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ROLE OF CONTINGENCY IN FORMATION OF INTERNATIONAL LAW

INTRODUCTION. *A group of foreign international scholars has recently published a collective monograph – "Contingency in International Law: on the possibility of different legal histories" [Contingency in International Law…2021]. The starting point of this work is the question why international law is as we know it today, and whether it could be different. The problem of possible alternative ways for development of international law calls challenges the necessity of the current state of international law and urges to research the interrelation among the power of international law itself, historical context and wills of subjects involved in international law-creating.*

MATERIAL AND METHODS. *The research material for the present article is the collective monograph "Contingency in International Law: on the possibility of different legal histories" edited by I. Venzke and K.J. Heller. The study of the presented ideas is based on general scientific methods and private legal methods, as the historical and legal approach.*

RESEARCH RESULTS. *The development of a national international legal scholarship of the theory of international law sometimes needs an intellectual impulse, a bold statement of questions that challenge the dominant theoretical principles. In this regard, the question on the possibility of different ways of developing international law due to a variety of factors, could be a trigger for rethinking positivist attitudes in the Russian theory of international law. The intention in revising the classical theses does not imply rejection of established legal positions, but, on the contrary, it necessitates fruitful reflections on traditional tenets. This assumption is illustrated with the concept of the international legal policy of the state, which originates from the classical theory of coordination of wills, and at the same time makes a number of assumptions or explanations which could answer questions about contingencies in formation of international legal norms. Relying on the materials of the book edited by I. Venzke and K.J. Heller the article provides outlook on questions about chance and regularities in determining the content of international law, about role of context in the creation and development of international law, about the sovereign wills and role of contingencies and extra-legal factors in the concept of international legal policy.*

DISCUSSION AND CONCLUSIONS. *In contrast to the theory of coordination of wills, which is based on strict positivist grounds, the concept of the international legal policy of State assumes influence of extra-legal factors for arrangement of international legal argumentation of States. For example, the problem of context is of great importance in determining the possibility of legitimizing certain international legal positions of State. The arguments of States as such with references to norms of international law remain fruitless outside certain context (including present content of international law, current state of international relations, topics on the international agenda). This is because legitimated legal norms fix the current results of coordination of wills among States, which depend on interaction of legal and non-legal factors. But it is also important to understand limits of assumptions about impact of certain factors on the content of international law. So, on the one hand, the role of context should not be overestimated, since international law does not succumb to conjuncture, but develops consistently. At the*

same time, by studying international legal policies of States, one should avoid false determinism. It poses the risk to trace a wrong strategic line of State's legal arguments with over-shadowing 'irrelevant' facts. Thus, questions that open perspectives on seemingly solved problems make it possible to develop established doctrinal ideas in a new direction. However, it is necessary to take into account methodological limits of new assumptions for consistent development of contemporary national discipline of international law.

KEYWORDS: *sovereign will, counterfactuals, coordination of wills, international legal policy, legitimation, international legal arguments, context*

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РОЛЬ СЛУЧАЙНОГО В СТАНОВЛЕНИИ МЕЖДУНАРОДНОГО ПРАВА

ВВЕДЕНИЕ. *Группа зарубежных ученых-международников недавно опубликовала коллективную монографию по тематике вероятности в международном праве – «Contingency in International Law: on the possibility of different legal histories». [Contingency in International Law…2021]. Исходным пунктом данной работы является вопрос, почему международное право такое, каким мы его знаем сейчас, и могло ли оно быть другим. Обращение к проблеме возможностей альтернативных путей развития истории международного права ставит под вопрос неизбежность развития международного права в современное состояние и требует исследования взаимосвязи между значением самого международного права, историческим контекстом и волей субъектов, участвующих в становлении международного права.*

МАТЕРИАЛЫ И МЕТОДЫ. *Материалом исследования послужила коллективная монография «Contingency in International Law: on the possibility of different legal histories» («Вероятность в международном праве: о возможности иных историй права») под редакцией И. Венцке и К. Дж. Хеллера. Исследование идей, изложенных авторами монографии, проведено с использованием общенаучных методов и частных юридических методов, как историко-правовой подход.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Для развития отечественных международно-правовых исследований в области теории международного права иногда нужен интеллектуальный импульс, смелая постановка вопросов, идущих вразрез с доминирующими теоретическими установками. В этом отношении вопрос о возможности совершенно отличных путей развития содержания международного права ввиду самых различных факторов может быть триггером для обновления позитивистских установок в российской теории международного права.*

