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BETWEEN RESISTANCE AND REFORM: TWAIL AND THE UNIVERSALITY OF INTERNATIONAL LAW

LUIS ESLAVA[*] AND SUNDHYA PAHUJA[**]

This article explores the relationship between TWAIL scholarship and the universality of international law. In particular, it offers an account of this relation as the outcome of what we describe as TWAIL's characteristic double engagement with the attitudes of both reform and resistance vis-à-vis international law and scholarship. In being thoroughly critical of the cornerstones of the established order, and yet being simultaneously engaged with the practice and operation of international law, TWAIL scholars have intimated in their search for justice, an idea of universality capable of accepting international law as an agonic project. To further its political engagement with the universal promise of international law, we suggest an explicit methodological turn for TWAIL scholarship that is attentive to international law as a material project. By paying attention to the daily operation of international law at the mundane, quotidian and material plane, we suggest that TWAIL can sharpen its analytical potential and generate at the same time, a 'praxis of universality'. Such a praxis would be capable of troubling the constitution of places and subjects in the name of the international, whilst heightening our sensitivity to the numerous forms of resistance that are already at play as a particular normative project is being institutionalised and administered across the world.

[*] Senior Fellow (The Melbourne Law Masters) & Ph.D. Candidate, Melbourne Law School, The University of Melbourne; Visiting Research Fellow, Max Planck Institute for Comparative Public Law and International Law (2011-2012), Heidelberg, Germany. The usual disclaimer applies. Email: leslava[at]unimelb.edu.au

[**] Associate Professor of Law, Melbourne Law School, Director of the Law and Development Research Programme, Institute of International Law and the Humanities, The University of Melbourne; Visiting Research Fellow, Birkbeck, University of London. The usual disclaimer applies. Email: s.pahuja[at]unimelb.edu.au

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Third Worldism offers histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilisational plurality and diversity.

-Upendra Baxi (2008)[1]

I. INTRODUCTION

During the past few decades, a collection of scholars who may loosely be united (reflexively or *ex post facto*) under the banner of 'Third World Approaches to International Law' or 'TWAIL', have spent enormous intellectual and political energy identifying the political, cultural and economic biases embedded in the international legal project. In this, they have demonstrated how uncomplicated understandings of international law, at best reduce, or at worst completely negate, whatever political or emancipatory potential might exist in calls for the international.

Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore not so much a method, as a political grouping or strategic engagement with international law, defined by a commonality of concerns. Those concerns centre on trying to attune the operation of international law to those sites and subjects that have traditionally been positioned as the 'others of international law'.[2]

By excavating the historical and conceptual distortions of international law, TWAIL scholars have made an important contribution to international legal

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[1] Upendra Baxi, *What May the 'Third World' Expect from International Law?*, (hereinafter Baxi) *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 10 (Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds., Routledge-Cavendish 2008) (hereinafter Falk, Rajagopal & Stevens eds.).

[2] See especially on the 'others of international law': INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., Cambridge Univ. Press 2009).

scholarship. In advancing what has been a surprisingly reformist agenda, they have also helped to consolidate and institutionalise a political avenue that argues for the improvement of international law. Bringing to the forefront of thinking and writing on international law - issues of political economy, the cultural practices of differentiation, the uses of violence or the excessive exploitation of natural resources that have accompanied the expansion of the international legal order - TWAIL has become a virtual site from which scholars and activists can work both to resist, and to transform – or reform – international law.

As we explain in the first part of this article, this duality of engagement with international law – of resistance and reform – is arguably characteristic of TWAIL approaches. Although, on one level, these two ways of relating to international law could be understood as contradictory, we suggest that resistance and reform – or indeed, transformation – are brought into relation by the way in which TWAIL scholars approach the idea of justice, and in particular, by the way in which the concept of universality which resides at the core of international law may implicitly be understood in writings associated with the TWAIL project.

The most significant point of departure of TWAIL from what might loosely be called 'mainstream' interpretations of international law, is in TWAIL's insistence that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood. Working at this level, TWAIL has made a substantive contribution to the revitalization of questions about justice in the international legal order.[3] However, if concerns about justice have united the movement and given TWAIL an axis around which both resistance and reform can turn, basic questions about the nature of international law sometimes seem an absent subject of analysis within the smorgasbord of TWAIL and TWAIL-friendly approaches.

On one level, the treatment of the nature of international law within TWAIL as a sort of 'conceptual black box' is both positive and productive. Bracketing out

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[3] *See for example*, B. S. Chimni, *A Just World under Law: A View from the South*, 22 AM. U. INT'L L. REV. 199 (2006-07); B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8(2) MELB. J. INT'L L. 499 (2007); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16(2) WIS. INT'L L.J. 353 (1998); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMMUNITY L. REV. 355 (2008) (hereinafter Mickelson); Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (hereinafter Mutua); Obiora Chinedu Okafor, *Newness, Imperialism , and International Legal Reform in Our Time: A TWAIL Perspective*, 43(1-2) OSGOODE HALL L. REV. 171 (2005) (hereinafter Okafor); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing the Bias under the Specters of Neoliberalism*, 41(2) HARV. INT'L L.J. 419 (2000) (hereinafter Shalakany).

questions about the nature of international law sidesteps the discipline's neurotic preoccupation with the authenticity of international law's claim to be 'law',[4] and gives to the movement a certain flexibility, enabling people to resist and reform international law while remaining open to diverse forms of existence and authority. But while there are distinct advantages to avoiding an overt definitional or metaphysical debate about the nature of international law, we think it might be helpful to explore how TWAIL scholars *implicitly* understand the ontology of international law, and in particular, whether there is any common understanding within TWAIL of the way in which international law relates to the concept of universality.

Unless we pay close attention to the universal claim of international law, we run the risk of writing out the teleological quality of international law *per se,* or perhaps more importantly, misunderstanding the various functional regimes of international law as individual regimes of governance within international law. This becomes particularly problematic with regard to the discursive practices of trade, development or human rights. Like many other international discourses, trade, development and human rights are potent transmitters of particular modes of being.[5] At the same time, they are proxies for the promise of future perfection, perhaps of a Kantian state of universal brotherhood. In this way, the regimes of trade, development and human rights endow with content, the 'universal'

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[4] *See* Anne Orford, *Positivism and the Power of International Law*, 24 MELB. U. L. REV. 502 (2000); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2005).

[5] *See for example*, how the legal vocabulary that justified trade and private rights during the 16th and 17th centuries crystallized a particular form of social relationships across the world: Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011). See on recent scholarship exploring the effects of this trend, particularly in regards to private property, in the contemporary world: Eric Hirsch, *Property and Persons: New Forms and Contests in the Era of Neoliberalism*, 39 ANN. REV. ANTHROPOLOGY 347 (2010). See especially on how trade, coupled with the discourse of development, creates particular identities: Tania Murray Li, THE WILL TO IMPROVE: GOVERNMENTALITY, DEVELOPMENT, AND THE PRACTICE OF POLITICS 96-122 (Duke Univ. Press 2007). *See generally*, in the seminal work by Arturo Escobar how development alters local self-understandings of people in relation to themselves and others: ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Princeton Univ. Press 1994). *See for example*, on how human rights has changed the content of citizenship and its use by individuals and governments: Franz Von Benda-Beckmann, Keebet Von Benda-Beckmann & Julia Eckert, *Rules of Law and Laws of Ruling: Law and Governance between Past and Future*, *in* RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW (Franz Von Benda-Beckmann, Keebet Von Benda-Beckmann & Julia Eckert eds., Ashgate 2009); Barry Hindess, *Neo-Liberal Citizenship*, 6(2) CITIZENSHIP STUD. 127 (2002).

embedded in contemporary calls for the *international*,[6] just as the trilogy of Civilisation, Commerce and Christianity did before them.[7] These ostensibly distinct functional concepts, institutionalised in 'regimes', work together to constantly and normatively shape how we organize and imagine our global politics (and polity). This occurs regardless of their often contradictory aspirations and modes of practice, or their cumulative effects on the regulation of life. In other words, what might look like 'fragmentation' from above looks a lot more like proliferation from below.

