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# Reframing the "Universality" of International Law in a Globalizing World

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Article abstract

In this essay, I highlight the historical use of notions of universality and objectivity in international law to advance First World economic interests, primarily through the codification of conditions that sustain ongoing Third World dispossession. I argue that these interests have taken on a transnational character and are being pursued through an elaborate network of meta-regulatory regimes beneficial to an emergent transnational capitalist class. These regimes are used to diffuse neoliberal economic reform on a global scale, resulting in the embedding of various neoliberal precepts both in legal machinery and in social meaning. Finally, I suggest that while instances of resistance are observable, critical international legal jurists appear ambivalent in their efforts at crafting proposals for reform of the global legal order. While some champion a type of global legal pluralism that would recognize the legitimacy of lawmaking as executed by non-institutional actors, many remain perplexed as to how we might reconcile the pursuit of a universally and objectively just order in a pluralist, subjective, and highly stratified world. I conclude by applying Nancy Fraser's "political dimension of justice" to conceptualize and structure more representative participatory transnational lawmaking processes, the kind that would promote both parity of participation and actor subjectivity, and possibly further the cause of global justice.

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# REFRAMING THE "UNIVERSALITY" OF INTERNATIONAL LAW IN A GLOBALIZING WORLD

*Mohsen al Attar**

In this essay, I highlight the historical use of notions of universality and objectivity in international law to advance First World economic interests, primarily through the codification of conditions that sustain ongoing Third World dispossession. I argue that these interests have taken on a transnational character and are being pursued through an elaborate network of meta-regulatory regimes beneficial to an emergent transnational capitalist class. These regimes are used to diffuse neoliberal economic reform on a global scale, resulting in the embedding of various neoliberal precepts both in legal machinery and in social meaning. Finally, I suggest that while instances of resistance are observable, critical international legal jurists appear ambivalent in their efforts at crafting proposals for reform of the global legal order. While some champion a type of global legal pluralism that would recognize the legitimacy of lawmaking as executed by non-institutional actors, many remain perplexed as to how we might reconcile the pursuit of a universally and objectively just order in a pluralist, subjective, and highly stratified world. I conclude by applying Nancy Fraser's "political dimension of justice" to conceptualize and structure more representative participatory transnational lawmaking processes, the kind that would promote both parity of participation and actor subjectivity, and possibly further the cause of global justice.

Dans cet article je souligne l'utilisation historique des notions d'universalité et d'objectivité en droit international pour avancer les intérêts économiques du « premier monde », principalement à travers la codification de conditions qui assurent la dépossession continue du tiers monde. J'avance que ces intérêts sont désormais transnationaux et sont poursuivis grâce à un réseau élaboré de régimes méta-réglementaires qui bénéficie à une classe capitaliste transnationale émergente. Ces régimes sont utilisés pour répandre une réforme économique néolibérale à échelle mondiale, menant à l'enchâssement de divers préceptes néolibéraux dans l'appareil juridique et dans la signification sociale. Enfin, je suggère que malgré des exemples de résistance à ce courant, les juristes internationaux critiques semblent contradictoires dans leurs efforts pour proposes des réformes de l'ordre juridique mondial. Bien que certains défendent une forme de pluralisme juridique mondial reconnaissant la légitimité de la législation par des agents non-institutionnels, plusieurs restent déconcertés quant à la façon dont on pourrait réconcilier la poursuite d'un ordre universellement et objectivement juste dans un monde pluraliste, subjectif et extrêmement stratifié. Je termine en appliquant la « dimension politique de la justice » de Nancy Fraser pour conceptualiser et structurer des processus législatifs transnationaux participatifs plus représentatifs, d'une forme qui favoriserait à la fois la parité de participation et la subjectivité des agents et qui pourrait possiblement avancer la cause de la justice mondiale.

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## Introduction

This article is the fifth and final segment in a quintet on the foundational structures of international law. Inspired by the writings of third world approaches to international law scholars such as Bhupinder Chimni, Antony Anghie, Vasuki Nesiah, and James Gathii, I have sought to explore whether an alternative narrative of international law—more contemporary than historical—might aid in furthering a reconfiguration of the unjust order that mediates legal relations between the First and Third World.[1] A reconfiguration is needed for, to the Third World, modernity is discernible by what Edward Said identified as a "general European effort to rule distant lands and peoples," a pursuit that has severely impeded non-European peoples' practice of autonomy and self-determination.[2] While resistance to European efforts has been quick to materialize and frequently successful, the international legal order played (plays) a vital role in helping to propagate "a modern, aggressive, mercantile, and brutalizing urban existence."[3] With this less-than-virtuous narrative as touchstone, of particular concern throughout this quintet have been the dehumanizing trappings of the international legal regime, specifically colonialism's "enduring effects on the contemporary international system."[4] Of no less—and perhaps even of greater—interest has been the elaboration of processes via which these trappings could be challenged and ultimately rehabilitated.

To this end, in the first part of the quintet, I contrasted mainstream and critical representations of international law in legal academia.[5] My aim was to gauge whether a type of ideological imperialism—originating from both within and without legal academia—was curtailing reformative efforts by training future jurists to tolerate an inequitable status quo, itself compounded by an unjust international regulatory framework. A reviewer's question, "What is the alternative?" (presumably other than the use of alternate texts and alternate pedagogical methods amply detailed in the article), precipitated the second chapter in which I highlighted the mechanisms underpinning an emergent regional trading bloc operating

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1 Obiora Chinedu Okafor articulates useful a definition of "Third World" as a position chosen by peoples and scholars: "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43:1 Osgoode Hall LJ 171 at 174–75.

2 Edward W Said, *Culture and Imperialism* (New York: Knopf, 1993) at xi [Said, *Culture and Imperialism*].

3 *Ibid* at xiii.

4 Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 Third World Quarterly 739 at 739 [Anghie, "Evolution"].

5 Mohsen al Attar & Vernon Tava, "TWAIL Pedagogy: Legal Education for Emancipation" (2009) XV The Palestine Yearbook of International Law 7.

outside the confines of the World Trade Organization (WTO).[6] The Bolivarian Alliance of the Americas (ALBA) uses concepts such as equity and complementarity to guide treaty negotiations and to buttress the key policy aim of raising collective living standards across member states. While I established that incompatibilities between the normative aspirations of populations and those of the managerial cadre of the WTO precipitated the pursuit of a creative approach toward multilateral collaboration—*trade-in-kind* as exemplified by the ALBA—I felt that a genuine alternative, to paraphrase Clifford Geertz, needed to go beyond machinery and propose a transformative meaning.[7]

This led to the third segment where I considered conceptions of freedom as they originated within a transnational peasant movement and a transnational capitalist class, respectively.[8] My intent was to determine whether international law proposes a model of freedom or seeks to facilitate organic types of self-actualization. In this instance, the conclusion—perhaps unfortunate and perhaps not—was that international legal representations of freedom are in fact quite rigid, imposing through the influence of international law a particular understanding upon just about everyone. The privileging of one meaning over many others, often codified as a result of the influence (and crudeness) of class privilege, prevents any progressive dialogue between diverse groups, as a single position is presented as the *correct* or even *scientific* one.

Rather than surrender to nihilistic *realpolitik*, I next sought to employ a methodology that might facilitate the valuation of contributions emanating from heterogeneous groups.[9] Applying legal pluralism and democratic considerations, I argued that we might conceptualize a more inclusive transnational lawmaking process. Despite its remarkably protracted history as a tool of colonial power, the rule of law can be useful in supporting structural transformations that would value the activities of peripheral states and social movements. More idealistic than prescriptive, the conclusion to the fourth article—that the interplay between normative communities would strengthen international legal legitimacy—fell flat.

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6 Mohsen al Attar & Rosalie Miller, "Towards an Emancipatory International Law: The Bolivarian Reconstruction" (2010) 31:3 Third World Quarterly 347.

7 Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic, 1983) at 232.

8 Mohsen al Attar, "The Transnational Peasant Movement: Legalising Freedom from Want" (2010) 8 New Zealand Yearbook of International Law 107.

9 Mohsen al Attar & Rebekah Thompson, "How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination" (2011) 3:1 Trade, Law and Development 65.

This concluding segment is my final attempt to bring together meaning and machinery and to make sense of this meandering excursion. I begin by drawing attention to the historical use of notions of universality and objectivity in international law and to the less-than-coincidental privileging of First World economic interests that consistently ensues. Next, I argue that these interests have transcended the Westphalian frame and now inhabit an abstract, through increasingly textured, transnational plane. Through a network of meta-regulatory regimes, a programme of neoliberal economic reform is diffused on a global scale, resulting in the embedding of various neoliberal precepts in both legal machinery and social meaning. These precepts include a retreat of the state from a range of distributional activities and a surrender of domestic authority to unaccountable and undemocratic transnational institutions.

This article's point of novelty appears in its second half. Following a brief examination of the ambivalence of critical scholars toward resistance in international law and an equally pithy foray into legal pluralism, I propose the use of Nancy Fraser's third dimension of justice—representation—as a means of overcoming the disenfranchisement of Third World peoples that is emblematic of legal transnationalism. Rather than perpetuate the illusion of universality in international law, I suggest that a more fruitful approach would be to adopt an ethos of justice (*meaning*)—parity of participation—and then to establish rules (*machinery*) that facilitate popular and democratic engagement. This approach, I argue, would allow subjectivities to collide in a structured environment, thus facilitating what Stephen Holmes describes as authentic collective rationality and self-correction, or, as the five segments have led me to conclude, to reconfigure international lawmaking processes to enable the pursuit of both collective self-determination and individual self-actualization.[10] Stated otherwise, and perhaps idealistically yet again, reforming both norms and processes is critical if a more just international legal order is to be achieved.

## I. The Neoliberal Reversal: Argentina and the Return of Peronism

In May 2012, the Argentinian government renationalized the oil and gas company YPF (of which Spanish energy giant Repsol owned a majority of shares).[11] The decision was made because of YPF's alleged failure to maintain production levels commensurate with Argentina's economic growth, leading to a rise in oil imports and a corresponding decline in for-

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[10] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) ch 6 at 181, 200–01.

[11] See Hugh Bronstein, "Argentina nationalizes oil company YPF" *Reuters* (4 May 2012), online: <www.reuters.com>.

eign currency reserves. To address YPF's failings, Argentina reassumed a controlling interest in the oil company.

This decision, of course, runs counter to the dominant economic ideology of the last three decades—neoliberalism—and has generated much ire from free-market fundamentalists. Pierpaol Barbieri, a fellow at Harvard's Kennedy School of Government, decries the Argentinian move as an act of "economic folly" that is likely to exacerbate "falling competitiveness, rampant corruption, and [the further] collapse of productive investment."[12] Daniel Altman, of the Stern School of Business at New York University, described both the act and the Argentinian government as "self-destructive."[13] And Míriam Leitão, identified by the New York Times as "one of Brazil's most influential columnists on economic issues," echoes both Barbieri and Altman, lambasting the government in its totality—"Argentina's capacity to err seems unlimited"[14]—for its "decade" of failed policies.[15]

The vitriol, more akin to the response one would expect from disciples than from academics and pundits, seems grossly out of step with the context in which the decision is being made. Recall the Argentinian economic crisis (1998–2002) and its strong correlation with the blanket implementation of the Washington Consensus as backed by the international financial institutions. This crisis triggered a bout of national introspection, resulting in an overall reversal of neoliberal policies beginning with the decision to default on Argentina's debt and forego crippling and unsustainable dollar parity. The decade Leitão derides has been marked by considerable expansion in social spending—in real terms, a near trebling of pre-crisis levels[16]—including *inter alia* increases in social security payments, unemployment stipends, and industrial subsidies.

Deducing from their most recent pronouncements, it would not be unreasonable to presume similar condemnatory effusions from the likes of Barbieri, Altman, and Leitão in response to this catalogue of contra-neoliberal policy choices; Argentina's "capacity to err" is surely bringing its economy to the brink of collapse. Yet, upon closer examination, and

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12 Pierpaolo Barbieri, "The Tragedy of Argentina" *The Wall Street Journal* (20 April 2012), online: <online.wsj.com>.