Задача пересмотра направляющий тезисов не требует отказа от сложившихся правовых позиций, но, напротив, необходимость плодотворного осмысления традиционных убеждений. Данное предположение иллюстрируется концепцией международно-правовой политики государства, которая исходит из положений классической теории согласования воль, и вместе с тем делает ряд допущений или пояснений, позволяющих отвечать на вопросы о вероятности становления международно-правовых норм тем или иным образом. На основе материалов книги под редакцией И. Венцке и К. Дж. Хеллер исследуются вопросы о роли случайного и закономерного в определении содержания международного права, о значении контекста в создании и развитии норм международного права, о месте волевых решений и роли случайных и внеправовых факторов в положениях концепции международно-правовой политики.

ОБСУЖДЕНИЕ И ВЫВОДЫ. *В отличие от теории согласования воль, стоящей на строгих позитивистских основаниях, концепция международно-правовой политики государства подтверждает влияние внеправовых факторов на ход развития международно-правовой аргументации государств. Например, проблема контекста имеет большое значение в определении возможности легитимации тех или иных международно-правовых позиций государства. Сами по себе доводы государств со ссылками на нормы международного права остаются бесплодными вне актуального контекста (включая настоящее содержание международного права, состояние международных отношений, темы в международной повестке). Это связано с тем, что легитимируемые правовые нормы фиксируют текущие результаты согласования воль среди государств, достижимость которых зависит от комплекса правовых и внеправовых факторов. Но также важно понимать пределы допущений о влиянии тех или иных факторов на содержание международного права. Так, с одной стороны, не следует преувеличивать роль контекста, поскольку международное право не может поддаваться конъюнктуре, а развивается последовательно. В то же время при исследовании международно-правовых политик государств следует избегать склонности к ложному детерминизму в оценке их развития ввиду риска ошибочного выделения стратегической линии международно-правовой аргументации государства при пренебрежении фактами, не соответствующие данной линии. Таким образом, вопросы, предлагающие неожиданные ракурсы на казалось бы решенные задачи, позволяют развивать устойчивые доктринальные представления в новом русле. Но вместе с тем необходимо учитывать методологические пределы новых допущений для последовательного развития современной отечественной науки международного права.*

КЛЮЧЕВЫЕ СЛОВА: *суверенная воля, альтернативная история, согласование воль, международно-правовая политика, легитимация, международно-правовые доводы, контекст*

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1. Introduction

International law as a fundamental normative system seems hardly consonant with the category of 'contingency'. The more reason why it is so surprising to see these terms together in the title 'Contingency in International Law: on the possibility of different legal histories'. The book under the editorship of Ingo Venzke, professor at the University of Amsterdam, and Kevin Jon Heller, professor at the University of Copenhagen, bands essays by thirty international legal scholars with different backgrounds (from Australia and South-Eastern Asia to Europe and North America) and original views on the topic. Therefore the book does not develop a single hypothesis but presents a vibrant discussion with cross-references and astute observations on advanced arguments. Indeed the collection results from the conference which was held under the auspices of the Amsterdam Center for International Law (ACIL) in 2018. The discussion involved views from theory and history of international law, international migration

law, law of the sea, human rights law, humanitarian law, economic international law. The intriguing question brought together scholars from different schools of thought and international legal disciplines – *'could international law have been otherwise?'* [Venzke 2021:3]. This simple question sets several directions for ideas development.

First, the question challenges the necessity of the present international law. Is the current state of international law a necessary consequent of main trends, or a spontaneous outcome of event sequence? For instance, Christopher Szabla explores why the issue of international migration has not yet received a coherent multilateral regulatory framework and whether there are 'the possibilities of reforming migration governance today' [Szabla 2021:201].

Second, the question incites the critical assessment of the past factors. What forces shaped the present international law and if the outcome of their concurrence was predetermined? In this respect, Bianca Maganza presents her multi-faceted analysis of the role contingency played in the negotiation, adoption, interpretation of Common Article 3 of the Geneva Conventions of 1949 on international minimum protection to persons taking no active part in hostilities [Maganza 2021:336-348].

Third, the question inspires counterfactual speculations. If international law could turn out different, what alternatives would have been available? For instance, Alex Oude Elferink explores two counterfactual scenarios for the case if the Agreement on Part XI of the UNCLOS had not been adopted prior to the entry into force of the Convention [Elferink 2021:215-230].