This situation has been intensified by the recent (normative) orientation toward the production of 'coherence',[8] including ongoing efforts to create cross-discursive frameworks that bring together the application of these individual regimes, including ideas such as 'Trade for Development' or 'Human Rights-Based Approaches to Development'.[9] When these new hybrid frameworks are deployed by NGOs, or through institutional programmes and are translated into local public policy, the idea of the international reveals itself as a dense cluster of aspirations supported by a body of technical knowledge and carrying with it a large raft of managerial practices. The rise of measurements and indicia as the currency of the new 'coherence' is symptomatic of this situation.[10] Efforts to measure progress or

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[6] SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (Cambridge Univ. Press 2011) (hereinafter PAHUJA).

[7] *See for example*, in terms of Civilisation: ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (Cambridge Univ. Press 2004) (hereinafter ANGHIE). In terms of Christianity, *see* JENNIFER BEARD, THE POLITICAL ECONOMY OF DESIRE (Routledge-Cavendish 2006). In terms of Commerce, *see* ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE (Harvard Univ. Press 2005).

[8] Coherence includes, for example, the harmonisation of objectives and strategies across institutionally distinct entities, as well as projects of 'harmonisation' and 'convergence' between them.

[9] See for instance, Ernesto Zedillo, Patrick Messerlin & Julia Nielson, *Trade for Development* (Task Force on Trade, UN Millenium Project, 2005); UNITED NATIONS, THE UN AND HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT (UN Practitioner's Portal & HRBA Programming) *available at:* http://hrbaportal.org/?page_id=929 (last visited August 12, 2011).

[10] *See especially*, on the extensive use of measurements, Sally Engle Merry, Measuring the World: Indicators, Human Rights, and Global Governance (January 6, 2009) (unpublished manuscript, prepared for Wenner Gren/School of Advanced Research conference on *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*) *available at:* www.nyu.edu/ipk/files/docs/events/merry-measuring.doc (last visited August 12, 2011). Updates and recent scholarship on the current use of measurements in international practice can be found in the website of the *Indicators as a Global Technology/Governance by Information Project* (Institute for International Law and Justice, New York Univ. School of

compliance in terms of the holy trinity of development, trade and human rights give a precise shape to the idea of the international, cleansing it of contradictions and assuming that social life should be calibrated in a particular way.[11] This particular form of social life is the 'universality' at the heart of modern international law.

The proliferation of regulation directed at bringing about a particular way of being is therefore closely connected to the kind of universality that resides at the core of the international legal project. Because of the specificity of the universality at the heart of modern international law, the sterile debate over 'universal' and 'relative' values becomes oxymoronic. Instead, it becomes important to think about what *kind* of universality we want to embrace and what *kind* of universality we should resist.[12] Elaborating this would involve developing a 'praxis of universality'. Such a praxis would seem to be another valuable avenue for pursuing TWAIL's political project of achieving a more just international legal order. In this way, in combination with thinking about the role of universality in the mechanics of international law, this article concludes with some thoughts for the methodological future of a TWAIL agenda. We turn to methodology here in order to examine the dual problem of how we should interpret and engage with international law once we recognize international law's particular relation to universality and the way this relation acquires an existence in the concrete, material world.[13]

On one level, TWAIL takes the idea of what we would call the 'materiality' of international law seriously. A prime example of this concern with the material dimension of international law in TWAIL would be its overarching political goal of constantly re-sensitising international legal scholarship to the place and production of international law's 'others'. But in the last section of this article, we suggest that TWAIL needs to expand its emphasis on materiality to think of international law as not only an ideological project that has material consequences – for example in the

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Law) *available at:* http://iilj.org/research/IndicatorsProject.asp (last visited August 12, 2011).

[11] *See especially*, Gerhard Anders, *The Normativity of Numbers: World Bank and IMF Conditionality*, 31(2) POLAR: POL. & LEGAL ANTHROPOLOGY REV. 187, 195-7 (2008); Kerry Rittich, *Governing by Measuring: The Millenium Development Goals in Global Governance*, *in* SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW Vol. 2 (Hélène Ruiz Fabri, Rüdiger Wolfrum & Jana Gogolin eds., Hart Publishing 2010) (hereinafter Ruiz Fabri, Wolfrum & Gogolin eds.).

[12] *See generally*, Linda M. G. Zerilli, *This Universalism which Is Not One*, 28(2) DIACRITICS 2 (1998) (hereinafter Zerilli).

[13] See on international legal scholarship as an exercise of interpretation: Susan Marks, *Introduction*, (hereinafter Marks-*Introduction*) *in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 6 (Susan Marks ed., Cambridge Univ. Press, 2008) (hereinafter Marks ed.).

entrenchment of asymmetrical power relationships between the North and the South via the operation of the international trade regime. For us it would also be important to start examining international law as a material project in itself. By this we mean that concerns with the material context and repercussions of international law need to be extended to a theoretical and scholarly consideration of international law as being a specific kind of material practice: a practice which 'creates' and 'takes place' through the very materiality of the world. When understood as such, the international normative project sometimes assumes the form of what we usually conceive as elements of international law's economy (e.g. international courts, the nation-state, the subject bearer of human rights, the refugee, or the passport). But it can also present itself as something else (e.g. the city, the local resident, the ID card or the water meter).

For us, therefore, an approximation to international law as a material project implies an examination of the practices that occur, not only through typical international legal places, but also through many other sites and objects in which international law operates today. In particular, it is crucial that we start examining the way in which international law unfolds on the mundane and quotidian plane through sites and objects which appear unrelated to the international. Administrative procedures, subject formations, spaces and artefacts that are usually identified as expressions of other normative orders, social spheres or simply innocuous technical or commercial *things*, are the very material sites in which international disciplines are at work.

To advance TWAIL's avowedly political agenda and to develop a praxis of universality drawn out of TWAIL scholarship, it is therefore important to sharpen the attention we pay to these dimensions by incorporating an explicit and particular methodological turn into the TWAIL project. This methodological turn would focus on the (re)constitution of routines, spaces, subjects and objects under the name of the international. As expertise increasingly becomes today's technology of governance, these places, in particular those presented as ordinary and foreign to international law, are the key 'legal' sites which need to be studied and evaluated as potential sites of resistance.[14] By looking at the operation of the international legal order within, and beyond, its traditional historical confines, modes of self-representation, and sites of enactment and performance, the already rich corpus of TWAIL scholarship would be extended, and made to work harder still to fulfil its political potential.

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[14] See on the role of expertise in the operation of international law: David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27(1) SYDNEY L. REV. 5 (2005) (hereinafter Kennedy).

A. Modes of Resistance and Reform

The dynamic of resistance and reform that characterises TWAIL offers an analytical challenge. On one hand, one might assume that the logical outcome of a committed form of resistance is the total replacement of the object of that resistance. This is the path taken by Miéville, for example, who has strongly argued that there is no emancipatory value in international law.[15] For Miéville, '[a] world structured around international law cannot but be one of imperialist violence'.[16] In contrast to this position, TWAIL scholars, by and large, still hold out hope that international law can offer a space in which claims of justice can effectively be expressed. Antony Anghie, for example, has expressed his and his TWAIL colleagues' continuous commitment to international law in the following way:

> I continue to hope, together with the many scholars who are working to reconstruct international law precisely because of their awareness of the many ways in which it has operated to exclude and subordinate people on account of their gender, race and poverty, that international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power. At the very least, I believe that the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events.[17]

Resistance and reformation then come together in TWAIL to form a single process of the destabilization and renewal of international law's history and operation. Rather than replacement, TWAIL scholarship is more interested in overcoming international law's problems while still remaining committed to the idea of an international normative regime largely based on existing institutional structures.[18]

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[15] *See especially*, China Miéville, *The Commodity-Form Theory of International Law: An Introduction*, 17(2) LEIDEN J. INT'L L. 271 (2004) (hereinafter Miéville); CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW (Brill 2005); China Miéville, *The Commodity-Form Theory of International Law*, *in* Marks ed., *supra* note 13.