13 Simon Romero, "In Brazil and Elsewhere, Dismay at Argentina's Nationalization Move" *The New York Times* (18 April 2012), online: <www.nytimes.com>.

14 *Ibid*.

15 Others are more charitable. NYU economist Nouriel Roubini praised the move and is urging Greece to follow suit (Nouriel Roubini, "Greece's Best Option is an Orderly Default" *The Financial Times* (28 June 2010), online: <www.ft.com>).

16 See Mark Weisbrot et al, *The Argentine Success Story and its Implications* (2011) at 1, online: The Centre for Economic Policy Research <http://www.cepr.net>.

even despite the absence of loans from financial markets or substantial foreign direct investment, the decade appears much less the disaster the pundits contend.

From 2002 to 2011, the Argentine economy grew by 94 per cent, with benefits accruing to a wide cross-section of society.[17] Moreover, virtually every social indicator, including poverty, unemployment, health, and income inequality, has exhibited significant improvement, harkening to the immense social progress made during the reign of Juan Perón. Amelioration in this final marker is most staggering and deserves singling out: in just ten years, the share of income of the wealthiest 5 per cent of earners fell from thirty-two to seventeen times the share of the remaining 95 per cent of the population, effectively dispersing purchasing power over a wider cross-section of society.[18] Mark Weisbrot credits the "miracle" to the *increase* in social spending implemented by the Argentinian state—from 10.3 per cent to 14.2 per cent of GDP[19]—a policy at odds with the demands of the international financial institutions and antithetical to the austerity packages being unravelled across Europe today to deal with the implosion of numerous continental economies. Labelling policies that distribute income more equitably and improve general well-being for the bulk of a people "economic folly" appears, in a democratic society at least, a little peculiar.

Moreover, setting aside the micro specificities of the Argentinian condition and examining the matter through a macro lens, we find a world writhing in the clutches of a global recession, owing in no small part to failed neoliberal policies such as the ones that prompted the Argentinian *volte-face* including YPF's privatization.[20] The evidence would be impressive were it not so dismal. During part of the neoliberal era (1980–2000), per capita income across the Latin American region grew by 5.7 per cent. Contrast this figure with the 91 per cent growth measured during a comparable period of the welfare era (1960–1980).[21] When we factor in the behaviour of neoliberal henchmen such as Pinochet of Chile and the generals of Argentina, or technocrats and insiders such as Lehman Brothers, Goldman Sachs, CitiGroup, and sundry financiers—both during the Ar-

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17 *Ibid* at 3.

18 *Ibid* at 8.

19 *Ibid* at 10.

20 See David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 152–156 [Harvey, *Neoliberalism*].

21 See Mark Weisbrot & Rebecca Ray, "The Scorecard on Development, 1960–2010: Closing the Gap?" (2011) United Nations Department of Economic and Social Affairs Working Paper no 106 at 7, online: <http://www.un.org/esa/desa/papers/>.

gentinian economic collapse and the subsequent global recession—Barbieri's claim of rampant corruption also rings rather queer.

It is worth noting that the partisan blowback was to be expected, for the Argentinian decision was not an isolated act of *self-destruction* on the South American continent; similar scorn was heaped on other defiant states. Indeed, while the *Financial Post* may wish to assuage investors' fears with reassuring pronouncements—"the risk of similar nationalization proposals elsewhere in the developing world is likely to be limited"[22]—the verdict seems flawed, for evidence suggests that Argentina is not the source of the contagion but rather a willing victim. In 2003, for instance, Venezuela launched a quasi-renationalization programme of its own state oil company, reasserting governmental authority over what had become an autonomously acting *Petroleos de Venezuela*.[23] Shortly thereafter, following the election of Evo Morales, Bolivia claimed sovereignty over its natural gas reserves. As per the Bolivian decree: "[I]n historical struggles, the people have conquered and paid with their blood, the right to return our natural resources and our wealth in natural gas to the hands of the nation and to be utilized to the benefit of the country."[24]

It is equally unsurprising that these contra-neoliberal and contra-*universal* developments would occur on the South American continent. Throughout its spirited history, Latin America has been a vanguard in both legal and democratic innovation. For instance, as early as the nineteenth century, Latin American nations such as Venezuela and Argentina sought to (re)shape the rules of international economic governance to account for the disparity in power that coloured the earliest manifestations of modern international relations. Luis Drago, the former Venezuelan secretary of foreign affairs, conceived a legal doctrine that would preclude states from engaging in the forcible collection of debt: "[P]ublic debt cannot give rise to armed intervention or even to the material occupation of the soil of American nations by a European power."[25] Reforming the international legal regime beyond its European origins was essential in reflecting an increasingly post-colonial world.[26] For Drago, if Latin Ameri-

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22 David Pett, "Argentina Nationalization Plans Not Contagious" *The Financial Post* (17 April 2012), online: <business.financialpost.com>.

23 See Gregory Wilpert, "The Economics, Culture, and Politics of Oil in Venezuela" *Venezeuela Analysis* (30 August 2003), online: <venezuelanalysis.com>.

24 Cited in Walter Mignolo, "Beyond Populism: Decolonizing the Economy" *Counterpunch* (9 May 2006), online: <www.counterpunch.org>.

25 Luis M Drago, "State Loans in Their Relation to International Policy" (1907) 1:3 Am J Int'l L 692 at 709.

26 See Arnulf Becker Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation" (2010) 51:2 Harv Int'l LJ 475 at 476.

can sovereignty was to be on par with that of its European counterparts, its subjectivity must be written into the framework.

Drago was member of a new cadre of what Arnulf Lorca termed "semi-peripheral jurists". This group was comprised of non-Western international lawyers who strategically internalized the European international law in circulation at the time, appropriating and rejecting elements according to national and regional interest. These jurists "pursued a distinctively non-European interpretation of the classical European law of nations, in which they re-signified and redeployed its fundamental elements ... to advocate for a change in extant rules of international law."[27] Positivism, formalism, and deductive reasoning, perspectives and tools often dismissed as reactionary, were championed by post-colonial jurists to achieve two mutually inclusive objectives: to bolster Latin American sovereignty and to counter the "argumentative plasticity" of natural law that was frequently drawn upon by Europe to rationalize intervention.[28]

Nor did it end there. Similar reformative efforts, directed toward the structuring of a genuinely universal international law, were observable in the post–World War II period. During the negotiations for a global human rights standard, Panama's Joaquin Alfaro, with the support of much of the Latin American continent, pursued a comprehensive model of human rights that acknowledged economic, cultural, and social rights relating to education, health, and labour alongside the more reputed civil and political rights favoured by Euro-American governments. Indeed, following ratification of the Universal Declaration of Human Rights, Alfaro sought the codification of a single covenant. Emerging from a colonial period in which masses of Third World peoples were dispossessed of their resources and wealth, he saw the indivisibility and interdependence of all rights as self-evident. As history affirms, the Latin American position was subordinated and two distinct covenants formalized.[29]

Fast-forward another half century, and we witness a wave "of original participatory formats such as participatory budgeting, different sorts of citizen's councils, oversight boards, participatory urban planning, neighborhood committees, and public audiences" occurring, once again, in South America.[30] Many of these initiatives are tied to national instances

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27 *Ibid* at 482–83.

28 *Ibid* at 489.

29 See Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004) at 223. The second covenant was the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 360.

30 Enrique Peruzzotti, "Broadening the Notion of Democratic Accountability: Participatory Innovation in Latin America" (2012) 44:4 Polity 625 at 636.

of constitutional reform, while others have their source in the Bolivarian Alliances of the Americas and the Union of South American Nations, two regional integration projects that, in addition to cementing trade ties across the continent, seek to disperse governing authority more widely, empowering citizens and social organizations. In contrast with the efforts of Drago, Alfaro, and others, what is most compelling about the latest initiatives is the shift away from the pursuit of genuine universalism. In each of these instances, whether at the local, national, or regional level, while pursuing regulatory harmonization, they emphasize the subjective preferences of communities, preferences to be identified through more public and deliberative formats of policy setting.[31]

As explored throughout the remainder of this article, the promotion of subjectivity and public participation in international lawmaking are leading away from privatization, neoliberalism, and, critically for my argument, universalism. Indeed, the latest efforts, whether materializing in Argentina or beyond, underscore not only a crisis unfolding among hydrocarbon investors but also a general malaise emerging within international law. In the following section, I explore this malaise—and potential *renouvellement*—through the prism of neoliberalism and its growing displacement.

## II. Embedded Neoliberalism

### *A. Ideology to Law and Back Again*

Since the late eighties, international law has experienced an existential shift. An emergent form of legal institutionalism—transnational law—has developed, largely to overcome both political and social barriers to commodity and capital mobility. Indeed, in the era of accelerated globalization, capitalist momentum is pressing world society toward the establishment of a unitary legal order, one characterized by a corpus of meta-regulatory regimes or supranational regulatory structures that, more and more, supersede national authority.[32] Combined, these regimes are shaping a transnational legal apparatus governed by seemingly autonomous legal norms.

This new legal order—whether illustrated by the agreements of the WTO or the actions of international financial institutions—has forcefully acted as a channel for the dispersal of neoliberal diktat. Through the efforts of these bodies, a trifecta of privatization, liberalization, and deregu-

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31 See *ibid* at 640.

32 See Bronwen Morgan, "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality" (2003) 12:4 Soc & Leg Stud 489 at 491.

lation was launched (unleashed) globally as an alleged panacea for recurring economic crises and persistent Third World underdevelopment. Tellingly, the variable structural causes underpinning both syndromes—whether inflationary and deflationary pressures, unfavourable terms of trade, or unfair distribution/production networks—were casually avoided. No longer were economic decisions to be situated within the wider social sphere and made according to public impetuses, identified through democratic guidance; being overly subjective, public opinion was too temperamental. Instead, a scientific economic programme was implemented to develop objective economic principles and legal mechanisms, not to mention pathways of accumulation and distribution. Striking at the heart of the postwar welfare state, neoliberalism was used to dislodge capital from its active role in the social and moral economies of state planning, allowing it to hover unrestrained—benignly—over nation-states.[33]

Both neoliberalism and global regulatory standardization are motivated by a drive for economic efficiency, a drive which aims to sideline nonconforming and idiosyncratic ways of connecting to the physical world. This framework seeks to induce particular reifications of social life—such as the renegotiation of public and private proprietary spheres—and to standardize them globally, prompting Bhupinder Chimni to describe transnational law as a groundwork for the materialization of a global state.[34] Emanating from First World minds and institutions, this framework placed emphasis on persuading Third World nations to adopt neoliberal normative priorities. The role of development banks and international financial institutions in pushing neoliberalism, largely by way of conditional financial aid—including the now-notorious structural adjustment programmes—and take-it-or-leave-it transnational legal agreements is well documented.[35] Trubek, for instance, makes the case that Third World nations consented to neoliberal reforms, competing to surrender authority over national resources in the hope of eliciting some of capital's largesse.[36] Drahos and Braithwaite, for their part, demonstrate the collusion between transnational corporations and their First World patrons in exploiting intellectual property agreements to preserve their economic ascendan-

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[33] See Harvey, *Neoliberalism*, *supra* note 20 at 11.

[34] BS Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15:1 EJIL 1 at 1 [Chimni, "International Institutions"].

[35] See David P Fidler, "A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization" (2000) 35:3 Texas Int'l LJ 387.

[36] David M Trubek "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 74 at 82.

cy, often at the expense of Third World development.[37] Of course, others such as Barbieri and Leitão seem to have simply been swayed.