Thuswise the conceptualization of contingency in international law essentially demands the inquiry into the past of international law. As the editors noted, 'international law's past is ripe with possibilities that have been forgotten' [Venzke 2021:3]. From this perspective, the book is of the most interest to 'votaries of Clio'. However, the work reveals an underlying problem of the role of States in international law. Undoubtfully, States are the principal (in some approaches even the sole) contributors to the creation of international legal order. But *how much do their sovereign wills matter for the contingent international law?*

This question is particularly poignant for Russian international legal scholarship, where the adherence to positivist approach prevails [Mälksoo 2017]. International law is generally regarded by Russian scholars as an outcome of 'coordination of sovereign wills' [Tunkin 1956a]. The present article suggests to examine this thesis through the lens of considerations for contingency in international law. To illustrate the methodological possibilities of such considerations for developing new theories it is interesting to take the concept of international legal policy of States, which was developed from the Tunkin's theory by Guy Ladreit de Lacharrière, the French lawyer [de Lacharrière 1982]. Although the concept of international legal policy (hereafter - ILP concept) is a novelty for Russian legal scholarship, it has already come into notice of some Russian legal scholars [Shugurov 2015; Vylegzhanin, Dudikina 2016].

Under this sociologically tainted concept States might be considered as rational actors, which make strategically weighted decisions within their international legal policies [de Lacharrière 1982 ; Kolb 2015]. That is to say, States aspire to insert their views into the general understanding of international law through persuasion in the course of argumentative practice [Hughes 2019:871-872; Venzke 2016:10]. Unlike the theory of coordination of wills based on the positivist premises, the ILP concept concedes challenging strategic efforts of States with the contingency problem. If the emergence of a certain international norm or a particular interpretation is not a necessary result of a State's purposeful work, the question rises how much the international law depends on States' calculations by 'coordinating their wills'.

The book under review does not address this particular concern, it provides a plenty of thought-provoking observations. Therefore the present research paper will not narrate the main theses of the volume in structural order. Rather it shares some valuable ideas gained from the book in the order of discovered answers to some topical questions.

The first question is what 'contingency' means in international law and what its methodological value is for Russian theory of international law, and the concept of international legal policy of State in particular. The second question concerns the role of sovereign will in the development of international law. For instance, how considerable is the coordination of wills in the international legal field in view of State's limited (conditioned) agency? The third question focuses on the meaning of 'legal' in regard to the categories 'contingent' and 'necessary'. The following issue is the problem of context. It is worthwhile to consider to what extent it is reflected in law and how it determines the success of a particular international legal policy. Another puzzling question is whether the phenomenon of 'legitimacy' can be contingent or it is feasible only as a determinist concept. This research paper makes the attempt to treat these ques-

tions, relying on the suggestions of the authors of the book [Venzke, Heller 2021]. The more it is interesting that observations on these questions could outline new vectors for developing international legal studies in Russia.

2. The meaning of 'contingency' and its methodological value for Russian legal scholarship

The turn to contingency is an interrogative look on the present through analysis of its 'prequel', since 'behind every possibility of the past stands the reason why the law developed as it did after all' [Venzke 2021:3]. Therefore the terrain of contingency lies in the field of 'causation'. But the notion 'contingency' does not have its positive definition, it usually gets determined through opposition to 'necessity'. For instance, this approach is adopted in the work of Susan Marks 'False contingency', which might have served as the main source of inspiration for the collected essays, as judged from the number of references throughout the book's chapters [Marks 2009]. As opposed to *'necessity',* which 'refers to the phenomenon of constraint' (if not compulsion in some cases), the term contingency denotes the lack of such constraints, *id est* 'uncertain occurrence or fortuitousness' [Marks 2009:6]. As Marks simply puts it 'something is contingent if it may or may not happen' [Marks 2009:6]. Thuswise contingency consists either in an indefinite cause or in absence of cause accessible for our comprehension. The authors of the book precise this understanding, situating contingency 'between necessity on one side and chance on the other' [Venzke 2021:4]. The research into contingency is not limited to revealing cause-effect links and forces balance but includes 'search of plausible possibilities that arose within given circumstance' [Venzke 2021:3]. In this regard, 'contingency is not only opposed to necessity, but also to the impossible' [Venzke 2021:6]. Although contingency is often associated with all that is random and indeterminate, Ingo Venzke opposes 'contingency' to 'the random and arbitrary occurrence of events'. This is because to present something as contingent does not mean to treat it as an 'autonomous fact', the contingent phenomenon should be approached relationally as an element of a large system [Marks 2009:20].