[16] Miéville, *Id.* at 302.

[17] ANGHIE, *supra* note 7, at 318.

[18] *See for example*, Karin Mickelson, *Co-opting Common Heritage: Reflections on the Need for South-North Scholarship*, *in* HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOUR OF IVAN HEAD 112 (Obiora Chinedu Okafor & Obijiofor Aginam eds., Univ. of Toronto Press 2003); Ibironke T. Odumosu, *Locating Third World Resistance in the International Law on Foreign Investment*, 9 INT'L COMMUNITY L. REV. 427 (2007); B. S. Chimni, *Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation*, 38 INDIAN J. INT'L L. 208

In this section, we generate a taxonomy which might help us to situate TWAIL's characteristic dynamic of resistance and reform *vis-à-vis* other (critical) positions in current international legal scholarship. In particular, we are interested in mapping the relationship between international law and the impulse to struggle with, and rebel against the discipline. This is an impulse that has become an important feature of international legal scholarship, and to some extent, a practice, in recent years.

Amongst those who identify themselves as international lawyers and scholars of international law, there are three broad attitudes to political struggle. For heuristic purposes, we can shorthand these attitudes as: (i) Conservation; (ii) Reform; and (iii) Revolution. In each of these categories, or modes of engagement with international law, each set of actors has a different self-perception about their own proper role in relation to international law's normative and institutional order and the kind of society that it produces. After outlining the taxonomy as a heuristic device, we shall go on to explain how TWAIL's dynamic of resistance and reform moves across these three common attitudes, or positions, and we explore briefly what this might teach us about both TWAIL, and about international law.

First, lawyers and scholars who belong in the 'conservation' category consider that their role is to uphold the law and to protect the current institutional and normative order. For them, disobedience to law is criminal. Because of the strong alliance forged between themselves and the legal framework, they may perceive themselves – implicitly or explicitly – as guardians of the law. By and large, legitimacy for this group resides in adherence to the law, and the only legitimate avenue to challenge and change society is through the law itself. In domestic law, the classic figure of this position might be the judge. In international law, this could be more complex. The representatives of international organisations or the personnel deployed in international actions could perhaps embody this position.

The second attitude of lawyers and scholars to political struggle is one of 'reform'. These lawyers understand their vocation to be defined by an obligation to use the law to further the aims of a (just) struggle. For them, not all disobedience to law is equal. Instead, for these lawyers and scholars, some disobedience – even though technically illegal – might be legitimate or justified if it is in the name of an external value which is both just and legitimate. This is a serious qualification, but is usually answered in the form of a higher – or alternative – law. The iconic figure of this position is the public-interest lawyer, the lawyer-activist, the NGO or (law and) development worker and the grassroots human rights lawyer.

(1998); B. S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13(3) J. REFUGEE STUD. 243 (2000).

In the third category, we find lawyers and scholars who use their technical knowledge of the law to reveal the injustices wrought by law. We could call this figure the *revolutionary*. For this person, disobedience to law might be necessary in order to challenge, or even to overturn an unjust order. This person does not want, seek or expect authorisation from the current legal order but may use law *strategically* to bring about greater change. The classic figure of this position is much harder to name. It could be lawyers turned independence leaders, like Nelson Mandela or Mahatma Gandhi, who although operating within the frame of the nation-state, and within particular nation-states, were able to promote large national and international legal-political shifts. But it could also be people to whose struggles we are less sympathetic. We could therefore think of this category as the liminal or border position between inside and outside the law. These figures, though revolutionary in one sense,[19] still maintain a connection to law, if only through technical mastery and political resistance. The borderline position of this person, between law and non-law arises from what is at stake: if this struggle fails, the protagonists are criminalised or exiled. But if they succeed, they found a new (legal) order.

Crucially, the position of a figure in one or other of these categories, or 'boxes', tells us nothing about a person's politics in the sense of the conventional politics of 'left' or 'right'.[20] Similarly, situating a person on the traditional left/right political spectrum does not correlate directly with where they might be positioned in our emerging taxonomy. Instead, what places a lawyer (including scholars and activists) in one category or another is that person's idea of the relationship between the order in which they find themselves and their own sense of *justice*. To clarify this point we need to return to our three categories.

1. The Conservative

For the conservative, there is no clash between justice as that person perceives it, and the current system. This could be for at least three different reasons. The first is because the conservative does not see justice as his immediate concern. This lawyer sees himself as involved in a technical enterprise. We might think of him as the technocrat who assumes that his role can only be performed properly if questions of justice are suspended. Secondly, an alternative reason for the perception of an absence of conflict between justice and the current system could

[19] Remember that our taxonomy is not purporting to define revolutionaries *per se,* but to name particular attitudes to law and legality.

[20] Here we are referring to the usual distinction that assumes that the people on the left side of the political spectrum seek social justice through redistributive social and economic intervention by public authorities; and that those on the right side defend private property and capitalism as the best ways to organize economic relationships.

be because this lawyer has an ethical commitment to *this* system, either as a system *per se*, or because he thinks the particular system in which he finds himself is the least worst option. He might also believe that the system is 'smart' enough to solve things by itself – so in other words, the system is able to rectify its gaps or solve its blind spots 'itself' (for example in terms of social justice), simply by being left to operate without direct intervention. In this way, the conservative tends to see law as a 'legal' domain and politics as elsewhere. This person might be called an ethical-positivist. Thirdly, this lawyer may be 'conservative' in his understanding of the relation between law, justice and the *status quo* because he and others like him benefit from the current system and is comfortable with that. We might (facetiously) call this person a member of the ruling classes.

2. The Reformist

In contrast to the conservative, the reformist's sense of justice is not exactly co-extensive with the current order. But it is not too far away. In other words, this scholar or lawyer's sense of justice is close to the present legal order, and although there is a gap, the gap is not too great. For the reformist there is no meaningful alternative beyond the current system, therefore the system should be improved rather than rejected. For him, fighting for justice within the confines of the system is the best, or perhaps the only option. The small gap that separates justice and the current order can thus be bridged, either through the adjustment of systemic aims, or in an adherence to the just aims of the system, but always with institutional and procedural recalibrations to better fulfil those aims. Domestically, this terrain is the province of 'law reform', particularly as it is understood in rich common law jurisdictions. In the public international realm, a much larger proportion of people fall into this category. Indeed, all adherents to what we might call the 'more and better' arguments and their variants, about the broader application and expanded enforcement of existing international norms would fit into this category. In this context, the reformist is either a progressive strategist (or strategic progressivist), or a committed pragmatist.

3. The Revolutionary

Finally, for the revolutionary, justice is far from being delivered by the current legal order and is perhaps incommensurable with a great deal of it. He usually sees small value in tinkering with it for little probable gain. In order for justice to be achieved, this lawyer or scholar thinks something other than the current order is necessary. He is either a committed idealist or a confrontational visionary. This is probably where many kinds of critical legal scholars sit.