Both coercion and stealth were necessary, for the objectivity of neoliberal science ran counter to the subjectivity of emancipatory aspirations. Indeed, neoliberal proposals were antithetical to a host of projects launched across the Third World during the decolonization era. Nationalization programmes, for instance, were favoured by Third World nations as an important means of redressing what Gathii terms "the legacy of colonial disempowerment."[38] At the forefront of this legacy is a garish imbalance in both liberty and living conditions between "the predominantly raw material producing economies of the capital-importing States and Western industrial economies."[39] Part of this imbalance can be traced to foreign ownership of key industries in the Third World, both historically and presently, and the inevitable repatriation of profits that ensues. As Gathii observes, foreign ownership represents a critical element in "the political economy of extraction and exploitation of [the] wealth"[40] of Third World states and is emblematic of the "routine disregard and subordination of non-European peoples to the interests of European powers."[41]

### *B. International Law as Regulation, Oppression, and Emancipation*

Over the years, various attempts have been made to rectify these imbalances, including the New International Economic Order (NIEO), as partially elaborated in the (arguably defunct) Charter of Economic Rights and Duties of States (CERDS).[42] Central to the NIEO and the CERDS were national initiatives, including policies of nationalization of foreign-owned property and permanent sovereignty over natural resources, both of which sought to establish local interests over local resources and to counter the economy of extraction that hollowed out domestic aspira-

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37 Peter Drahos & John Braithwaite, "Hegemony Based on Knowledge: The Role of Intellectual Property" (2003) 21 Law in Context 204.

38 James Thuo Gathii, *War, Commerce, and International Law* (New York: Oxford University Press, 2010) at xxi [Gathii, *Commerce*].

39 *Ibid* at 160.

40 *Ibid* at 186.

41 *Ibid* at 44.

42 For an account of the NIEO along with other alternative approaches to economic governance, see James Thuo Gathii, "Third World Approaches to International Economic Governance" in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds, *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) 255. See also Ruth Gordon, "The Dawn of a New, New International Economic Order?" (2009) 72:4 Law & Contemp Probs 131 (explicating an updated version of the NIEO).

tions.[43] Indeed, just as it was during the decolonization period, the exercise of sovereignty over natural resources occurring across South America today is intended to promote what Argentine president Cristina Fernandez de Kirchner describes as "achieving energy self-sufficiency ... to sustain growth, employment and economic activity,"[44] or, simply put, collective emancipation.

It would not be inaccurate to suggest that, in addition to dodging transcontinental proprietary disparities, neoliberal proponents appear to have evaded both other persistent inequalities—political, economic, and technical—that continued to characterize First to Third World relations and the impact that a liberalizing model was likely to produce for dominated states. Neoliberalism is a model of economic relations designed to encourage greater involvement of private actors in most facets of societal governance.[45] By shifting public goods to the private sector, corporations are delegated the responsibility of ensuring the availability, though not the accessibility, of many of the elements upon which people depend. Meta-regulatory regimes codified neoliberal edicts and circulated them transnationally, encouraging developing states to utilize economic efficiency (and all that this entails, including further reliance on First World service providers)[46] as a foundational governing precept.

This point cannot be stressed enough. While decolonization struggles were successful in achieving political independence, they did not redress the wealth and power inequalities established during the colonial era between Western societies and most others: "This is the 'everyday' imperialism, the quotidian and mundane imperialism, that is accepted as somehow normal."[47] Nor does this appear to be happenstance. As Mattei and Nader convincingly demonstrate, the First World's engagement of the Third World has historically been characterised by a very successful stratagem of "brutal and violent extraction,"[48] resulting in the grossly inequitable distribution of wealth prevalent today. Aware of its history of deprivation and economic vulnerability, the Third World sought to pro-

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43 See Anghie, "Evolution", *supra* note 4 at 748.

44 "Argentine president signs YPF nationalization into law" *PressTV* (5 May 2012), online: <www.presstv.ir>.

45 See Harvey, *Neoliberalism*, *supra* note 20 at 65.

46 See Ugo Mattei & Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, Mass: Blackwell Publishing, 2008) ("[e]fficiency is the powerful factor granting legitimacy to universal constructs such as intellectual property and to their expansion beyond reasonable limits" at 98).

47 Anghie, "Evolution", *supra* note 4 at 750.

48 Mattei & Nader, *supra* note 46 at 22.

vide the "wretched of the earth"[49] collective access to services and opportunity for advancement, ambitious aims that formed what Vijay Prashad dubbed the Third World project.[50] The form of allocation—universal accessibility—was inspired by the modes of valuation—justice and well-being.

In an imbalanced world, where First World corporations dominate the global economy, the structural swing to neoliberalism was hardly benign. The liberalization of weaker developing markets further exposed the resources and assets Third World peoples were eager to protect.[51] By reducing these resources to the status of basic commodities, by transforming them into instruments of private exploitation and profit, they were made attractive (and available) for acquisition by First World corporations and interests:

> For the controllers of the national public realms and their apologists, an international public realm without law or justice seemed to be a state of nature of the most exciting kind, in which the survival of the fittest is decided by an intoxicating mixture of urbane diplomacy and mass murder.[52]

Instead of the right to preserve natural resources and nationalize foreign-owned property, transnational law compelled Third World states to grant the usual suspects the right to appropriate domestic resources, domestic industry, and domestic wealth.

### *C. Neoliberalism and the Recolonization of the Third World*

As Jane Kelsey remarks, when experienced alongside the legacy of colonial disempowerment, "rules for the distribution of wealth and power in favour of historically dominant Western states have become embedded through international treaties."[53] Gathii makes a similar point, arguing that neoliberalism and its attendant institutions "repackaged the inequalities between capital-exporting and capital-importing States ... perpetuat[ing] the subordinate position of these formerly colonial countries in a manner that uncannily reflects the imbalances that characterized colonial rule."[54] Tying it to ideological elements of the international legal regime,

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49 The term is Frantz Fanon's: *The Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press, 2004).

50 See Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York: New Press, 2007) at xv–xvi.

51 See e.g. *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII) UNGAOR, 17th Sess, Supp No 17, UN Doc A/5217 (1962) 15.

52 Philip Allott, "The Concept of International Law" (1999) 10 EJIL 31 at 35.

53 Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (New York: Routledge-Cavendish, 2008) at 17.

54 Gathii, *Commerce*, *supra* note 38 at 189.

Bardo Fassbender asserts that equality rooted in formalism amounted to a de facto endorsement of the inequality upon which power disparities were established.[55] In this way, neoliberalism, transnational law, or, in effect, aspirations to universal objectivity were used to justify an indirect grab of the tools of emancipation of Third World states, resulting in the hollowing out of their recently acquired sovereignty and precipitating what Chimni describes as the "recolonisation" of the Third World.[56]

Nor did it end there. Revealing its competing normativity, neoliberalism specifically "targeted progressive social and political settings," attributing industrial inefficiencies and economic underdevelopment to the prevalence of universal welfare programmes in Third World states.[57] Market logic demands that "all resources, knowledge, land, and labor, wherever located, must be available for whoever is willing to pay for them."[58] This perspective is loosely rationalized via utilitarianism—market exchanges efficiently allocate goods to those who value them most—and libertarianism—laws that impose social obligations (e.g., taxes that fund welfarism) infringe upon individual liberty.[59]

Whether valid or fallacious, a critique of these theories falls outside the scope of this article; however, what remains relevant is the inequality that marketization produces. Michael Sandel argues that by commodifying public services, neoliberalism made money matter more: "Where all good things are bought and sold, having money makes all the difference in the world."[60] Taking Sandel's critique to its logical conclusion, an impact of the commodification of everything was the inevitable widening of inequality gaps as the (in)ability to pay for basic necessities came to dictate the very access to services and opportunity for advancement the Third World project aimed to equalize.[61] Gaps between the First and Third

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55 Bardo Fassbender, "Sovereignty and Constitutionalism in International Law" in Neil Walker, ed, *Sovereignty in Transition* (Portland, Or: Hart, 2003) 115 at 128. For its part, private international law allows the reconciliation of state sovereignty with extra-territorial application, delinking economic liberalism from democratic doctrine: see A Claire Cutler, "Artifice, Ideology and Paradox: The Public/Private Distinction in International Law" (1997) 4:2 Review of International Political Economy 261 at 263–64.

56 BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3 at 3.

57 Mattei & Nader, *supra* note 46 at 43.

58 *Ibid* at 50.

59 See Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012) at 29.

60 *Ibid* at 8.

61 Evidence of the proliferation of inequality during the neoliberal era, both in the Third World and globally, is well documented. Robert Wade provides conclusive proof of the profligacy of an upward trickle resulting in the upper 1 per cent of earners comman-

World in terms of economic (in)equality, technological innovation, and political influence have accelerated during the past two decades, suggesting that global integration is not synonymous with global prosperity.[62] While something should be said of emergent middle classes in a handful of target Third World markets—India, China, South Africa, and Brazil, to name the *causes célèbres* of the neoliberal era—on the whole, indices of human well-being point to the deterioration rather than amelioration of actual conditions.[63] The professed universal objectivity of neoliberalism may be in tatters, but its universal aggravation of global inequality appears as steady as ever.

## III. A Crisis of Modernity

### *A. Cultural Difference and the Celebration of Objectivity*

The perseverance (and worsening) of an inequitably stratified world, especially when considered alongside the multiplication of global wealth over the last three decades, points to what Ashley and Walker characterize as a "crisis of modernity".[64] In international law, this crisis is manifesting through the increasing schizophrenia of its ambitions. On the one hand, European liberalism supports the ideal of self-determination; yet, on the other, European outer-state aspirations demand ideological adherence: aspirational universality borne of European subjectivity.[65] As argued above, the structural shift from international negotiations to global gov-

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deering some 24 per cent of income (see Alex Izurieta, "Reflections: Robert Wade on the Global Financial Crisis" (2009) 40:6 Development and Change 1153 at 1164).

62 See Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns The Knowledge Economy?* (London: Earthscan, 2002) at 111–12 [Drahos & Braithwaite, *Information Feudalism*].

63 To cite just one example, the 2004 report of the Food and Agriculture Organization of the United Nations tells us that "hunger has increased to 852 million gravely undernourished children, women and men, compared to 842 million last year, despite already warning of a 'setback in the war against hunger' in 2003" (*Economic, Social and Cultural Rights: The Right to Food: Report of the Special Rapporteur on the Right to Food*, UNESCOR, 61st Sess, UN Doc E/CN.4/2005/47 (2005) at page 2 [mimeo], cited in Richard Goulet, "'Food Sovereignty': A Step Forward in the Realisation of the Right to Food" (2009) 1 Law, Social Justice & Global Development Journal 1 at 2).

64 Richard Ashley & RBJ Walker, "Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies" in Steven C Roach, ed, *Critical Theory and International Relations* (New York: Routledge, 2008) 343 at 344.

65 Edward Said makes a similar point and far more eloquently than I have: "This is in effect what Americans have felt about their southern neighbors: that independence is to be wished for them so long as it is the kind of independence *we* approve of. Anything else is unacceptable and, worse, unthinkable" (*Culture and Imperialism*, *supra* note 2 at xviii).

ernance, from controlled international law to compelled transnational law, has not only failed to redress the imbalances but actually appears to be aggravating them.

According to Antony Anghie, the universal-particular dichotomy dates from the genesis of the international legal framework.[66] Francisco de Vitoria, the Catholic jurist who first conceptualized *jus gentium*, was smitten with an analogous narrative of *cultural difference*. While the Indians may have possessed reason, thus binding them to a universal system of natural law–based norms, their actual cultural practices were both alien and anachronistic to the objective framework. As a result, colonial powers regarded themselves as benevolent in their (violent) enforcement of these norms that, conveniently, happened to match European subjectivity, allowing them to promote the rule of law and redress Indian deviance with the same stone.[67] The crux of Anghie's argument is that the origins of international law are located in the intellectual and moral traditions of Western Europe. Accordingly, ostensibly neutral legal standards appear more as subjective cultural preferences that, via the objectivity of international law, promote the erosion of non-conforming practices.