What makes the study of contingency particularly interesting from a methodological perspective is its link with the matter of freedom [Venzke 2021:4]. In view of contingency situated between necessity and chance, Venzke consistently shares Marx's famous statement on human's agency: "[m]en make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past". Notwithstanding the widespread understanding of this affirmation as determinist, the focus should not be fixed on the material conditioning of human's freedom in the course of 'inevitable history' . Besides this message, it also implies that 'history is a social product, not given but made' [Marks 2009:2]. This is an especially notable point for introducing the consideration of 'contingency' into the positivism-oriented legal scholarship.

In fact, Russian scholars consider positivism not only as a scientific heritage but the present legal realm [Rad'ko, Medvedeva 2005]. Positivism took the leading role in directing Russian legal thought in 1930-s since its premises the best met the official demand for rationalizing the overwhelming position of State. The theses of statism foster the understanding of sovereign will as exclusive law-creating power. As applied in the international legal field this background originated the theory of coordination of wills [Tunkin 1956b]. It may be said the Soviet legal scholarship moved beyond the classic positivist perception of international law, 'existing recognized rules of which are to be found in the customary practice of the states or in law-making conventions' [Oppenheim 1908:333], to the understanding the international law as a product of coordination of wills either 'by way of formal negotiations' or 'by negotiations conducted in the language of fact and action' [Tunkin 1956b:34-35]. Here the forces determining the course of international law are the wills of States and those social laws of the international community, which States consider by decision-making.

In particular, under the ILP concept, States are expected to contribute to international law following their strategy for advancing their international legal views [de Lacharrière 1982:11]. That is to say, States are considered as capable to estimate the existing situation on some international legal issue as determined by precedent coordination work and to calculate necessary steps and expected reactions of other members of the international community, literally determinable consequences. Nonetheless, this 'determinist' concept is open to adopting a 'contingency' view. We can see that research methodology based on 'contingency' considerations enriches the concept with its *explanatory power*. The determinist approach to the acquis of international law fosters the view on international law as result of *'politique juridique extérieure qui a réussi*' [de Lacharrière 1982:199]. As

achievement fixed in the course of time the existing international legal order would be a bare fact, provoking no speculative efforts. 'History is as it has happened - whether it was good, whether it would have been better not to have happened, whether we will or will not acknowledge that it has had 'meaning' - all this is irrelevant'. Once the concept assumes that international law is contingent, it gets a perfective effect for an international legal policy of State, since a State appreciates the existing international law as only one of multiple possible versions. That motivates States, on the one side, to work at advancing their international legal policies, and, on the other side, to maintain the existing international law as the most preferable alternative. Thereby the idea of 'contingency' serves as a drive for development of the ILP concept.

Admittedly, the issue of necessity and contingency has been rarely evoked in research papers on international law [Marks 2009:3]. 'The appeal of contingency, philosophical and practical' has emerged only recently, but its emergence in the international legal discourse is quite timely [Moyn 2021:515]. The methodological precept of 'contingency' came forward in the wake of 'turn to history in international law' driven by critical legal studies [Painter 2021: 49; Nijmann 2021:94-96; Craven 2016:21-37]. At the same time it meets the demand for discussion from trending economic analysis of international law developed from the rational choice theory as well as growing interest to forecasting in human sciences, since the understanding of alternative past is always an attempt 'to see in the present what international law *can* be in the future' [Nijman 2021:92]. The thesis about contingencies in international law also corresponds with postmodern thinking, which "challenges the assumptions of mainstream international legal scholarship" [Nijman 2021:95] and looks for the plurality of perspectives on international law [Carty 1991:87]. Therefore 'the debate about contingency and necessity has become a cipher for anxieties and hopes about international law's differentiation from other fields, its futures, and the political stakes of writing its history' [Painter 2021: 45]. After all, the focus on contingency and agency matters is attributable to the methodological trend for putting law in multiple contexts, that is identified as 'a symptom of the continuing search for a basis for the differentiation of international law' [Painter 2021:51].