The differences, therefore, between common political conceptions of left and right *per se* are not indicative of any given lawyer's position in the taxonomy. That

position depends instead, on the specific relationship between that person's sense of justice and the system in which they happen to find themselves. So, for example, an anti-apartheid activist might be revolutionary in that setting, but an economic conservative and political liberal in another setting. Similarly, for our purposes, a free-market capitalist might be a revolutionary in a centrally controlled economic system, but a conservative in a free-market economy.

For heuristic purposes, we can summarise in a tabular form, the content for each of our modes of engagement with international law and their way to conceive the question of justice in the following way.

<table>
<tr><th colspan="3">CONSERVATION</th><th colspan="2">REFORM</th><th colspan="2">REVOLUTION</th></tr>
<tr><td colspan="3">Uphold the law
Protect current order</td><td colspan="2">Use the law to further the aims of (just) struggle</td><td colspan="2">Use knowledge of the law to reveal injustices wrought by law</td></tr>
<tr><td colspan="3">Guardians of the law</td><td colspan="2">Amend the law</td><td colspan="2">Overcome the law</td></tr>
<tr><td colspan="3">Disobedience is criminal</td><td colspan="2">Disobedience could be illegal but legitimated by a higher order</td><td colspan="2">Disobedience can be justified in the name of the struggle</td></tr>
<tr><td colspan="3">No clash between justice and the current legal order:</td><td colspan="2">Gap between sense of justice and the current legal order is not too great</td><td colspan="2">Gap between sense of justice and the current legal order usually is too great to be bridged</td></tr>
<tr><td>Technocrat</td><td>Ethical positivist</td><td>Ruling class</td><td>Progressive strategist</td><td>Committed pragmatist</td><td>Committed idealist</td><td>Confrontational visionary</td></tr>
</table>

For us, this brief and partial taxonomy raises three questions which are particularly relevant to TWAIL's political agenda. In the current international legal setting, these questions are: (i) What makes people belong to one camp or the other?; (ii) What makes people move from one category to the other?; and (iii) Can the answers to the first two questions enrich our understanding of international law, and even potentially suggest an ontology for it? The next section will provide some possible responses to these questions.

II. TWAIL'S RESISTANCE, REFORM AND UNIVERSALITY

To begin with the second question – *why might people move from one category to the other?* – we need to return to the point made above about the relationship between law and justice, this time observing the flip side of this relationship. In other words, if over time, the gap between a person's sense of justice and the law 'grows', and ultimately gets too big for the person's position in one category or another, that person, whether he be conservative, reformist or revolutionary, will move from one category to the other. This move could be partial, unwilling or paradoxical. When a judge is forced to move away from precedent to hand down a decision which accords with his sense of justice, he is making this move.[21] In a domestic setting, the label we often give to this uncomfortable position is the 'activist judge' – the judge who wanders beyond strict jurisprudential lines in his search for re-establishing law's ownership of justice.

If we move to the international realm and return to TWAIL, we find another example of a shift, this time not simply of professionals and scholars moving from one box to the other, but inter-generationally as well. So for example, after decolonisation, we find a shift from what Anghie and Chimni have called 'TWAIL I' to 'TWAIL II'.[22] 'TWAIL I' is a retrospective name given to the first generation or so of international lawyers who were institutionally close to the struggle for freedom from colonisation. Picking up Nehru's famous invocation, 'midnight's' international lawyers called on the Enlightenment *promise* of international law;[23] to universality, to sovereign equality, and to what many see as the egalitarian spirit which animates international law.[24] Calling on this promise, midnight's lawyers

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[21] For readers familiar with Australian law, the High Court's *Mabo* decision could be read as an example of a 'reluctant' move from legal conservatism to reformist position: Mabo v. Queensland II (1992) 175 C.L.R. 1. For an astute critique of the decision, *see* Stewart Motha, *The Failure of Postcolonial Sovereignty in Australia*, 22 AUSTRALIAN FEMINIST L.J. 107 (2005). A similar phenomenon has been occurring across the Third World in recent decades as a result of constitutional reforms and the establishment of constitutional courts. In these constitutional courts, new jurisprudence – not new legislation – has served the objective of closing the gap between justice and the *status quo*, without actually reconfiguring the political order of these nations. *See for instance*, UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (Oxford Univ. Press 2002) in the case of India; or in the case of Colombia, *see* Luis Eslava, *Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons*, 22 REV. DER. ESTADO 183 (2009).

[22] *See especially*, ANTONY ANGHIE ET AL., THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION (Martinus Nijhoff 2003) (hereinafter ANGHIE ET AL.); Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 CHINESE J. INT'L L. 77 (2003). *See also*, Mutua, *supra* note 3.

[23] PAHUJA, *supra* note 6.

[24] This is a reference to Jawaharlal Nehru's famous words marking India's

argued for a revolutionary re-reading of international law's history and tenets. They were hoping for something akin to a revolution from within, which would exceed simple calls for 'reform' by its argumentative and political force. But after several attempts by these heroic legal figures of the newly independent states to use international law to bring about greater material equality (for example), many were disappointed in international law's capacity to answer the call being made to international law's promise. In response to this disappointment, there would seem to have been three choices: denial, cynicism or exit. In other words, one could deny the problem or its relation to international law; one could become cynical about international law; or one could exit, either in terms of engaging in an open revolutionary struggle, or if that were not feasible, in the form of rejecting international law as a site of struggle, or rejecting the project and/or the profession all together.

But we suggest that there is a secret fourth choice enacted by TWAIL scholars and their fellow travellers. This fourth position productively picks up on the combination of hope and frustration which seems to be an occupational hazard of (international) lawyers. That secret fourth choice is illustrated *par excellence* by the analytical and political move of the heirs of midnight's lawyers, that is, the second generation of TWAIL or TWAIL II. For these international lawyers and scholars, the most adequate way to engage with international law is not by remaining within the reformist page, nor by committing fully to the idea that it is possible to have a world without or beyond (international) law. Instead, for them a systematic process of resistance to the negative aspects of international law must be accompanied with continuous claims for reform. Resistance, not abandonment, becomes a position that fuels their approach to international law and their tool to reform, to reconstruct, the international normative project and world order.

Antony Anghie's work is a paradigmatic example of the shift from TWAIL I to TWAIL II, and also of the dynamic way in which TWAIL relates to our taxonomy. Anghie's celebrated book, *Imperialism, Sovereignty and the Making of International Law,* offers a thorough working critique of the way in which international law's key concepts were formed in the imperial project.[25] Attention is given to the way that international law's foundations were grounded in the justification of imperialism and its acquisitive aims, and an erudite examination is made of how attempts to use law's concepts were continually met with what Anghie calls 'the dynamic of

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independence in which he said *'at the stroke of the midnight hour, while the world sleeps, India will awake to new life and freedom.*' Nehru, the first Prime Minister of independent India, delivered this speech to the Indian Constituent Assembly, on the eve of India's Independence, towards midnight on August 14, 1947.

[25] *See especially*, ANGHIE, *supra* note 7, at 4-6.

difference'.[26] As Anghie shows, the 'dynamic of difference' refers to the way that those societies, or people who did not fit into the universal categories of international law – but who were potentially similar – were subordinated and continually forced to transform their own way of being, or their 'particularity', into another culture's way of being. This was the price that peripheral subjects had to pay for their admission to international law's various domains. Importantly, Anghie shows in his book how this colonial inclusion of 'others' in terms of the European cultural and economic predicament, backgrounded modern international law and still shapes the functioning of today's international legal order.