Being informed by the same professed universal objectivity, our contemporary international legal regime is equally driven by an ethos of standardization, pursuing the integration of all cultures within a single logic. Mario Prost provides a simple yet accurate sketch of universality: "[T]o say that international law is universal means that it has become accepted by, valid for and binding on all states."[68] But how do we define acceptance? The cultural difference that concerned de Vitoria harkens loudly to the cultural difference that informs current transnationalization efforts, "a difference which is rendered primarily in terms of the different social practices and customs of each society."[69] Bronwen Morgan notes, in this instance, that universal objectivity is embodied in the single overriding logic (and culture) of the market. Specifically, market logic necessitates "the production of judicial regimes and legal systems that secure credible and predictable property rights."[70] Morgan bemoans not just the embedding of "a general mechanism of [global] governance" in ideologically unitary international institutions, but also the cascading effect this has on social life (lives) across jurisdictions: meta-regulation "functions as a

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66 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 22 [Anghie, *Imperialism*].

67 *Ibid* at 24.

68 Mario Prost, *The Concept of Unity in Public International Law* (Oxford: Hart, 2012) at 35.

69 Anghie, *Imperialism*, *supra* note 66 at 29.

70 Morgan, *supra* note 32 at 493.

site of conflict over the ethical limits of capitalism," limits which neoliberalism has sought to eradicate by facilitating the transfer of market norms into traditionally non-market spheres of society.[71]

The impetus behind this model, Stephen Gill observes, is the new global economy where "[t]he mobile investor [stands as] the sovereign political subject."[72] William Robinson develops this same claim, arguing that transnational capitalism has unveiled new circuits of accumulation, primarily through the privatization of public assets: "public spheres managed by states and private spheres linked to community and family" were "broken up, commodified, and transferred to capital."[73] The globalization of these economic activities was facilitated by late twentieth century technological developments—e.g., transportation, automation, computer-aided design, and communication—which freed capitalism from its nation-state moorings and enabled its transnational restructuring.[74] New technologies in global telecommunications, for instance, abrogated many of the traditional constraints that mandated local administration, easing ex-situ management in the process.[75] While commodity production and financial exchanges continue to buttress national economies, Robinson argues that the global integration of the productive process and the transnationalization of these exchanges have "redefine[d] the relation between production and territoriality, between nation-states, economic institutions and social structures."[76]

Just as de Vitoria's aim was not merely to manage exchanges between sovereign states but to order relations between "societies belonging to ... different cultural systems,"[77] so too does the present global framework seek to stamp out non-conforming practices and align them with a redefined capitalist model. Again, like de Vitoria, the transgression is linked to a clash between a deviant culture and allegedly universal (market) norms. Partial nationalization, we are told, amounts to economic folly while increases in social spending are positively suicidal. Many of these

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71 *Ibid* at 490–91.

72 Stephen Gill, "New Constitutionalism, Democratisation and Global Political Economy" (1998) 10:1 Pacifica Review 23 at 23.

73 William I Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Baltimore: John Hopkins University Press, 2004) at 7.

74 *Ibid* at 5.

75 See Robert Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Alfred A Knopf, 2007); Rawi Abdelal & Adam Segal, "Has Globalization Passed Its Peak?" (2007) 86:1 Foreign Affairs 103.

76 William I Robinson & Jerry Harris, "Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class" (2000) 64:1 Science & Society 11 at 16–17.

77 Anghie, *Imperialism*, *supra* note 66 at 28.

universalizing efforts, both Robinson and Chimni conclude, are being carried out by a transnational propertied bourgeoisie or a transnational capitalist class: the "owners of the major productive resources of the world."[78] This global moneyed elite is comprised of proprietors such as transnational corporations, international institutions such as the International Monetary Fund, and industrial trade associations such as the Intellectual Property Alliance, all of which exhibit little in the way of national allegiance. Each faction is struggling toward a deeper restructuring of production and exchange along transnational lines and the universalization of suitable conditions for (their) private gain.

### *B. Meta-Regulation and the Diffusion of Norms*

To this end, a key strategy of the transnational capitalist class is the enactment of supportive regulatory measures intended to enhance the mobility of both capital and commodities. Foremost, this class exploits its economic power to influence the position of nation states on global regulation "such that a particular form of economic rationality becomes part of the taken-for-granted ways of policymaking."[79] I note, however, that meta-regulatory structures are as much about regulating regulation as they are about regulating non-regulation—that is, defining areas where regulation is permissible or, to use familiar language, efficient, as well as areas where it is not. We thus see transnational law placing a series of constraints upon states—including the *GATS* and *TRIPS*—ensuring consistency across borders and cultures and thus lubricating the global flow of capital.[80] Through universalized market logic, even notions of sovereignty and self-determination are being reconceptualized—"disaggregated"[81]—to accommodate transnationally integrated processes of capital accumulation and global governance. For instance, Europe has taken it upon itself to augment the criteria by which statehood is recognized, demanding that *new* states fashion modes of governance—multi-party democracy—and modes of social regulation—individual rights—

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78 Robinson & Harris, *supra* note 76 at 22; Chimni, "International Institutions", *supra* note 34 at 4.

79 Morgan, *supra* note 32 at 490.

80 See Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32:2 NYUJ Int'l L & Pol 243. *GATS* refers to the *General Agreement on Trade in Services* 1869 UNTS 300, being Annex 1B to *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 3 ILM 1144 (entered into force 1 January 1995) [*GATS*], while *TRIPS* refers to the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, 15 April 1994, 1867 UNTS 154, 3 ILM 1197 (entered into force 1 January 1995).

81 Chimni, "International Institutions", *supra* note 34 at 17.

before assent is bequeathed.[82] While this may seem laudable at first, the prominence in these criteria of individual and foreign proprietary rights gives pause for thought.

For the Third World, there is another element of concern with this emergent form of global lawmaking. Having struggled to achieve (formal) sovereignty just a few decades ago, Third World states are today compelled to cede their recently acquired authority over domestic policymaking. Bruno Simma makes a similar point, albeit in cheerier tones:

> [T]he significance of international law has grown; it regulates more and more fields which before were left solely to foreign policy or domestic jurisdiction, like the protection of the individual, environmental concerns, or international trade. International law is dynamic, and globalization calls for global legal solutions.[83]

Power is shifting to an ever-expanding network of popularly unrepresentative and politically unaccountable international institutions operating at the behest of transnational capital, itself located principally outside the Third World. With the erosion of sovereignty comes a weakening of policy autonomy and national self-determination. Additionally, an *uploading* of authority promotes a concentration of control that is antithetical to the democratic—and devolutionary—aspirations of freshly decolonized states and peoples.

From this angle, and to paraphrase Clifford Geertz once again, international law appears more as "movement" than machinery. Indeed, both concept and practice shift from a fixed structure to a malleable process open to contestation: "[I]nternational law [is a] process [for] articulating political preferences into legal claims."[84] Susan Sell and Aseem Prakash provide a biting example of the interplay between special interests and international law, describing in detail the process by which a network of intellectual property–dependent corporations successfully championed a "patents = free trade + investment = economic growth" formula that eventually "became the normative building block of the TRIPS agreement."[85] This network sought principally to induce Third World states to surrender jurisdiction over intellectual property matters to a transnational forum

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[82] See Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post–Cold War Practice* (Oxford: Hart, 2013).

[83] Bruno Simma, "Universality of International Law from the Perspective of a Practitioner" (2009) 20:2 EJIL 265 at 289.

[84] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration" (2004) 17:2 Cambridge Review of International Affairs 197 at 198 [Koskenniemi, "Hegemony"].

[85] Susan K Sell & Aseem Prakash, "Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights" (2004) 48:1 International Studies Quarterly 143 at 145.

operated by their First World counterparts.[86] While it was hardly as influential, Sell and Prakash also describe a countervailing struggle by a social justice–minded network, motivated by a desire for greater equity in Third World access to much-needed pharmaceuticals.[87]

Short of the final (and futile) initiative, little of this is in the interest of the Third World. Not only do the bulk of intellectual property rights rest with corporate owners in the U.S., Europe, and Japan, but TRIPS's primary concern is the protection of intellectual property rights and not the dissemination of information.[88] This modus operandi stands in stark contrast to domestic legislation that seeks to "balance the economic interests of owners of intellectual property against the public interest in having access to new knowledge."[89] Commensurate with the transnationalization of intellectual property protections has been a reduction in technology transfer from North to South.[90] The legislative privileging of First World corporate profit margins over Third World access to technologies and medicines appears to be undermining prospects for improved quality of life and economic development.

Notwithstanding the negative implications for the Third World, what can be extrapolated from these efforts is the depth to which notions of contestation can be useful in explaining transnational lawmaking processes. What was once the exclusive purview of states now involves many institutions and interest-based consortiums, manoeuvring for global lawmaking authority. A platitude—international law "cannot be detached from the conditions of political contestation in which [it is] made"[91]—is worth repeating, for transnational law continues to expand in a world characterized by wide inequities in power, wealth, and technology. While political and economic development are highly particular exercises, heavily dependent on local cultural and normative preferences as well as available natural resources, the universalizing mission of international institutions and transnational legal projects dismisses, if not denies, subjectivity

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86 *Ibid* at 154.

87 *Ibid* at 160.

88 Drahos argues that "[u]nderneath the development ideology of intellectual property there lies an agenda of underdevelopment. It is all about protecting the knowledge and skills of the leaders of the pack" (Drahos & Braithwaite, *Information Feudalism*, *supra* note 62 at 12).

89 Ruth L Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29:4 Vand J Transnat'l L 735 at 742.

90 See Sangeeta Shashikant & Martin Khor, *Intellectual Property and Technology Transfer Issues in the Context of Climate Change* (Penang: Third World Network, 2010) at 29–30.

91 Koskenniemi, "Hegemony", *supra* note 84 at 198.

by imposing global compliance with transnational lawmaking processes, consistently at the behest of interests far removed from the subject states.

As highlighted above, the institutions' standardizing efforts are compelled by a market-informed mandate for the pursuit of economic efficiency. The pursuit of efficiency, a universal norm of progress par excellence, acts to sideline non-conforming ways of connecting to the physical world, primarily by ascribing to them the presumptively pejorative character of *inefficiency*. So authoritative has market logic become, Habermas argues, that even the very legitimacy of a state can be drawn from it:

> [T]he property order has shed its political form and been converted into a relation of production that, it seems, can legitimate itself. The institution of the market can be founded on the justice inherent in the exchange of equivalents; and, for this reason, the bourgeois constitutional state finds its justification in the legitimate relations of production.[92]

Stated otherwise, while sovereignty originally presumed the pursuit of a self-determined path, the modern state draws legitimacy from its embrace of the liberal (now neoliberal) model. When considered alongside the embedding of neoliberalism in transnational law, self-determination is being made into a redundant if not anachronistic exercise.

### *C. A Pattern of Continuity: Transforming the Third World*

Witness here the contradictory ambitions of international law and the crisis of modernity in full spotlight. As touched on earlier, during the first wave of colonialism, sixteenth century Europe drew upon de Vitoria and his musings on the universal norms of *jus gentium* to justify its commercial and acquisitive ambitions. In the nineteenth century, we observe a recycling of Vitorian logic by the now reimagined, if not reconstituted, bourgeois European constitutional state.[93] For example, under the direction of

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[92] Jürgen Habermas, *Legitimation Crisis*, translated by Thomas McCarthy (Boston: Beacon Press, 1975) at 22. Habermas believes that constitutional democracies are unable to cope with values conflicts. Legitimation is secured by way of normative neutralization through apparently fair, formally rational procedures, however Habermas derides their sidelining of the internal contradictions of capitalism:

> Genuine participation of citizens in the processes of political will-formation, … that is, substantive democracy, would bring to consciousness the contradiction between administratively socialized production and the continued private appropriation and use of surplus value. In order to keep this contradiction from being thematized, then the administrative system must be sufficiently independent of legitimating will-formation (*ibid* at 36).