In this regard, the perception of 'contingency' by Russian legal scholarship may be surprising. Due to the rigid normativist tradition of constructing legal argument as a direct deduction from a legal norm without considering historical, political and cultural aspects of law, Russian legal scholarship generally skipped the stage of ardent historiographic investigations into international law [Tolstykh 2016:52]. Russian scholarship did not face the task to revise historic origins as the Western scholars did because of post-colonial critique of Eurocentric international law [Painter 2021:48]. So the Russian scholars do not doubt the historic facts as justifying historical titles. In the same universalist vein Russian legal scholarship has never felt much excitement over 'the differentiation of international law' matter: at the least, the phenomenon of fragmentation of international law has not been construed as a 'serious problem' [Kolodkin 2005:59] and its meaning for legal discourse was not estimated more than 'therapeutic' for reconsidering the integral system of international law [Shestakova, Vissenberg 2020:30]. On this account, it is even more important to estimate what particular aspects of 'contingency' affirmation could spark the Russian legal scholarship.

3. The role of law

We intuitively understand that contingency is rather intrinsic to social, political relations, while law is objective, 'different from descriptive and normative politics' [Koskenniemi 2005:16]. Hence law is necessary. However, the book under review challenges this traditional understanding by pointing to the fact that 'contingency and necessity are not political *per se*' or *vice versa,* law is not squarely necessary or contingent [Tedeschini 2021:143]. Law may be initially contingent in those 'minuscule moments where the new is being articulated for the first time' [Koskenniemi 2021:239-240]. This does not prevent law from being 'highly conservative', necessitating every following development with the ponderable background [Tedeschini 2021:141]. The contributors of the book provide different plausible explanations for this observation.

Filipe dos Reis suggests that international law is itself contingent by origin. Relying on the theory of social system by Niklas Luhman, the author presents the international legal norms as a result of an evolutionary communication process, therefore 'they do not exist prior to the interaction itself' [dos Reis 2021:123]. Their emergence is contingent. Thereby contingency gets 'inscribed in the communication processes (as confrontations, translations, encounters, and struggles) of various actors of international law' [dos Reis 2021:127]. It seems surprising how contingent communication originates the 'evolution-

ary narrative of international law'. This is because the international law finds the system-forming force in the sequence of events [dos Reis 2021:126].

On the other side, being a social product, international law is not so much sensitive to the disruptive force of new events, as it is subordinated to the existing social narratives, literally mode of thinking. Mohsen al Attar illustrates this with the arguments of the TWAIL (Third World Approaches to International Law) against the legal heritage of the colonial time: Eurocentric international law was not just globally imposed through colonization. This is not the matter of events as colonization, but of the deep social process of coloniality, 'whereby human experience and human aspiration are dictated by the preferences of a singular civilizational trajectory' [al Attar 2021:153]. In some regard 'coloniality' is a mindset, therefore the rhetoric of TWAIL seem contradictory: scholars argue against the existing international law while using terms and categories of the countered international law. Even assuming that the present international legal order results from contingency and suggesting on the past alternatives, a scholar should develop counterfactuals from *the context.* This liberation from the foregone narrative is achievable 'by pursuing new ways of thinking, knowing, and being' [al Attar 2021:157].

Michele Tedeschini points that law itself can become a context [Tedeschini 2021:140]. Drawing on the example of the Tadić case in the International Criminal Tribunal for the former Yugoslavia the author notes that international adjudicators apply the legal technique to evoke alternative possibilities of the legal realm. It is explained with Pierre Bourdieu's sociological notion of *habitus* [Tedeschini 2021:135]. Here the habitus of international legal practitioners is understood as a product of history, of individual and collective international legal practices. The habitus is capable to 'turn the contingency offered by law [a range of possible alternatives] into a kind of historical necessity' [Tedeschini 2021:136]. Therefore the outcome of the Tadić case did not depend on any legal argumentation: the habitus of judges was determining factor [Tedeschini 2021:138-141]. Nevertheless, contingency finds its place in the choice that international legal practitioners have to make between legal alternatives. In this regard, every choice in the international legal practice is both contingent and necessary: 'contingent because different moves would be possible, necessary because one has to make it' [Tedeschini 2021:142].

But international law should not be characterized only as 'both contingent and necessary'. The current state of international law may be 'necessary because of contingencies'. Geoff Gordon relies on the thesis of 'indeterminate law', noting that 'contingency is a key element in the operation of international law as a mode of power' [Gordon 2021:162]. Since international law is always contingent, the consistent decisions made over time are rather due to other stabilizing factors. But exactly contingencies and possibilities make the legitimacy of international legal rules intelligible. In other words, the realization of a normative programme on the back of many alternatives proves its particular value. The same rationale is appropriate for the ILP concept, under which possible alternatives of resolution are determined by concurring interests, while an ultimately legitimized position is considered as the most valued [de Lacharrière 1982:19].