The turn to an explicit 'Third World Approach to International Law' that Anghie proposes in this book is thus, and before anything else, a call for a careful – yet politically inclined – examination of international law. In this way, Anghie's work relates to the evolution that we can witness in the work of the 'subaltern studies' scholars.[27] In the case of that collective, a project which began as an effort to re-write the history of the subcontinent to include the history of peasants and other non-elite actors, morphed into a project about the historical, economic and cultural underpinnings of the colonial and post-colonial production of knowledge.[28] In other words, a large part of subaltern studies became a critical analysis and exploration of why the histories they were interested in were written out of the picture in the first place and what the effects may be of such knowledge production. Similarly, in the evolution of TWAIL (from I to II as Chimni and Anghie would have it), the project became less about trying to use international law to remedy the social and economic domination of the postcolonial world by the former imperial powers (the objective of midnight's international lawyers) and more about how colonialism and imperialism and their ways of knowing have been crucial to the formation and practice of international law as a discipline.[29]

So on one level, we can see the move from TWAIL I to TWAIL II as a manifestation of broader shifts in critical theory and practice in the social sciences. But, what is interesting about *Imperialism, Sovereignty and the Making of International Law* in terms of the aforementioned taxonomy, is that even after the revelation about the imperial origins of international law, Anghie does not shift from reformist to revolutionary, not even in disguise. On one level, this position could

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[26] *Id.* at 3-5, 188-9, 267 & 310-11.

[27] For some foundational texts of the 'subaltern studies' collective, *see* A SUBALTERN STUDIES READER: 1986-1995 (Ranajit Guha ed., Univ. of Minnesota Press 1997); and SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Chakravorty Spivak eds., Oxford Univ. Press 1988).

[28] *See especially*, MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL (Vinayak Chaturvedi ed., Verso/New Left Review 2000).

[29] *See also* Okafor, *supra* note 3; Mickelson, *supra* note 3.

be strategic. As others have observed, to remain within the boundaries of the legal body might limit the radical potential of critique, but to adopt a critical methodology can sometime entail, or at least appear to entail, the forfeiture of the ability to speak, interact and act within the law.[30] Chimni and Anghie have themselves suggested something similar to this strategic embrace, observing that TWAIL scholars have been unwilling to exit the arena of international law, partly because of a fear that it would be dangerous to leave an undoubtedly powerful arena and look for another language in which to speak.[31] But if fear of exit is one dimension of this position, a certain hope, or faith in the transformative potential of international law is another. For although this faith is often unarticulated, TWAIL scholars routinely invoke international law's aspirational quality as an ideal of law which is able to constrain power, and to create realities, beyond singular nations.[32]

Anghie's work is therefore a good example of the way in which most TWAIL scholars embrace what we could call (for these purposes) a 'revolutionary' politics, but who usually stay in the middle, or 'reformist' box of our taxonomy.[33] It is both because there is no outside the law – in that we cannot escape the law and the need for judgment – but also because of a certain faith in international law. This faith hinges on understanding international law as a key shaper of what may involve all of us under a possible universal rubric. And like many avowedly TWAIL texts, this faith haunts *Imperialism Sovereignty and the Making of International Law* whilst remaining largely unexamined.[34]

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[30] *See for instance*, Olivia Barr, Luis Eslava & Yoriko Otomo, *In Search of Authority, Rebellion and Action*, 3(2) SORTUZ: OÑATI J. EMERGENT SOCIO-LEGAL STUD. 1 (2009).

[31] *See especially*, B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, *in* ANGHIE ET AL., *supra* note 22, at 47.

[32] For instance, in the context of the legitimizing role given by the international legal system to global capitalism and its negative effects over the world's population, Chimni proposes as an alternative route against (international) legal nihilism: 'a creative and imaginative use of existing international law and institutions to further the interests of the 'wretched of the earth', even as we underline [international law's] class character.' For Chimni, international law can fulfil this role given its capacity to facilitate transnational collaboration and resistance. B. S. Chimni, *An Outline of a Marxist Course on Public International Law*, *in* Marks ed., *supra* note 13, at 90-91 (hereinafter Chimni).

[33] *See for example*, Makau W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42(1) HARV. INT'L L.J. 201 (2001); OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS (Cambridge 2007); James Thuo Gathii, *Third World Approaches to International Economic Governance*, *in* Falk, Rajagopal & Stevens eds., *supra* note 1.

[34] For other examples of texts that contain this 'faith', *see* Karin Mickelson, *Leading towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Cooperation*, 43 OSGOODE HALL L.J. 137 (2005); Shalakany, *supra* note 3;

However, it is this unexplored faith which offers us a valuable clue to something interesting about international law from a TWAIL perspective. In our view, if international law is a child of imperialism - it is, as Fitzpatrick has put it, a child with 'oedipal dimensions'.[35] These patricidal dimensions suggest something about the way in which international law always seems to exceed itself. The 'something interesting' therefore lies in the idea of universality implicit in much of TWAIL scholarship. And this can be revealed by observing what resides at the core of Anghie's 'dynamic of difference'.

For Anghie what produces or generates the dynamic of difference, is the way in which 'one' set of particular values - the dominant set – is able to cast itself as universal. In a historical perspective, peoples, practices and societies that have not fit within this particular idea of 'universality' have been systematically cast as lacking something. In this manner, they have been rendered simply as expressions of just another particularity. These peoples who 'lack something', and their practices and societies, have been turned into an expression of the particular (or the 'relative'), in contrast to which the 'universal' (or the predominant particular of the time) has been able to claim itself to be such.

Importantly, and as other kindred scholarship has shown us, a constellation of institutions and normative bodies are always in operation to hold in place this particular meaning for the universal.[36] The three concepts, with which we began – trade, human rights and development – are three individual regimes in that constellation. But there are many others, including international environmental law and the discourse of environmentalism, global administrative law and global governance, or even more targeted projects such as democratisation or the unfolding of the rule of law as an international initiative. The concept of 'failed-states' could be seen as another instantiation of this trajectory. On the one hand, the idea of failed-states could be approached as a framework to assess and defend the universal claim of statehood and the value of the nation-state as the paradigmatic vehicle of collective and political organisation. Instead of this reading, however, the idea of failed-states has been too often deployed in a way that it prefers form over substance. In particular, the idea of failed-states has often been used to obfuscate analyses of the failure of state-building as a (post)imperial project while still reinforcing the widespread obsession that links institutional failure with 'under-developed' societies.

Usha Natarajan, *A Third World Approach to Debating the Legality of the Iraq War*, 9 INT'L COMMUNITY L. REV. 405 (2007).

[35] Peter Fitzpatrick, *Latin Roots: Imperialism and the Making of Modern Law*, CLAVE: COUNTER-DISCIPLINARY NOT. RACE POWER & ST., *available at:* http://www.clave.org/latinroots.pdf (last visited August 12, 2011).

[36] PAHUJA, *supra* note 6.

But this permanent foreclosure is only one aspect of the operative dynamic of international law in relation to its universal claims. In TWAIL and kindred scholarship, universality always has two aspects. The key to the other dimension lies in the under-explored faith which haunts Anghie's text, and in the faith which animated the revolutionary efforts of midnight's international lawyers. In these heroic struggles, we see that the universal claim of international law is continually belied by its universal promise. It always seems that that promise escapes or exceeds, from time to time, whatever international law might currently be. The universal *as such* is always beyond international law, even if it lies under an accretion of layers of regulatory particularisms.

This quality of international law – to be both the extant law and the law beyond itself - gives to it the presumed capacity to enact a substantive reform of the *status quo* without a formal revolution. In other words, international law seems yet to allow the political persistence of that which remains radical as a proposition in relation to international law. Another way of understanding this might be to say that there remains a possibility of conceiving Law in Law's terms, or at least in terms of a certain ethical 'lawfulness', such that it is possible to engage critically with law without leaving law's economy.

We can illustrate this by the way we see (legal) reformists in the domestic context able to negotiate struggle by reference to a higher order. In the contemporary world, this 'higher order' is often international law. Human rights law in particular, is the higher order to which domestic reformists appeal when the gap between law and justice cannot be bridged from within the domestic legal order. Indeed, this is the typical way of conceptualising the legitimacy of disobedience to the law in the name of justice, in a domestic setting, without seeming to bring back God, Reason or Natural Law.