[93] Emblematic of the xenophobia of the period, the following statement by Cambridge professor of international law John Westlake reveals how international law was essential in furthering the colonial project:

Leopold of Belgium, and with the blessings of his American, German, and British counterparts, the African region now known as the Congo was amalgamated—at least geographically—into a single state to promote "freedom of commerce in the Congo."[94] The pursuit of *legitimate* relations of production appeared to necessitate the stamping out of the diversity of native communities, their modes of interaction, and their normative aspirations in order to make room for the universal objectivity of the colonizing mind and coffer.

A century later, this time in Iraq, we see yet again the imposition of a self-serving economic and regulatory model by a Euro-American alliance, ostensibly to promote a universally accepted rule of law. Of course, with sundry pretexts for the invasion of Iraq having melted away, what remains is a society refashioned along a free-market fundamentalist's wish list, including complete foreign ownership of domestic companies, a regressive flat tax model, and a policy of privatization of key industries, all of which received consent and support from a consortium of international financial institutions. Again, the objective logic of the market was used to justify the transformative programme, a programme which had the predictable effect of transferring Iraqi assets to foreign transnationals and transforming "the Iraqi economy into something of an idyllic bastion of the free markets."[95]

The landscape of transnational law has been heavily influenced by the seemingly unlimited success of neoliberalism. The rise of meta-regulatory norms—and the concomitant displacement (sometimes destruction) of national imperatives—has accrued legitimacy via national and transnational channels, while receiving exposure through a transnational capitalist class that favours and is favoured by their application. Meta-regulation supplants competing approaches to regulatory policymaking and, in so doing, forces notions of social welfare and well-being into a market mould that presses human actualization into the image of "implicitly capitalist

> When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it (cited in Anghie, "Evolution", *supra* note 4 at 745 [footnote omitted]).

94 Gathii, *Commerce*, *supra* note 38 at 205.

95 *Ibid* at 39.

social powers, social positions, and identities."[96] When meta-norms are used as baselines of universal objectivity, the social context they inhabit, the political content they entail, and the material outcomes they produce become largely superfluous.

Time and time again, European subjectivity—specifically, wants of commercial expansion and territorial acquisition—has been disseminated and pursued through the international legal order of the period. Beginning with Columbus' voyage—"there I found very many islands filled with people innumerable, and of them all I have taken possession for their highnesses"[97]—and carrying forward through the centuries, the legitimacy of European commercial pursuits has stood almost unquestioned. In what Gathii describes as a pattern of continuity,[98] allusions to objective universal norms have been used to legitimize the wholesale transformation of non-European nations, beginning with the spiriting away of native labour and resources.[99]

## IV. International Law: A Case for Universal Subjectivity?

### *A. The Objectivity of Third World Dispossession*

What explains the prevalence of assumptions of universality in the theory and rhetoric surrounding international law? The international legal regime can hardly lay claim to a democratic impulse; in fact, the exact opposite holds true.[100] International legal relations and regulations during and after colonial conquest have been heavily influenced by coercive realities, with international law long possessing a hegemonic texture.[101] As defined by Gramsci, hegemony constitutes organized consent to the exercise of class power in service of capital. In practice, hegemony denotes the mixture of mechanisms, institutions, and ideology used to elicit consent to the ascendancy of a powerful elite, a group that manipulates a multiplicity of social elements for personal gain.

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96 Mark Rupert, "Reading Gramsci in an Era of Globalising Capitalism" (2005) 8:4 Critical Review of International Social and Political Philosophy 483 at 495; see also Morgan, *supra* note 32 at 509.

97 Christopher Columbus, "First Voyage: Letter of Columbus" in *Select Documents Illustrating the Four Voyages of Columbus*, ed and translated by Cecil Jane (Farnham, UK: Hakluyt, Ashgate, 2010) vol 1 at 2.

98 Gathii, *Commerce*, *supra* note 38 at 142.

99 See Anghie, "Evolution", *supra* note 4 at 751.

100 See al Attar & Thompson, *supra* note 9 at 69.

101 See Gathii, *Commerce*, *supra* note 38 at 188.

Varied methods are employed to stimulate popular acquiescence to an otherwise unfavourable social arrangement including, Gramsci asserted, law.[102] By outlining the boundaries between the permissible and the prohibited, law sketches the contours of acceptable behaviour and educates populaces in the virtues of compliance.[103] Over time, law comes to represent not just a code of conduct by which individuals abide but a normatively constitutive instrument that informs collective behaviour: "Law has an anchoring effect on normatively acceptable behaviour; it symbolizes moral and normative commitments; it expresses values that become assumed; and it evokes the norm of law-obeying for its own sake."[104] Today, much of this appears to be happening on a transnational scale. Through transnational law and global legal institutions, the transnational capitalist class is creating new circuits of accumulation while concurrently facilitating the communication of (neoliberal) normative preferences—now deployed as objective legal commitments—transnationally.

Like Gramsci, Martti Koskenniemi regards this struggle as one of hegemonic contestation. The term is apropos, for it underscores the manner in which transnational lawmaking continues to operate as a technique for the projection of parochial preferences and their consolidation into justiciable legal claims: "To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*."[105] Stated in this way, we come to see that the articulation of global norms and principles is often little more than the expression of special interests, amplified through a bullhorn and superimposed on the world as a universal good. Perhaps the most dangerous aspect of hegemony, then, is the ideological certainty it conveys, neutralizing human imagination and creativity.

Of course, not all agree with this claim, but some do not appear to disagree either. Seemingly wanting it both ways, Simma concurs with Koskenniemi's assessment—"Any international institution will necessarily be biased in its analysis of the dispute"—but quickly moves to qualify his endorsement: "[the hegemonic] struggle has hitherto been one among friends. It is being led with a sense of responsibility by all concerned. It has not stood in the way of mutual respect, coordination, and cooperation

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[102] Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, ed and translated by Quintin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971) at 208, 246.

[103] See Mark A Edwards, "Law and the Parameters of Acceptable Deviance" (2006) 97:1 J Crim L & Criminology 49 at 55.

[104] *Ibid* [footnotes omitted].

[105] Koskenniemi, "Hegemony", *supra* note 84 at 199.

where necessary."[106] Is it possible to describe, as Simma does, protracted hegemonic machinations as a friendly, almost jovial affair when even a cursory examination of the historical record uncovers convincing evidence of the ethno-chauvinistic outlook taken by First World states regarding the practice of international law? Double-standards, tiered treatment, contradictory and hypocritical obligations are common within the regime, all of which are dressed up as objective universality yet all of which seem to consistently contribute to preserving the economic ascendancy of the usual suspects. As Gathii notes, "[A]lthough territorial conquest in the nineteenth century facilitated the extraction of mineral and other resources from poor countries, in the twenty-first century international legal regimes ensure their continued nonviolent access."[107] Modern transnational law is no exception, routinely prescribing reformative programmes that efface localized paths of lawmaking and cultural expression in favour of European partialities, privileges, and interests. Again, Simma appears to want to have his cake and eat it too. While he specifically acknowledges the bias in the actions of transnational institutions (this time the judicial wing)—"one could not be blamed for indeed regarding the Hague Court as a stubborn defender of certain '*anciens regimes*' in international law"—he again moves to qualify and essentially withdraw the admission: "[Yet] no master plan of *divide et impera* lies behind [these] development[s]."[108]

Simma makes this assertion *almost* categorically. I say almost, for I must enquire whether he might also be acting slightly disingenuously. While Simma, formerly a judge on the International Court of Justice, is abundantly familiar with legal argumentation and the importance of evidence in support of allegations, he offers none to buttress the friendly relations, mutual respect, or absence of any "sinister motives" to which he alludes regarding hegemony in international law.[109] The lack of either reasoning or analysis is made even more conspicuous when contrasted with other facets of his scholarship—specifically the article from which these quotes are drawn—which otherwise appears diligently and meticulously ordered. Perhaps, though, Simma is less guilty of sloppy scholarship than he is of the same ethno-chauvinism I critique throughout this essay.

To many Third World legal scholars, and Third World peoples for that matter, the two-tiered nature of the international legal regime is as self-evident as mutual respect is to Simma. Whether in his examination of

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106 Simma, *supra* note 83 at 290. I note, however, that Simma earlier refutes the suggestion that universalism necessarily presumes hegemonic aspirations (*ibid* at 268).

107 Gathii, *Commerce*, *supra* note 38 at 145.

108 Simma, *supra* note 83 at 289.

109 *Ibid* at 270.

Francisco de Vitoria, Lord Coke, Justice Marshall, former American president George W. Bush, or former British prime minister Tony Blair, Gathii provides striking evidence of the "genealogical similarity" between their respective pronouncements on international law.[110] No matter the context or the impact, each of them ultimately rationalizes "European conquest and acquisition of non-European territory and resources" under the consistent guise (though inconsistent application) of universal values.[111] The alleged primitiveness—sometimes darkness—of non-Europeans supplies the troublesome foundation for their moral rehabilitation, including through the use of force.[112] Highly racialized and racist arguments, Gathii remarks, effectively sanction "the disregard not only of private property rights, but also of the lives and dignity of [Third World] people,"[113] almost always with the blessing of a universally objective international legal order. As Mattei and Nader have observed, to the extent they were recognized at all, Third World legal traditions and normative preferences—or Third World subjectivities—have been "downgraded to 'pre-modern,' rigid and incapable of autonomous evolution."[114] To resolve their inherent backwardness, substitution with universalized and universalizing First World constructs was necessary. That none of this sways Simma—"the universality of international law in all its variations is in relatively good shape"[115]—says more about the ethno-chauvinism of certain European legal thinkers than any argument I could hope to make.

Ultimately, the same ethno-chauvinism evident in Simma's casual dismissal of competing perceptions of international law gave rise to the formula upon which today's transnational law has been fashioned: development = Western legal consciousness + neoliberalism = freedom. While there have always been doubts as to the formula's viability, the failure of a key constant throws the whole into disarray. Stated otherwise, the collapse of the *universal* model raises questions, on the one hand, about the professed superiority of First World legal thinking and, on the other, about the presumed value of universal pursuits. Seen from yet another angle, the crisis appears to create opportunity for the introduction of reform along pluralistic lines, a matter that is explored in the following section.

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110 Gathii, *Commerce*, *supra* note 38 at 33–34.

111 *Ibid* at 31, 142.

112 *Ibid* at 35–36.

113 *Ibid* at xx.

114 Mattei & Nader, *supra* note 46 at 20.

115 Simma, *supra* note 83 at 297.

### *B. Theorizing Global Legal Pluralism*

Kenyan revolutionary Ngũgĩ wa Thiong'o has described in caustic detail the impact the internalization of colonial conceptions has had on colonized societies: "The effect of a cultural bomb is to annihilate a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves."[116] Indeed, while coercion and stealth may have been necessary to the spread of neoliberal policies, much can also be said about ideological internalization among Third World peoples. Paolo Freire described identification by the colonized with colonial perceptions as the phenomenon of "adhesion": "the one pole aspires not to liberation, but to identification with its opposite pole."[117] Writing during the heyday of decolonization struggles, Freire was worried about the colonized peoples' internalization of the colonial mentality: a self-immolating worldview that denied the value of non-conforming cultures and identities. Evidence of this masochism is rife, including many instances of Third World elites pursuing stronger ties with their former oppressors post-independence or gleefully assenting to universal prescriptions originating within European minds. Finally, as David Sallach observes, "[t]he most effective aspect of hegemony is found in the suppression of alternative views through the establishment of parameters which define what is legitimate, reasonable, sane, practical, good, true, and beautiful."[118] Hegemony, in short, consolidates cultural denial and, eventually, erasure.

To Ngũgĩ, Freire, and Sallach, resistance is expected to take many forms, a claim convincingly corroborated by their respective scholarship. Sallach directs his efforts toward challenging gospel-like assertions—recall Barbieri, Altman, and Leitão—articulated by the centres of power and, in the process, countering the devaluation of alternative views. Freire, for his part, sought to establish an emancipatory pedagogical philosophy that could liberate oppressed and oppressor alike from the dehumanizing structures developed during the colonial era. And Ngũgĩ, despite being an accomplished scholar of English literature, is committed to producing literary works in his native Gikuyu to promote non-imperial languages and thus non-imperial cultures (relevantly, he bade farewell to the

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[116] Ngũgĩ wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (London: James Currey, 1986) at 3.