At the same time, the ILP concept admits the power of context: if 'contingency is part and parcel of the political project' [Gordon 2021:162], there should be factors that bring all contingencies into balance to finally trace out the line for the development of international law – that is to prioritize one suggested version of international legal rules over the others.

4. The role of context

Law gets realized in certain circumstances. Hence this is context, material conditions, which evoke a particular alternative from the range of legal possibilities. The contributors of the book do not harbour the illusion about the self-actualization of international law through the practice of subjects. 'Law and its development are largely shaped by conditions that the law does not itself control' [Venzke2021:15]. The role of context in creating the current international legal order is differently estimated: it varies from the determinative factor to the framework within which law establishes itself.

Using the example of international investment law Josef Ostřanský asserts that a profound legal change (not just technical adjustments) is not possible 'without change in the prevailing political economy underlying the international investment legal regime and its practice' [Ostřanský 2021:437]. Therefore the legal argumentation is powerless for advancing an international legal position without due context determining the current state of international law. This view echoes the famous Marxist thesis: 'revolutions are not made with laws' [Özsu 2021:64]. In this regard 'Marxism affords an especially strong set of analytical tools for explaining the contingencies of international law', since it treats all contingency (like agency) as socially conditioned [Özsu 2021:62].

Then legal rules only have to fix gains of historical dynamics [Özsu 2021:67]. Indeed, among numerous resolutions of the UN General Assembly stressing the sovereign equality and the need for international peace and security, only those had some appreciable effect, which reflect the course of social trends, like did the 1974 Declaration on the Establishment of a New International Order, fixing the emergence of new participants in the international economy. This is how 'legal and extra-legal are bound together in complex relations of social co-constitution', and therefore 'legally formalised distributions of power are neither entirely settled nor strictly inevitable' [Özsu 2021:74-75].

From another point of view, law does not fix a present state of relations, but the social context gives a sense to an abstract legal thought. In the view of the legal process school in the American legal scholarship, 'there is nothing neutral or necessary about any given construction of a legal concept' [Desautels-Stein 2021:85]. That is to say, that legal concept cannot 'work itself 'naturally' outside of time' [Desautels-Stein 2021:85; Cohen 1935]. For this reason, for example, 'legal rights' cannot be conflated with human rights as if they were discovered in nature, since legal constructions have no 'meaningful existence outside of the positive exercise of legal authority' established in a given context. In this regard 'legal concepts always exist in a temporal naturalism, rendering them contingent, always changing' [Desautels-Stein 2021:88].

However, the context is not an absolutely overwhelming force. International law does not "drift" in the stream of events, but *has its own imperative.* If an event occurs in a moment, international law asserts itself in the course of time. This is why 'the effects of what appears like a plausible alternative fade in the *longue durée',* while law looking differently for a moment always regains its track [Venzke 2021:13].

Venzke emphasizes, that 'the law tends to have its own reasons that are not less real, its own realm of possibility' [Venzke 2021:17]. This is what Koskenniemi called an utopian, context-breaking aspect of law [Koskenniemi 2021:216]. Due to this feature of international law, no international legal policy can impose an artificial legal position, which does not meet the existing legal background, nor finds support in the prevailing social context. In this respect, the importance of the *present* context should not be overestimated.

When it comes to the *past* context of choices made at different times, the contextualist approach contributes to 'doing history' of international legal thought. It alienates legal scholars from their own understandings, beliefs, assumptions and other products of the present time as well as from interpretations of the past [Skinner 1988:67]. Thereby it 'prevents oversimplified interpretation induced by metanarratives' [Nijman 2021:101]. At the same time, the context is closely related to the subjective element, since this is an individual scholar or a decision-maker who determines appropriate context for a legal norm or concept, who interprets a historical text in the 'evaluative-descriptive terms', who is 'doing history in using core concepts in their intellectual context' [Nijman 2021:102]. Interpretation of the past and the assessment of the present are what exactly constitute the analytical stage of every international legal policy. Here comes to the forefront the question on the place of subjects in view of contingencies in international law.