However, a problem arises when we ask to what secular(ised) higher order we can appeal when the legality with which we are struggling is international law itself? Put differently, how can we revolt against international law when it positions itself as the ultimate law in institutional, normative and doctrinal terms? In non-TWAIL approaches, legal reformists often try to concretise this appeal by using the different parts of international law against itself. They bring environmental law or labour law to bear on trade law, for example, or they try to bring human rights to bear on development and international economic law more broadly.[37] Others try to bring humanitarian law to bear on the laws of war. These projects are productive of the terrain of the new hybrids raised in the introduction of this paper: the cross-

[37] *See for example*, MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (Hart 2003).

discursive and normative frameworks that aim to make coherent the application of individual regimes.

But in the clash which invariably occurs between the competing domains that are hybridized in these frameworks, resolution of the dispute is often achieved by reference to a third term drawn from a domain seemingly *outside* the law, such as economics, or development, howsoever defined.[38] Even when reformists overtly refuse the subordination of one legal domain to another, arguing for example that human rights must *trump* the law it is meant to temper, we find that resolution is secretly brought about by a resolving term or value such as economic growth.

In this resolution, the resolving term operates in an ostensibly external or even transcendent position in relation to the conflict. Whether because of the ostensibly technical nature of this resolution,[39] or because of our blindness to an effectively neo-sacral positioning,[40] we don't see the active work law is doing in positioning this resolving term. The term is therefore removed from political contestation and the dispute becomes about how to bring it about, rather than whether it is a useful aim *as such*. Attempts to concretise the trumping of one regime by another, in some form of constitutionalisation, always end up freezing, or congealing a particular meaning for the universal. This results in some people and some struggles being sacrificed.[41]

In contrast to this, although not always theorised explicitly or in this way, TWAIL scholarship gestures toward the idea that what gives international law its emancipatory appeal is its promise of universality *as such*. Such a promise of universalism is quite different from international law's usually formal claims to universality, which are in themselves, as TWAIL scholars have argued, the carriers of specific particularities. Because of this recognition or in some cases, intuition, most TWAIL scholars eschew attempts to re-establish a putatively genuine universality. Such an attempt would be to engage in a neo-Kantian enterprise of finding a new, genuinely universal ground for law. TWAIL's concern for history has shown us repeatedly that these ostensibly genuine universals invariably end up elevating a particular meaning to the universal, thus enacting a familiar mode of

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[38] PAHUJA, *supra* note 6.

[39] *See generally*, Nehal Bhuta, *Democratization, State-building and Politics as Technology*, *in* GREAT EXPECTATIONS: THE ROLE OF INTERNATIONAL LAW IN RESTRUCTURING SOCIETIES AFTER CONFLICT (Hilary Charlesworth, Brett Bowden & Jeremy Farrall eds., Cambridge Univ. Press 2008); Kennedy, *supra* note 14.

[40] *See generally*, PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (Cambridge Univ. Press 2001).

[41] Anne Orford, *Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice*, 18 LEIDEN J. INT'L L. 179 (2005).

power.[42]

Arguably, what TWAIL's political project then calls for us to hold onto is the promise of universality *as such*. This is a universality which is what Zerilli, following Laclau calls the 'universal which is not one'.[43] It is neither a simple call for plurality nor a call for a renewed transcendent ideal. Instead this normative conception of international law's universal promise can be understood as *quasi-transcendent.* By this we mean that it recognises the impossibility of genuine universality, but also recognises that the impossibility of universality is precisely what makes a fruitful plurality possible.[44] It recognises the impossibility of law avoiding grounds or foundation – for law must depart from somewhere – but recognises the agonic contingency of those grounds. Struggle or rebellion then becomes the condition of possibility of a *lawful* international law which maintains a relationship between what the law is from time to time, and a relationship to a necessarily indefinable, or *open*, idea of justice.

III. METHOD AND PRAXIS

The reach toward something like an 'open' universality which implicitly resides at the core of the TWAIL project, requires a commitment to constantly re-engage with the promise(s) of international law. This re-engagement must call on the promise not as perfectibility, but instead always take the agonic nature of that promise as a first premise. In a praxis of universality, certainty should give way to dialectics, and affirmation to multiple assertions. But if this is a way of approaching international law strongly resonant with the already existing TWAIL project, it is also an important part of that praxis to constantly trouble our conceptualisations of international law. In other words, it is important to revisit exactly how and where we do engage, and should engage, with international law. This brings us in particular to the observation with which we began, about the importance of thinking about international law as a set of concrete practices that express themselves in the material world, as well as about international law as a normative or ideological project.[45]

Through the creation or enclosure of spaces, administrative procedures and the use and constitution of particular bodies and objects, international law acquires (or attempts to acquire) an effective presence in our everyday life. From this point

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[42] *See generally*, IMMANUEL WALLERSTEIN, EUROPEAN UNIVERSALISM: THE RHETORIC OF POWER (New Press 2006).

[43] Zerilli, *supra* note 12. *See also* ERNESTO LACLAU, EMANCIPATION(S) (Verso 1996).

[44] OLIVIER MARCHART, POST-FOUNDATIONAL POLITICAL THOUGHT: POLITICAL DIFFERENCE IN NANCY, LEFORT, BADIOU AND LACLAU (Edinburgh Univ. Press 2007).

[45] See also on the nature of international law beyond its ideological confines: Chimni, *supra* note 32; Marks-*Introduction*, *supra* note 13; Miéville, *supra* note 15.

of view, international law is a material enterprise in itself. To advance a praxis of universality drawn from, and out of the body of TWAIL scholarship, and to contest international law's shortcomings, or to fulfil its apparent potential, it is important therefore to pay attention to the ways in which international law constantly constitutes and reconstitutes what we might think of as places, subjects and modalities of administration. Our invitation here is to engage international law, and its norms and institutions – as Marx put it more broadly – 'neither from themselves nor from the so-called general development of the human mind, but rather [from] their roots in the material conditions of life'.[46]

This methodological invitation runs against the grain of traditional ways of studying and engaging with international law. It invites us to 'get down and dirty' with international law in contrast to what is usually a cool and lofty scholarly relation between the international legal scholar and his subject. This invitation to delve into the everyday life of international law therefore challenges traditional manners and forms in which international law is represented: as the law of exceptional, state-centric actions and relations and its position as normatively superior and foreign.[47] International law is in these representations, the law of the 'above and beyond'; a law which occupies the upper quadrant of legal taxonomies, and the final step in doctrinal and legal argumentation. This notion of a hierarchical and stratified relationship between the international, national and sub-national orders has been at the very centre of legal and political scientific approaches to international law.[48] Indeed, international law gains most of its power either by erecting a discursive, normative and institutional distance from particular national realities (the form in which it constructs its universal ethos) or by using the nation as a separate unit for monitoring and enforcing international laws (particularly human rights obligations).[49]

This representation of international law, as permanently exceptional and *above*

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[46] KARL MARX: SELECTED WRITINGS 389 (David McLellan ed., Oxford Univ. Press 1977).

[47] The placing of international law as detached from national and local normative and institutional orders is prevalent in discussions about the sources of international law and the extent of the relation between international law and municipal law. *See for example*, MALCOM M. SHAW, INTERNATIONAL LAW (Cambridge Univ. Press, 6th ed. 2008).

[48] See for instance on an argument against such approaches to international law: Gerhard Andres, *The New Global Legal Order as Local Phenomenon: The Special Court for Sierra Leone*, *in* SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY (Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Anne Griffiths eds., Ashgate 2009).