[117] Paulo Freire, *Pedagogy of the Oppressed,* 30th anniversary ed, translated by Myra Bergman Ramos (New York: Continuum, 2005) at 45–46.

[118] David L Sallach, "Class Domination and Ideological Hegemony" (1974) 15:1 Sociological Quarterly 38 at 41.

English language in a text entitled *Decolonising the Mind*).[119] Each instance of resistance seeks to facilitate the manifestation of an authentic experience or, to use the language appropriate to this article, to value subjectivity. The impetus behind these varied instances of resistance is the creation of political space for the pursuit of new forms of social self-determination: what Mark Rupert poetically describes as the "re-opening of political horizons effectively foreclosed by capitalist social relations and their associated self-understandings."[120] In short, resistance aims to substitute professed universal objectivity with actual organic subjectivity.

From an international legal vantage point, however, it remains unclear how organic subjectivity—or simply resistance—might materialize. As Ruth Buchanan explains, a strategy for manifesting counter-hegemony or resistance in international law has long perplexed jurists. Many Third World legal scholars describe international law as an oppressive tool that aids in the preservation "of a deeply unjust global order."[121] Even Simma recognizes, if only indirectly, the nefarious origins and practices of international law.[122] Sadly, their support for programs of decolonization, self-determination, and collective well-being is entangled with their commitment to high-sounding *universal* ideals and to a global regulatory regime that perpetuates "the very hierarchies and exclusions that they ostensibly stand against."[123] In this way, the promotion of self-determination is articulated, not without irony, through support for universal and objective norms. This contradiction, Buchanan asserts, helps explain the ambivalence of scholars toward the role of international law in transformative movements and their inability to "envision the next step."[124]

To Roderick Macdonald, Paul Schiff Berman, and Brian Tamanaha, the next step is a type of global legal pluralism.[125] The ideal upon which global legal pluralism rests is human diversity: the world is made up of a vast array of diverse cultures, all of which possess their own methods of expression, forms of knowledge, and normative priorities, though only

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119 For a particularly impassioned look at the impact of colonization on language and culture, see Jules Koostachin, "Remembering Inninimowin: The Language of Human Beings" (2012) 27:1 CJLS 75.

120 Rupert, *supra* note 96 at 492.

121 Ruth Buchanan, "Writing Resistance into International Law" (2008) 10:4 International Community Law Review 445 at 445. Of course, this view is not shared by mainstream international legal scholars who regard international law as a "decidedly modernist enterprise" (*ibid*).

122 Simma, *supra* note 83 at 289.

123 Buchanan, *supra* note 121 at 446.

124 *Ibid* at 454.

125 See Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375.

some are able to impose their norms through (potentially coercive) legal mechanisms.[126] Regardless of this codified hierarchy—both transnationally (between First World states) and domestically (within the nation-state)—Berman hastens to deny the exclusive legitimacy of the nation-state in international legal discourse, quoting with approval Robert Cover's statement that "*all* collective behaviour entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word 'law.'" [127] Berman stresses that regardless of whether these knowledge-bases ever acquire the force of law, they invariably impact actual practices and everyday facets of life.[128] Ultimately, to both Cover and Berman, subjectivity provides the scaffolding upon which regulatory arrangements are fashioned.

Macdonald makes a similar point albeit with a geographic or, more to the point, *non*-geographic twist. Declaring that respect should be afforded to different and equally legitimate cultural preferences, he denies "the local hegemony of national legal orders," believing that future global legal arrangements are to be based on negotiations between "multiple, overlapping, often non-geographically defined legal systems." [129] Accordingly, when examining law from an international or transnational angle, the discussion must henceforth account for the interplay between shifting normative regimes, including local, national, regional, international, and now global scales.[130] This creates multiple overlapping jurisdictions, suffusing a wide variety of cultural constructs with the claimed legitimacy of law.[131]

Of course, contrasting normative aspirations between cultures will necessarily engender tension with dominant conceptions. With pluralism, efforts are made to minimize hierarchical relations between differing legal and social orders; the contention is that the accommodation of distinct

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[126] See Paul Schiff Berman, "Global Legal Pluralism" (2007) 80:6 S Cal L Rev 1155 at 1157.

[127] Paul Schiff Berman, "A Pluralist Approach to International Law" (2007) 32:2 Yale J Int'l L 301 at 307.

[128] *Ibid* at 308.

[129] Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15:1 Ariz J Int'l & Comp L 69 at 79.

[130] For enlightening examples of the politics of scale, see César A Rodríguez-Garavito, "Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas" in Boaventura de Sousa Santos & César A Rodríguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 64; Thomas Perreault, "State Restructuring and the Scale Politics of Rural Water Governance in Bolivia" (2005) 37:2 Environment and Planning A 263.

[131] See William W Burke-White, "International Legal Pluralism" (2004) 25:4 Mich J Int'l L 963 at 977–78.

cultural norms requires a shift in our perception from international legal equality to international legal equivalence, from objective norms to subjective priorities.[132] In this instance, jurists are being invited to engage with law as social scientists increasingly do with their sources: eschewing truth and certainty for context and circumstance, and favouring circular rather than linear investigation. The failure of this shift to materialize can be traced to the unwillingness of official actors to acknowledge human culture and subjective experiences on equivalent terms (or even on equal terms), suggesting that the post-colonial international legal regime stands as a compelling example of modernity's cultural supremacist dialectic—or crisis—at work.

Yet, notwithstanding the impressive range of scholarship in support of the pluralist position, the leap of imagination—or perhaps of faith—has yet to occur. Instead, we observe an expanding jurisdictional reach among international institutions, institutions that continue to foreclose the participation of both non-conforming and popular voices. Moreover, the process of international lawmaking is increasingly exhibiting plutocratic tendencies, monopolized as it is by powerful institutional actors, highly uniform in their ideologies and vastly acrimonious towards notions of cultural plurality.[133] As Koskenniemi asserts, these fixtures are straining the regime and must be confronted if the international legal project is to progress.

In the following section, I draw upon Nancy Fraser's reflections on the "political dimension of justice" in a globalized world to explicate how this progress might transpire, specifically by sidestepping the perilous universal-particular dichotomy. By making the structures more representative—or, in Fraser's language, by revising political boundaries to allow for participatory parity between traditionally legitimate international actors and those hitherto excluded from transnational lawmaking processes—we promote "the sort of reflexivity that is needed in a globalizing world."[134]

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[132] See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Int'l LJ 201 at 243.

[133] See Martti Koskenniemi, "What Should International Lawyers Learn From Karl Marx?" (2004) 17:2 Leiden J Int'l L 229 at 242–46.

[134] Nancy Fraser, "Reframing Justice in a Globalizing World" (2005) 36 New Left Review 69 at 88.

## V. Effective Resistance–Effective Subjectivity

### *A. Dimensions of Justice*

I begin with Philip Allott: "The *aggiornamento* of international society means purposively bringing international society into line with our best ideas and highest expectations about society in general."[135] Part of a comprehensive examination of the concept of international law, Allott's inspired (and inspiring) statement is a welcome interlude to both formalistic and critical scholarship on the topic. What makes statement and article stand out—aside from the artistry of his prose and analysis—is the clarity of vision they convey. At the heart of this vision are notions of justice and common interest, grandly buttressed by a desire for the "prospering of the human species," to be achieved, Allott asserts, through "our best ideas and highest expectations."[136] His definitions of these ideals, while ideologically elucidative, are not of practical relevance to the following analysis. Instead, what I draw upon—in addition to the macro-vision he articulates—is his description of law: "Law is not, as so often supposed, a system of legal rules. Law is a system of legal relations. ... A legal relation (right, duty, power, freedom, liability, immunity, disability) is a pattern of potentiality into which actual persons and situations may be fitted."[137]

By using a relations model, Allott allows for law to be engaged less as code and more as movement, as discussed earlier, but also as "matrix", "heuristic", and "algorithm", which more closely parallel the nature of human interaction and thus of social reality. The relations model serves as a particularly helpful springboard into Fraser's political dimension of justice.

In a highly insightful essay, Fraser argues that accelerated globalization has altered the framework in which justice discourse is happening. Social processes have gone global, transforming (or hollowing out) "the previous structure of political claims-making," resulting in "a new sense of vulnerability to transnational forces"—from a Third World perspective, Chimni's *recolonization*—and "chang[ing] the way we argue about social justice."[138] Fraser defines justice as parity of participation, a definition that accords with the concerns raised in this article about the power disparity and subject-object relationship that persists between the First and Third World in transnational lawmaking arenas. Parity also corresponds with our highest expectations as embodied, for instance, by the equality

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[135] Allott, *supra* note 52 at 47.

[136] *Ibid* at 38, 47.

[137] *Ibid* at 36.

[138] Fraser, *supra* note 134 at 71.

ethos found in countless human rights treaties. While distributive injustice and status inequality—or maldistribution and misrecognition—persist as institutionalized impediments to participatory parity, what Fraser identifies as a third dimension of justice has taken on greater significance in the transnational era.

It should be noted that the political dimension embodies, on one hand, *jurisdiction*—those aspects of social organization over which an institution possesses authority—and, on the other, *standing*—those criteria that are used to ascertain social belonging. Together, these elements establish *who* is entitled to make justice claims and *upon whom* these claims are to be made. In this way, injustice in the political dimension is aptly described as *misrepresentation*, for boundaries act to include some and exclude others resulting in a denial of parity: "Misrepresentation occurs when political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on a par with others in social interaction."[139] The term "misrepresentation" is apropos, for it presupposes the very parity upon which justice is meant to rest, taking for granted equality of participation in public processes of social deliberation.

While certainly of value in a nation-state framework—citizens on par with one another possessing equal opportunity to participate in structuring the direction of their state—the significance of the political is also comparably self-evident when examined through a transnational lens (or at least the specific lens that emerges from this article). In a regime where European subjectivity has traditionally been presented and has often been received as universal objectivity, questions abound as to whether it might be more accurate to designate international law as European outer-state law. To be sure, in a stratified world and increasingly hegemonic global order, international legal concepts as seemingly concrete as sovereignty appear to sit on a continuum and are applied differentially to First World and Third World states.

When combined with our new sense of vulnerability to transnational forces and, idyllically, the prospering of the human species, actual levels of misrepresentation seem to trounce our highest expectations. To return to my earlier remarks, the rules pertaining to jurisdiction within international institutions are used to maximize reach over the political constitution of global society. Yet, these same rules are constructed so as to deny vast swathes of the human species standing in an emergent transnational political community, while simultaneously protecting the privileged few from any form of accountability or, to apply Allott's vocabulary again, to

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[139] *Ibid* at 76.

inoculate the transnational capitalist class from humanity itself.[140] This time, Chimni appears prescient in his description of transnational law as groundwork toward the materialization of an imperial global state.

When operating in such a framework, it becomes increasingly difficult to imagine conditions that might accommodate pluralistic knowledge-bases. As Koskenniemi recognizes, not without a hint of melancholy, "competing descriptions work to push forward some actors or interests while leaving others in the shadows."[141] This is neither comforting nor surprising, for international law has always been more than legal structure: it represents a global ideological movement that raises both possibilities and limits for political engagement and political emancipation. To restate my introductory argument, the transnationalization of the system has done little more than intensify processes of contestation by funnelling greater regulatory power into fewer hands. Writing nearly three centuries ago, even Rousseau argued that an abundance of legislative power among any class of self-serving actors who are neither democratically elected nor accountable both creates and perpetuates inequality: "[L]aws are always useful to those who possess and injurious to those that have nothing."[142] Power asymmetries in legislative processes may not be a new phenomenon but their expanding (global) reach makes this a worrying trend.