5. The role of subjects

There is the question: how much actors in the international legal field contribute to the contingent character of international law and the most important point here is whether the activity of legal subjects is essentially contingent. In terms of the ILP concept this is the question – *to what extent the effectiveness of international legal policy depends on the quality of an underlying strategy?*

In fact subjects of international law contribute to its development even before they get down to elaboration of some international legal position – the creative works begins with assessment of current legal conditions and their context. Therefore Ingo Venzke turns the spotlight on the role of observer of events in the historical course [Venzke 2021:11]. The example of the 1955 Bandung Conference demonstrates, that 'the act of judging an event's 'success' or 'failure' is itself contingent upon the temporal vantage point of the judge' [Crow 2021:442]. The same is true for assessing the present international legal conditions by States from perspectives of dominant discursive structures and from their legal and cultural background. These possibilities of different perceptions reflect 'ideologies continually imbedded in law' [Crow 2021:443, 459]. Therefore Emma Stone Mackinnon concludes her essay on the legacies of the Algerian Revolution in the anticolonial narrative of the first additional protocols to the Geneva Conventions with the clear idea on a link between contingency and subjective judgements. '[C]ontingency arises in the question of how the past will be remembered and made relevant for the future, and

in which intellectual legacies will be carried forward and which will be left behind' [Mackinnon 2021:335].

Notably, the system of values and perceptions of a State itself continually evolve. There is 'never a point when *the* State is finally built in a given territory and after which it operates […] according to its own, definite, fixed, and inevitable laws' [Jessop 2015:86; Özsu 2021:68]. In view of indeterminate evaluations of States contingencies in international law are often associated with the subjectivism in the law development. At the apogee, this suggestion leads to presenting 'power' in international relations as an 'art of contingency' [Pottage 1998:22]. However, Fleur Johns warns against methodological blindness, since the focus on unearthing unacknowledged contingencies in international law's past deflects our attention away from other trends or regularities observable in the holistic picture [Johns 2021:42]. Therefore the search of contingencies in international law should not narrow down to analysis of interstate relations between concrete subjects nor to analysis of the international legal policy of a single State.

All the more so as original understandings and interpretations of international law by foreign policy decision-makers are never independent from the context of their origination. From this perspective, there is no pure will as a primary source of some unique idea, but every act of will is a kind of reflection of legal practitioners' 'habitus' [Tedeschini 2021:141]. This is also the case of international legal scholars, who 'make their own research not out of knowledge created by themselves, but out of such learning as they find close at hand' – first of all, as 'tradition of past generations of scholars' [Al Attar 2021:160]. Consequently, it is possible to conclude even on 'necessity' of acts of will in the international legal field. 'Everything within the legal system is necessary. Formally, the establishment of a new norm or the adoption of a judicial decision is always part of a system as long as it is not arbitrary but based on some reasoning' [El Boudouhi 2021:406]. Therefore this is not the will of state decision-makers, that generates contingencies in international law, but extra-legal facts, appearance and consequences of which are not determined by the law. *Only non-legal facts are contingent.* As Fyodor Martens wrote: 'facts by their nature are transient and changeable; they are often the result of arbitrariness or chance. On the contrary, the ideas of some historical era, which underlie all the facts that fill it, make understanding possible' [Martens 1898:23].

So, what could have been different in the course of history are contingent facts. The composition of the court or attribution of the role of the opinion-leader within the international working group are contingent, but their legal views are not of contingent nature. Michelle S. Kelsall named the actors participating in legal practice among 'necessary determinants' [Kelsall 2021:462]. For instance, some scholars consider the failure of the UN Code of conduct for transnational companies as predetermined partly by failure to include the transnational companies in the negotiations on the Code [Kelsall 2021:474]. Certainly, factors of that kind are not decisive in question 'what will be finally law', but enabling the latent potential of law to develop in one or another way.

In light of the foregoing, the ILP concept seems tending to consider legal decisions of States as necessary rather than contingent. This is because the concept is premised on the idea of legitimation of the State's legal positions in international law, while legitimation results from the successful persuasion of the 'rightness' of advanced views. In other words, within the argumentative practice of international law legitimation is achieved through internalization of suggested ideas [Hurd I., 1999: 386]. But evaluation and adoption of a view as 'right' is possible with a certain criterion, a dominant narrative which necessitates preferring some views to others. Noteworthy, this view does not contradict to the assumption of contingencies in international law. Moreover, this assumption proves the legitimacy of acknowledged legal views. As Geoff Gordon remarked 'contingency becomes the principle by which the legitimacy of the normative programme is intelligible' [Gordon 2021:163]. The more alternative outcomes are possible, the more valuable is an accomplished version, as an option with the strongest arguments behind it. The choice of an option is always contingent, but once the view is acknowledged it is regarded as necessary. Indeed, only inherently legitimate positions find support in international law [Tunkin 2006: 260]. It means that only positions relying on the principles of international law, i.e. possessing the 'necessary' potential, get actualized through contingent coordination of wills.