[49] *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1793, 1806 (1993); Nathaniel Berman, *Modernism, Nationalism and the Rhetoric or Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992).

the quotidian realities of the nation-state, is best exemplified by Hans Kelsen's description of the international legal field, and subsequently by strict readings of that description. Kelsen described international law as the 'supreme legal order'[50] which precedes, in a relationship of superiority, all national orders.[51] International law has, in Kelsen's conceptualisation, an 'unlimited validity in time and space', at least 'in a purely potential meaning'.[52] This description of the field has given to Kelsen the role of the modern founder of the monist theory of the relationship between international and national laws. And even though Kelsen's reading could be taken as an invitation to approach international law as an interconnected system of international, national and local norms that drags, or 'pulls', social life in a particular direction, the technical, rational, scientific and anti-political approach to law promoted by Kelsen, and taken up by many of his heirs, has ensured that his conceptions of the international legal order have taken on an ultra-positivist cast.[53] This situation has ultimately positioned international law as a permanently *exterior* legal order.

Within this frame, international law has usually been interpreted as existing on a normative level that emerges as a kind a 'logical necessity' from, and for, the existence of nation-states. This positioning is typically framed in a static picture of how international and national laws interact with and feed into each other.[54] This mode of representing international law as an exceptional and superior order to nation-states clearly has political value, particularly if we think about international law in terms of the strategic advocacy it permits our domestic 'reformers', to rely on international legal grounds in domestic courts, or within international courts and institutions.[55] But in a scholarly setting, this approach to international law misses the way in which nation-states – as bureaucratic, social and material spatial units – are in themselves, part of the economy, as well as the political economy, of international law. Even more revealing in this regard is the way in which

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[50] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 177 (Holt, Rinehart & Winston, Inc., 2d ed. 1966).

[51] *Id.* at 184-186.

[52] *Id.* at 178.

[53] *See, however*, on the sociological foundations of Kelsen's understanding of law: Mónica García-Salmones, *On Kelsen's Sein: An Approach to Kelsenian Sociological Themes*, 8 NO FOUND. 41 (2011). *See*, on a recent presentation of international law as strictly legal and state-centric: Jean D'Aspremont, *The Doctrinal Illusion of the Heterogenity of International Law-Making Process*, *in* Ruiz Fabri, Wolfrum & Gogolin eds., *supra* note 11.

[54] *See especially*, the interpretation given in Latin America to Kelsen's theory of law, including international law: DIEGO LÓPEZ MEDINA, TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINO AMERICANA 341-398 (Legis 2004).

[55] *See especially*, Martti Koskenniemi, *What is International Law for?*, *in* INTERNATIONAL LAW (Malcolm Evans ed., Oxford Univ. Press 2003); Martti Koskenniemi, *The Politics of International Law – 20 Years After*, 20(1) EUR. J. INT'L L. 7 (2009).

international institutions continually and systematically announce that their most pressing objective is to transcend the dichotomy between the national and the international, aiming to become part of the everyday reality of people as a result of this 'transcending'.

Today, one need only observe any set of international guidelines, brochures, newsletters or electronic updates on trade, human rights or development (amongst others), to notice how international law is already understood, represented and contested as prosaic rather than exceptional. This is especially true of people in the Global South, but increasingly applicable everywhere. Ordinary people are routinely portrayed as the direct beneficiaries of the work done by the World Trade Organization (WTO), the World Bank or the United Nations General Assembly. Regulatory traces are left by the international trade regime on entire shelves of products in supermarkets. And grassroots movements across the world voice their dissatisfaction – using the language of human rights – against transnational corporations benefiting from multilateral and bilateral trade initiatives. Meanwhile, local municipalities are engaged today in an intense (re)organization of their social and geographical realities in order to ensure the arrival of international investment or the fulfilment of an increasingly large set of development prescriptions.[56]

These everyday intimacies across spatial divides and scales of governance reveal that international law cannot be conceptualized today (if it ever could) simply in terms of a restricted body of norms, or situated only in bureaucratic and institutional environments beyond daily life. Instead, international law should be understood as a field of *practice*. Approaching international law in this way implies the examination and contestation of sites, procedures, artefacts and forms of being that operate at the mundane and quotidian level and that tie together a vast raft of heterogeneous phenomena in a specific kind of way. Importantly for us the specific *way* of international law has already been explored in much TWAIL scholarship. In TWAIL's body of work we can already find the political, cultural and economic biases embedded in the international legal project. Our methodological turn would thus push us further into a consideration of how the 'tying' of heterogeneous phenomena by international law is effected, especially questioning how, where and to whom such tying occurs on an everyday level. To achieve such line of interrogation it is important to place a special emphasis on the material life of international law, and not only to study international law as an ideological project. In doing this we become able to examine the *practices* within, and beyond, international law's traditional historical confines, modes of self-representation, and sites of enactment and performance. We become able to examine international law as a field of practice(s) which 'creates' and 'takes place' through the very materiality

[56] See for instance, Luis Eslava, *Decentralization of Development and Nation-Building Today: Reconstructing Colombia from the Margins of Bogotá*, 2(1) LAW & DEV. REV. 282(2009).

of the world.

The methodological reorientation we propose for TWAIL therefore has implications, both for the kind of work to be done, and the scale of practices to be explored. In terms of the kind of work to be done, our approach would push (the friends of) TWAIL to build explicitly on the legal-ethnographic method currently being applied to explicitly international sites and artefacts such as international criminal courtrooms or international NGOs.[57] This is where some of the most interesting work of legal-ethnography has been done in recent years.[58] That work has been concerned with the mapping and exploration of what Sally Engle Merry has described as 'the circulation of ideas and procedures as well as [...] the array of small sites in which international law operates'.[59]

However, parallel to these analyses of 'typical' international legal places, we also believe that it is important to think ethnographically about the many other

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[57] Our understanding here of the legal-ethnographic method, and its use in the study of international law, follows closely Eve Darian-Smith's general definition of contemporary legal ethnography. According to Darian-Smith:

> [W]hat unites authors of contemporary legal ethnography is that each seeks, in different ways, to engage with the everyday complexities of law facing ordinary people situated within a global political economy. In an attempt to transcend the artificiality of a global/local divide and the opening up of legal spaces previously unrecognised, new legal ethnographies suggest that the impact and production of globalization – however defined – occur within and without the formal boundaries of nation-states. Moreover, these studies indicate that in any examination of law and its relationship to globalization, analysis must take into account a range of theoretical perspectives and subject positions.

Eve Darian-Smith, *Ethnographies of Law*, *in* BLACKWELL COMPANION TO LAW AND SOCIETY 546 (Austin Sarat ed., Blackwell Publishing 2004).

[58] See for instance, on ethnographic explorations of the work of local human rights NGOs as sites of international law: SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (Univ. of Chicago Press 2006). Annelise Riles has also explored international law in small sites and within the boundaries of formal international law yet focusing on international legal documents and networks. *See especially*, Annelise Riles, *Law as Object*, *in* LAW & EMPIRE IN THE PACIFIC: FIJI AND HAWAI'I (Sally Engle Merry & Donald Brenneis eds., School of American Research Press 2003); Annelise Riles, *[Deadlines]: Removing the Brackets on Politics in Bureacratic and Anthropological Analysis*, *in* DOCUMENTS: ARTEFACTS OF MODERN KNOWLEDGE (Annelise Riles ed., Univ. of Michigan Press 2006); ANNELISE RILES, THE NETWORK INSIDE OUT (Univ. of Michigan Press 2000).