### *B. Process as Path to Equivalent Subjectivity*

While this frame does not wholly elucidate a strategy of resistance, it does sketch a loose outline of parameters that might act to strengthen Fraser's third dimension of justice. Like Fraser, Freire regarded exclusion from participation as an overt form of oppression; the denial of participation amounts to a denial of liberty and, by extension, a state of injustice.[143] It stands to reason then that inclusion and participation equate decisively with justice. Of course, it also stands to reason that the general will of the collective—whether in a nation-state framework or a transnational one—is unlikely to consistently align with the will of an individual or a community. Nor is this necessary. According to a parity benchmark, those impacted by a particular decision must experience the *process* by which it is made and observe first-hand the responsiveness of structures to their rep-

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[140] *Ibid* at 81.

[141] Martti Koskenniemi, "The Politics of International Law: 20 Years Later" (2009) 20:1 EJIL 7 at 11 [Koskenniemi, "Politics"].

[142] Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses*, ed and translated by Susan Dunn (New Haven: Yale University Press, 2002) book 1, ch 9 at 169; see also Holmes, *supra* note 10 at 47.

[143] Freire, *supra* note 117 at 67–68.

resented values and ideas.[144] Participation or, more accurately, parity of participation is the end in itself and not a zero-sum exercise. If individuals or states feel alienated from the process by which regulatory regimes are established, consent is reduced to acquiescence by default, acquiescence by sale, or acquiescence by gunboat, all of which can be observed within transnational lawmaking arrangements and none of which harkens of humanity's highest expectations, of global prosperity, or even of the most superficial form of justice.

### 1. Procedural Scaffolding

To better appreciate the value of the procedural scaffolding I am alluding to in deepening the third dimension of justice, consider the current state of policy-setting in the area of trade law. Trade agreements represent an increasingly focal segment in both domestic and international law. Recent years have witnessed a form of jurisdictional creep as trade regimes are empowered to regulate more and more facets of social organization.[145] Examples are numerous and include essential goods and services such as healthcare, prescription medicines, oil and gas exploration, farm animal growth, and others. Yet the gradual pull of disparate matters of public import into the trade orbit appears not to have been matched by efforts to enhance the democratic legitimacy of trade negotiations. In fact, the exact opposite holds true as trade is increasingly insulated from forms of public oversight common to other domains.[146]

For instance, standard practices in trade law today include secret negotiations between the executive branches of negotiating governments and the near exclusive involvement of corporate actors in government consultations. The rise of secrecy in trade deliberations was predictable, for negotiations presuppose political sensitivity, thus favouring discretion throughout the process.[147] Canada's chief trade negotiator, Steve Verheul, when commenting on trade agreements, has consistently declared it inappropriate for him to speak publicly during negotiation phases, both to the citizenry and to Parliamentarians outside the executive branch.[148] While

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144 See Robert Post, "Democracy and Equality" (2005) 1:2 Law, Culture and the Humanities 142 at 145.

145 See Kelsey, *supra* note 53 at 17.

146 See Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: Norton, 2011).

147 See Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (London: Zed Books, 2003).

148 See e.g. Steve Verheul's letter to the Canadian Union of Postal Workers ("Letter From Steve Verheul Chief Negotiator Canada–EU CETA" (2 September 2010), online: Canadian Union of Postal Workers <www.cupw.ca/1/2/4/7/3/index1.shtml>).

the validity of this viewpoint is beyond the scope of this article, I remark that other nations apply different standards. For example, in Venezuela, the public is invited to comment on proposed treaties prior to their finalization.[149] This manifestation of direct democracy is unavailable to most—outside of Latin America—though it should be noted that consultations with "industry organizations" happen habitually. The concurrent exclusion of members of the public and an inclusion of corporate members of the private sector is surely advantageous for the quick resolution of trade deals. However, in terms of democratic principles such as political equality, transparency, and justice, these appear risky at best and dangerous at worst.

There is more. Trade law is modifying the functions of the three branches of government, specifically by stripping powers away from the legislature and judiciary and placing these, respectively, in the hands of the executive and of private dispute resolution bodies.[150] Legislative *responsibility* is being altered in two important ways. We observe legislatures conferring "open-ended parliamentary mandate[s]" to executive branches for the resolution of trade agreements and, in the process, reclassifying varying social activities under the trade banner.[151] While ratification remains with the legislative wing, this safeguard hardly seems adequate in ensuring a democratically robust process. As is evident, trade deals involve years of high-level negotiations. The probability of a legislature intervening *ex post facto* to oppose a settled agreement seems negligible.

The contemporary trade framework is equally stymieing legislative *authority*. Trade agreements such as NAFTA preclude parliaments from passing laws that derogate from their provisions. This amounts to a consolidation of power by the executive branch as it ultimately decides what falls within the trade ambit, resulting in a dilution of legislative authority and a muddying of the separation of powers. By extension, what is also being diluted is the democratic authority of citizens. As the powers of representatives are curbed, ballots diminish in value and effectiveness.

Finally, another standard practice within trade law involves vesting foreign private entities with the right to challenge the legality of domestic laws that conflict with trade terms (e.g., Chapter 11, the investment com-

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[149] See Thomas Muhr, "(Re)constructing Popular Power in Our America: Venezuela and the Regionalisation of 'Revolutionary Democracy' in the ALBA–TCP Space" (2012) 33:2 Third World Quarterly 225 at 228.

[150] See William E Scheuerman, "Reflexive Law and the Challenges of Globalization" (2001) 9:1 Journal of Political Philosophy 81 at 95.

[151] Harry W Arthurs, "Law and Learning in an Era of Globalization" (2005) 10:7 German Law Journal 629 at 634.

ponent of NAFTA).[152] Adjudication of these challenges is conducted by a supranational dispute resolution body far removed from domestic polities. Importantly, the body operates covertly, specifically by censoring both the identities of the adjudicators and the deliberations that produce the binding rulings. Like corporate consultations, the outsourcing of judicial authority appears to bear upon democratic norms. In both instances, democratic principles such as open justice and public accountability are undermined. First, locating the body outside national territorial boundaries precludes the public from participating in the proceedings. Second, the validity of a domestic law can ultimately be decided by neither of the traditional branches of government—the legislature or the judiciary—but, in the first instance, by the executive and, in the second, by a supranational body, with the deliberations of both altogether concealed from the public.

Trade law and all that it encompasses is quietly becoming the prerogative of a privileged political vanguard. If elected bodies are seeing their powers siphoned and trade practices increasingly eluding public control, then the nature of public authority is necessarily being altered. In sum, the rules and procedures that underpin the setting of trade policy appear to only allow for a chorus of like-minded voices to be heard, *misrepresenting* class-based unity—or subjectivity—as social universality. In this way, these procedures run counter to participatory parity and to the pursuit of justice emblematic of a free and democratic society.

Building on this notion of participation, and looping through the universal-particular and objective-subjective narratives, I propose that effective resistance—or at least resistance that can successfully stave off the ambivalence Buchanan laments—might be achieved via a two-pronged strategy. In the first stage, and as I have detailed elsewhere, mechanisms are needed to ensure that those affected by social institutions have a share in producing and managing them.[153] For instance, a central feature of ALBA, a Latin American integration project, is the Council of Social Movements. This formal body brings together national councils from member-states—consisting of delegates from local community groups—and places them alongside the Council of Ministers. It is tasked with "channelling popular opinion into ALBA initiatives and overseeing public interest in existing projects."[154] In this way, and in contrast to the model

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[152] *North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA]. See also Arthurs, *supra* note 151.

[153] Al Attar & Thompson, *supra* note 9 at 88–99.

[154] Al Attar & Miller, *supra* note 6 at 357 [footnotes omitted].

described just above, a measure of participation, parity, and accountability is integrated into the policy-setting framework.

Nor is this the only instance of participatory governance emerging from South America. Social councils, bodies that formulate and implement social policies, are common in Brazil, Venezuela, and Bolivia. These are in fact the most widespread participatory institution, possessing authority "in the areas of health, education, social services and children's and adolescents' rights."[155] The constitutive terms of the councils require that local authorities, private sector providers, and civil society actors meet to deliberate, negotiate, and ultimately implement public policy pertaining to the given subject matter. The council administers the process and monitors the implementation, ensuring accountability across all levels. Importantly, it should be noted that if the parties do not participate in the process or if the council refuses to endorse the outcome, federal funds earmarked for the municipality are withheld until consensus is reached: "The opening up of new venues of citizen participation is seen as a way to thicken the field of mediating mechanisms beyond legislatures and parties to promote the access of previously marginalized specific sectors to the political system."[156]

As has been suggested throughout this article, parity of participation allows subjectivities to collide in a structured environment. Decision making, or at least publicly accountable and democratic decision making, must be walled by structures, meaning formal rules and procedures that ensure parity of participation. Rule by fiat or disposition, of the variety that litters meta-regulatory regimes, essentially eviscerates representation and, by extension, the practice of justice: "[P]olitical and ideological struggles occur within institutionalized systems of domination. So long as such systems remain stable and intact, the leading group and its ideology are likely to persist."[157]

Mechanisms give value to participation. Contrast the earlier statement by Rousseau about legal coercion and legal partiality—"[L]aws are invariably useful to those who own property and harmful to those who do not"—with the following by Stephen Holmes: "When power and wealth become widely dispersed, law becomes not a stick used by the few against the many but a two-edged sword."[158] Holmes may be mostly concerned with lessening economic and cultural inequality to reduce the "predatory

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155 Peruzzotti, *supra* note 30 at 637.

156 *Ibid* at 638.

157 Howard H Lentner, "Hegemony and Autonomy" (2005) 53:4 Political Studies 735 at 741.

158 Holmes, *supra* note 10 at 50.

violence, humiliation, dependency and unpredictability inflicted on the weak"[159] (or maldistribution and misrecognition), but his statement readily applies to the third dimension—the dispersal of political participation (misrepresentation)—for, as Fraser observes, all three dimensions of injustice are commonly intertwined.[160] Indeed, "[o]nce traditionally excluded groups gain access and influence over the law-making process, rule of law, as opposed to rule *by* law, emerges as the reigning paradigm."[161] Presuming a desire to promote an ethos of justice (*meaning*)—in this instance parity of participation—then rules (*machinery*) must be amended to facilitate popular, effective, and meaningful democratic engagement.

### 2. Subjective Lawmaking as Path to Mutual Construction

The second and, I believe, more interesting stage of the strategy flows from the preceding but is also indirectly inspired by Holmes and Fraser's chosen vocabulary. Holmes designates much of the First World's behaviour toward Third World peoples as "predatory" and bemoans their collective "humiliation". Fraser, for her part, uses similarly loaded language, describing those marginalized within the current order as "despised".[162] At first blush, such vocabulary seems queer in international legal scholarship. Reasons for the discomfort vary but, I expect, foremost is a fear among international legal scholars of partisanship.

The United Nations Human Rights Council, for instance, has been heavily criticized for appointing Richard Falk as Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. Much of the criticism originates from his alleged partiality toward the Palestinian cause. For example, Julian Ku argues, "I have never thought Falk was particularly well-qualified to be a U.N. rapporteur, both his background and political preferences make him a relentlessly one-sided advocate rather than an objective investigator."[163] Without descending into the nihilism of radical subjectivity, I cannot help but wonder which aspect(s) of Falk's background or political preferences perturb Julian Ku. Concurrently, I must also enquire what exactly makes Ku's critique of Falk's background and political preferences objective in itself. I pose this second question not to mock the scholar but to highlight that along with fear of partisanship is a relentless— albeit fallacious—pursuit of objectivity in international law.

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159 *Ibid* at 49.

160 Fraser, *supra* note 134 at 76.

161 Al Attar & Thompson, *supra* note 9 at 85 [emphasis added].

162 Fraser, *supra* note 134 at 78.

163 Julian Ku, "Time for Richard Falk to Resign as Special Rapporteur?" (1 February 2011), online: Opinio Juris <opiniojuris.org>.