6. Useful lessons and concluding remarks

The reviewed collection of research papers on contingency in international law is a trove of insightful suggestions for research into international legal policies of States. Both analysis of cause-and-effect-links of some legally significant events and research

into international legal policies demand some turn to history and consider similar methodological traps. Therefore reflections on contingency in international law can considerably enrich inquiries into the ILP concept at the least with the following advice.

Ingo Venzke warns against false determinism. Historians tend to 'pile up causes until events are overdetermined, that is, they have so many causes that if one did not operate, the others would' [Venzke 2021:8; Evans 2014:82]. Although current events do not have any recognizable direction, in retrospect past events and acts get always vested with order and purpose [Venzke 2021:7]. In the research into international legal policies of States this hindsight bias leads to modelling strategies, which had never really existed. Moreover, false determinism makes for side-shadowing, where researcher highlights certain facts and overshadows the others [Venzke 2021:18]. Within the ILP concept the technique of side-shadowing illuminates a strategic policy, while deviations from the main line are construed as inconsistent or even erroneous steps [Lacharrière 1983:177-194]. Consequently, rush *ex post* judgements lead to wrong evaluations of concerned legal circumstances and to mistaken expectations. Therefore the historiographic work needs moderate contextualizing of law.

But the significance of context, as 'external conditions of possibility', should not be exaggerated. Umut Özsu warns against 'romaticising the concept of contingency as illumination of aporia or ruptures' [Özsu 2021:62]. Contingent events are not mutually unrelated accidents. In fact, all events can find their principle of regularity. This is what Fleur Johns calls 'the patterning of contingency' [Johns 2021:35]. Possibilities of some power relation 'get produced in the relation sculptured by its exercise' [Pottage 1998:22]. Therefore shallow judgements on the past of international law emerge by the analysis of power relations from afar. In this regard, it is recommended to address the operations of power in action, 'to focus on patters of transmission and superfluity' [Johns 2021:43].

The ever-present tension between past facts and present views develops into another methodological trap of treating legal history out of 'functional interest' [Nijman 2021:97]. It happens when legal scholars turn to history 'for needs and concerns of the present'. It is incorrect to approach to past attainments with the question from the present time. Janne Nijman notes that 'production of knowledge is never neutral and always political', consequently, 'historiography is always contextual and contingent upon power structures'. It means that appealing to the past thoughts is always fraught with the risk of substitution of notions and categories [Nijman 2021:97]. This is one of the arguments the international legal scholars use in regard to an international legal dispute with a long story behind it. For instance, the opponents against the application of the sector principle to the Arctic continental shelf assert that the sectoral delimitation-lines fixed in the bilateral treaties of the nineteenth century are not applicable to the continental shelf as the legal category shaped only by the middle of the twentieth century; whereas the proponents of the sector principle prove its consistent development through centuries at the level of customary international norms.

Divergence in retrospective assessments of legal and legally important facts emerges first of all for two reasons. Firstly, the history of international law has multiple perspectives and trajectories. However, international legal scholars often tend to privilege only one of these perspectives and trajectories, for instance, the one of a Western observer [Dos Reis 2021:126]. By research into the international legal policy of a State, there is also the risk to fix and interpret legal acts from a perspective different to that of the concerned State. Secondly, the linear progressive development of international law is not an exclusive way of development, since no social product, including international law, is safe from disruptive events [Kolla 2021:479]. Therefore the work at the ILP concept should consider effects of ruptures and turns in international legal policies of States such as a change of governments or an option for an alternative approach to an international legal issue.

The remarks listed above are only several of many useful lessons that an attentive reader could draw from the book. From a methodological view the introduction of contingency considerations into the research work opens up new horizons in seemingly settled questions. In the case of the ILP researches the idea of contingency even assumes the role of engine: confidence in better alternatives to the existing international law encourages States to participate in argumentative practices and to design their international legal policies. In this regard, the turn of Russian legal scholars to 'contingency in international law' could be a pivotal point for shifting focus from conservative 'statism' to more critical, sophisticated approaches in the theory of international law. At the least, Russian legal scholars researching international legal policies of States can find in 'contingencies of international law' a rich source for discovering new dimensions of past legal facts and the current state of international law.

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