[59] Sally Engle Merry, *Anthropology of International Law*, 35 ANN. REV. ANTHROPOLOGY 99, 111 (2006).

sites in which international law operates today. These other sites of practice we have in mind are not necessarily – or even usually – called 'international' in name, or imagined to be so in terms of their vision, outlook, size or scale. These sites include, for example, the nation-state and local municipalities, export processing zones, free trade areas and industrial parks. In each of these instances there is in operation a territorial and population demarcation where special rights and obligations (for instance, in terms of property and labour rights, competition or tax law, customs regulations and security and environmental requirements) are calibrated to ensure that international trade, development and human rights aspirations are achieved. Once we consider this plethora of spaces – new 'jurisdictions' – in which international law is being materialized today, it becomes clear that we should not confine our interrogations to only those sites that present themselves as 'international'.[60] The increasing number of jurisdictional forms that are now being created or recreated, in the name of good governance, sustainability or economic competitiveness deserve detailed attention - one capable of linking the existence and operation of these spaces to the ways in which the current global order is unfolding in the everyday lives of people across the world.

In our view, it therefore becomes important to extend the spatial scope of our studies of the international. At the same time, it is crucial to start paying attention to the many other practices and objects that are reflexively unrelated to the international, but which may be understood hermeneutically as expressions, embodiments and enactments of international law. These include administrative procedures, subject formations, places and objects usually identified as expressions of municipal norms and private bureaucracies or the innocuous artefacts of 'local' governance or 'private' use. They are the small places, where international work is actually – materially – done. In these places, the idea of the international comes into existence in a molecular manner – each disaggregated instance pulling life in a particular way. Importantly, this covert (re)production of the international usually takes place under the guise of the technical or the commercial. Instances we have in mind include the international regulatory work done today by biometric scanners at international frontiers in the fight against terrorism and the control of illegal migration,[61] the extensive implementation of ID cards[62] and water-meters for the

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[60] *See generally*, on the important role of jurisdiction in legal scholarship and thought: JURISPRUDENCE OF JURISDICTION (Shaun McVeigh ed., Routledge 2006).

[61] See for instance, *Biometrics – Prepare to be scanned: High-tech security systems that rely on detailed measurements of the human body, known as biometrics, are taking off. But should they be?*, ECONOMIST, December 4, 2003, *available at:* http://www.economist.com/node/2246191 (last visited August 12, 2011).

[62] See for instance, *Identifying a billion Indians: Reliable identity numbers could create many opportunities for business*, ECONOMIST, January 27, 2011, *available at:* http://www.economist.com/node/18010459 (last visited August 12, 2011).

functioning, rationalization and measurement of development projects,[63] or the targeted use of mobile phone technology for the integration of small farmers into the global trading system.[64]

IV. CONCLUSIONS

Two caveats should be kept in mind in order to understand our methodological proposal in this article. First, we are aware that once we start advocating an expansive view of international law and its operation, we put ourselves on a knife's edge between the imperial expansion of international law on one side, and its complete analytical dissolution into everything and everywhere on the other. With a less emphatic scope and specificity for international law, the flipside of our method carries the danger of accidental imperialism. This danger lurks not the least, in the potential loss of a capacity to revolt effectively against misappropriations of the formal norms and institutions of international law. However, the emancipatory potential of a broad interpretation of international law relies precisely on an insistence that international legal scholarship is itself a practice of interpretation.[65] More specifically, international law is a practice of interpretation which hinges on creating systemic links between the categories of the general and the specific, or more technically, between the universal and the particular. In its imperial guise, both categories – the universal and the particular – are constituted in the interpretive gesture of international law's 'application'. As we have insisted throughout this article, this act of application can be both 'conservative' or 'progressive', 'left' or 'right', 'accidental' or 'intentional' legal imperialism. In other words, for whatever ostensible political end, the international legal project becomes an act of domesticating the particular by interpreting it by reference to a frame of universality that is itself a 'universalised' particular.

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[63] See for instance, on the implementation of water meters to rationalize the use of water in low income areas in Africa: Food & Water Watch, *Prepaid Water Meters*, *avauable at:* http://www.foodandwaterwatch.org/global/africa/prepaid-water-meters (last visited August 12, 2011); Raffaella Delle Donne, *Water Meters for the Poor: New Name, Old Problems*, INTER PRESS SERVICE (IPS), March 22, 2009, *available at:* http://ipsnews.net/news.asp?idnews=46226 (last visited August 12, 2011).

[64] See for instance, Sara Hamdan, *A Big Push to Expand Mobile Service in Iraq*, N.Y. TIMES, March 2, 2011, *available at:* http://www.nytimes.com/2011/03/03/world/middleeast/03iht-M03B-ZAIN.html (last visited August 12, 2011). *See also*, Press Release, World Bank, World Bank 'Apps for Development' Competition Yields Global Response, Opens Public Voting (Press Release No:2011/311/EXT, January 31, 2011), *available at:* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22819263~pagePK:34370~piPK:34424~theSitePK:4607,00.html (last visited August 12, 2011).

[65] See for instance, Marks-*Introduction*, *supra* note 13, at 6.

In contrast, the method that we propose in this article insists on the impossibility of this domestication either being complete or completed. This refusal to accept the domestication of the particular can be read as an extension of TWAIL's idea of universality. What our methodological turn offers for the Friend of TWAIL, or for the actor we might think of as the political international lawyer, is an avenue for him to start locating the international in those places that usually escape our attention and yet regulate our lives, especially the lives of the billions who are subject to developmental interventions. In doing this, new opportunities will be created for him to chart the operation of international law and its growing number of regulatory fields. As a result of this exercise of 'charting' international law, the political international lawyer becomes aware that 'local' practices are not simply acts of anthropological curiosity or simply disaggregated expressions of people's agency or false consciousness, but that they are, on many occasions, proper acts of resistance to the idea of the international.

In this way, the exercise of charting the international as it unfolds in people's lives provides the political international lawyer – and those fluent in languages other than international law – with a map to resist, revolt and strategise against the effects of the regulatory proliferation of international law. In learning to locate the international legal project on the material plane of life, as well as within and beyond international law's traditional historical confines, modes of self-representation, and sites of enactment and performance, we can become more effective in the profanation of those sites, objects and subjectivities[66] or in the re-embedding of these in alternative political, juridical and emotional economies.[67] At the same time, once we start situating the international in this way, we can see that the fashionable oscillations between the ideas of optimism and pessimism, or hope and despair in relation to either revolution or the progressive realisation of international ideals, are missing the point. Tiny revolutions are everywhere, every day. The work of profanation and the re-embedding of international legal concepts, sites, artefacts and forms of life in alternative economies is already occurring in an extremely productive way across the world.[68] As Baxi reminds us, 'Third Worldism' offers

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[66] *See especially*, GIORGIO AGAMBEN, WHAT IS AN APPARATUS? AND OTHER ESSAYS (Stanford Univ. Press 2009).

[67] *See especially*, J. K. GIBSON-GRAHAM, A POST-CAPITALIST POLITICS (Univ. of Minnesota Press, 2006).

[68] See for instance, ARTURO ESCOBAR, TERRITORIES OF DIFFERENCE: PLACE, MOVEMENTS, LIFE, REDES (Duke Univ. Press 2008); JULIETA LEMEITRE RIPOLL, EL DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES (Siglo del Hombre Editores & Universidad de Los Andes 2009); Julieta Lemeitre Ripoll, *Legal Fetishism: Law, Violence and Social Movements in Colombia*, 77 REV. JUR. U.P.R. 331 (2008); SHANNON SPEED, RIGHTS IN REBELLION: INDIGENOUS STRUGGLE AND HUMAN RIGHTS IN CHIAPAS (Stanford Univ. Press, 2007).

beyond anything else, 'histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilisational plurality and diversity'.[69] The job for anyone interested in TWAIL is to learn how to engage and facilitate these forms of resistance.

[69] Baxi, *supra* note 1.