness of the leap overboard. His artificially produced distress at sea does not come about through the frailty of the ship, which is already an end result of a lengthy process of building and rebuilding. But the sea evidently contains material other than what has already been used. Where can it come from, in order to give courage to the ones who are beginning anew? Perhaps from earlier shipwrecks?^90

^90 Blumenberg (n 73) 78–79.