Not unlike many other international legal scholars, Ku begins from a position eloquently enunciated by Nicholas Rescher: "[T]he essence of objectivity lies in its factoring out of one's deliberations, personal predilections, prejudices, idiosyncrasies, and the like that would stand in the way of intelligent people's reaching the same result."[164] Objectivity, it seems, amounts to both consistency and reasonableness (or reasonableness *in* consistency). In our era of political correctness, notions of objectivity are effective in effacing subjectivity from social institutions or, at a minimum, concealing it. Yet, as neoliberal and transnationalization discourse repeatedly demonstrates, we find much in the way of predilections and prejudices in the international legal regime, as well as a baffling absence of consistency and reasonableness.

The failure, however, is not of objectivity as concept but in its manipulation to support a biased state of affairs. Perhaps this is a trite example, but is there any objective justification for the veto powers wielded by the victors of World War II in a system supposedly couched in the language of sovereign equality? Can we genuinely expect objective policy to mediate the relations between actors denoted by obscene levels of inequality across political, economic, and technological spectra? Does the pursuit and regular use of military power by the usual suspects buttress or undermine the deliberations of intelligent people? In short, is there any way of ensuring that predilections, prejudices, and idiosyncrasies are exorcised from geopolitics or, more to the point, from human interactions?

Holmes and Fraser's preferred vocabulary makes no allusions to either objectivity or universality, with both recognizing the partiality of their position. And while I share many of their views, it is not solely our shared sentiments that possess appeal. Instead, and this is the second stage of the strategy toward effective resistance that I am proposing, alongside participatory mechanisms there is, I argue, a need for subjectivity. Long the castoff of international law, subjectivity is an important tool in the humanization of international legal practice. By humanization, I mean that scholars could benefit from studying diverse human aspirations—justice, dignity, and a good life—in multiple areas of law and within varying normative traditions to ensure that legal constructs convey (or at least attempt) an authentic representation and amalgamation of these pursuits. In this way, the aim is to highlight the vital links between legal systems and the societies they service or, in metaphorical language, to reorder horse and cart.

As Paulo Freire pointed out some years ago, "[t]he oppressed have been destroyed precisely because their situation has reduced them to

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[164] Quoted in "Facts & Values, Truth & Objectivity" (22 September 2009), online: Ratio Juris <ratiojuris.blogspot.co.uk>.

things. In order to regain their humanity they must cease to be things and fight as men and women. ... They cannot enter the struggle as objects in order *later* to become human beings."[165] It is difficult to speak of law or society, justice or liberty—particularly on a global post-colonial scale—without a conception of humanity and a programme of humanization. Whether describing Ngũgĩ's use of Gikuyu or Sallach's conceptualization of alternatives, Allott's championing of highest expectations or Fraser's crusade for justice, La Via Campesina's model of food sovereignty or the World Social Forum's practice of participatory democracy, each effort amounts to an act of resistance that aims to challenge a perceived hegemonic situation.

Returning to Fraser, these challenges are manifested through acts of *representation*, each of which is propelled by a desire of the interlocutors to be heard and have their subjectivity recognized. Of course, there is often a desire to have a particular subjectivity concretized but this is beside the point for, being part of a political and social project, there is no way of avoiding competing interests and the attendant contestation that arises. At the same time, and this point is frequently made by members of the pluralist campaign,[166] under the right circumstances and with the correct methods, a process of contestation can morph into a process of mutual construction, mollifying rather than intensifying social divisions. Two instances of subjectivity guiding mutual construction can be located in the Islamic and contemporary international legal traditions.

Briefly, Islamic law is denoted by a wide multiplicity of jurisprudential trends. As the primary sources—the holy text (the *Qur'an*) and the prophetic traditions (the *Sunnah*)—cannot be revised, jurists must necessarily engage in the practice of interpretation and, in certain instances, in doctrinal development (*ijtihad*).[167] With an array of legal interpretive methods available, over the centuries jurists have adopted varied approaches toward the practice of interpretation, resulting in the materialization of distinct jurisprudential schools. Most fascinating is the interplay between the schools. Hardly competing or antagonistic, they operate as complementary bodies, balancing each other by helping to shape a vast compendium of diverse analyses. Nearly a millennium ago, the founder of one of these schools—Abu Hanifah of the Hanafi school—made a declaration that, until today, stands as the most cogent representation of effective subjectivity in lawmaking: "This knowledge of ours is an opinion, it is the best we have been able to achieve. He who is able to arrive at different

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165 Freire, *supra* note 117 at 68.

166 See Macdonald, *supra* note 129 at 90.

167 See M Cherif *Bassiouni* & Gamal M *Badr,* "The Shari'ah: Sources, Interpretation, and Rule-Making" (2002) 1:2 UCLA Journal of Islamic and Near Eastern Law 135.

conclusions is entitled to his opinion as we are entitled to our own."[168] In practice, the schools operate to make this compendium available to practitioners of the faith, allowing them to autonomously decide which approach gels with their personal preference toward worship.

Both the variability in the jurists' interpretation and the autonomy afforded to practitioners promote the practice of mutual construction while avoiding the pitfalls of social divisions. Regarding the former, jurists and scholars engage in sophisticated analyses not dissimilar to the kind found in academic halls. As new issues arise, novel approaches are proffered, helping to grow a collectively available bank of knowledge. In this case, subjectivity is settled upon as the most adequate strategy for ensuring that jurisprudential trends remain both dynamic and diverse. As to the latter, social divisions are placated by ensuring that practitioners of the faith (*believers*) enjoy *representation*. While believers do not possess the necessary training to produce advisory opinions (*fatwas*), they enjoy the autonomy to decide for themselves which jurisprudential schools best represent their values. When handling disputes between believers, judges (*qadis*) draw upon the edicts of the relevant schools and measure the actions in question accordingly. In this way, normativity is neither universal nor alien; it is subjective and private.

A second example of subjectivity is located in contemporary trade law. According to the preamble of the *Agreement Establishing the WTO*, two key objectives of the institution are to promote trade policies that take into account differing levels of development and to ensure that those economically worse off share in the benefits of trade.[169] Notwithstanding the often rhetorical nature of these aims, some mechanisms have been implemented that acknowledge difference, both textually and practically. Beyond most-favoured nation, national treatment, and reciprocity principles—all of which codify a neutral representation of objective equality between member states—we find Special and Differential Treatment, itself intended to give substance to the aims identified above. The preamble describes this principle as being embodied by "positive efforts designed to ensure that developing countries ... secure a share in the growth in international trade commensurate with the needs of their economic development."[170] *Unequal* treatment, or subjectivity, is necessary to address the gaps produced during the colonial period, gaps which have made for very unequal relationships between Third World countries and their First

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[168] Quoted in Farhad Nomani & Ali Rahnema, *Islamic Economic Systems* (London: Zed Books, 1994) at 12.

[169] *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144.

[170] *Ibid*.

World counterparts. Stated otherwise, without "positive discrimination mechanisms" or "special measures" or subjectivity, "effective equality" is impossible to achieve.[171]

These two examples illustrate the practice of subjectivity within both lawmaking and policy setting and, in at least the first instance, the practice of popular representation (by way of voluntary membership). Neither instance is a pure form of subjectivity—within Islamic law the primary sources are sacrosanct, and within WTO law the end goal is universal formal equality—and representation is highly imperfect—in the former, believers can endorse a school (or not) but cannot change it, and in the latter, power politics are rife, resulting in the dilution of active forms of Special and Differential Treatment (protection of local industries) and the promotion of passive ones (time-limited deferral of trade liberalization). Yet both examples provide evidence of the value of subjectivity. Norms such as objectivity and universality are substituted with subjectivity and particularity, elevating human aspirations—of both individuals (believers) and nations (Third World)—to the level of normative benchmark. Social divisions may persist but, ultimately, the valuing of varied manifestations and realities provides for the inclusion of multiple representations in the structuring of social normativity and, in my view, of justice in its most agreeable form.

## Conclusion: A Procrustean Bed?

In this essay, I have highlighted the historical use of notions of objectivity and universality in international law to advance First World economic interests, primarily through the codification of conditions that sustain ongoing Third World dispossession. I have argued that these interests have taken on a transnational character and are being pursued through an elaborate network of meta-regulatory regimes controlled by and beneficial to an emergent transnational capitalist class. These regimes are used to diffuse a programme of neoliberal economic reform on a global scale, resulting in the embedding of various neoliberal precepts both in legal machinery and in social meaning. Finally, I have suggested that while various instances of resistance are observable, critical international legal jurists appear bemused and hesitant in their efforts at crafting proposals for the reform of the global legal order. While some scholars champion a type of global legal pluralism that would recognize the legitimacy of law and lawmaking as executed by non-institutional legal actors, ambivalence is rife. Indeed, many critical scholars remain perplexed as to how we might reconcile the pursuit of a universally and objectively just

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[171] Gillian Moon, "Trade and Equality: A Relationship to Discover" (2009) 12:3 J Int'l Econ L 617 at 622–23.

order in a pluralist, subjective, and highly stratified world. Building on Fraser's "political dimension of justice," I argued that conceptualizing and eventually structuring more representative participatory transnational lawmaking processes, the kind that would allow for and even value both parity of participation and actor subjectivity, might help further the cause of global justice. By making the structures more representative, the international legal order comes to accord with humanity's highest expectations.

The question that remains, and the one I wish to conclude with, is whether I have successfully brought together meaning and machinery, as these two elements pertain to the restructuring of international law, within the context specified in the introduction. Admittedly, the jury must still be out. On one hand, the First World continues to dominate the Third World in virtually all measures and will likely do so for some time to come; old habits die slow and old structures reform even slower. In addition, what Philip Altbach described as "a kind of servitude of the mind in the Third World" is alive and well: "[t]hose in power in many Third World nations look to the industrialized world for models for their own development. The center-periphery relationship is implicitly accepted by those on both sides."[172] On the other hand, what the plethora of nationalization schemes potentially indicates is that, across Latin America, intellectual autonomy is back on the agenda. Neoliberal dogma is no longer the compelling force it once was, as the policy choices rising in popularity today endorse an *increase* in public involvement in the delivery of services, choices diametrically opposed to the teachings of Hayek, Friedman, and other neoliberal denizens (not to mention the policy preferences of international financial institutions). This redirection simply confirms what has been argued all along: transnational law is a site of political contestation, and the people of the Third World are creatively seeking to regain their humanity.

I have been careful throughout this essay not to claim either the complete absence of or my complete opposition to *universality*. In fact, in no less than five instances I explicitly alluded to universal ideals: justice, participation, liberty, highest expectations, and humanization. Hard pressed are we to locate a society that does not place preeminent value on these pursuits. And this, to me, is the crux of the matter. Unlike a principle, a universal pursuit lacks any fixed meaning or normative content. Development and progress, public and private, market and society, and, of course, law and order are merely surrogates for varying societal aspirations. Surely it is expected that these will mean different things to differ-

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[172] Philip G Altbach, "Servitude of the Mind? Education, Dependency, and Neocolonialism" (1977) 79:2 Teachers College Record 187 at 203–04.

ent people(s). Diversity in social position, tradition, and culture, not to mention the dynamism of human existence, necessarily produces invocations of varied meanings in support of varied standpoints. What is included—or what is left out—is, ultimately, more a matter of subjective strategy than of objective science.[173]

It is, however, also a matter of institutionalized structures and processes: certain claims can be made in specific forums while simultaneously being foreclosed in/to many others. In this way, I have come to realize that bringing meaning and machinery together essentially involves both acknowledging and valuing subjectivity. The sooner we embrace subjectivity, I believe, the sooner we move closer to reconfiguring the unjust relationship that characterizes the international legal order by providing for the equal representation of these subjectivities. I quote, and slightly paraphrase, Edward Said: to the extent that international law reproduces the imperial ideology of our time, "to that extent we can characterize our own present attitudes: the projection, or the refusal, of the wish to dominate, the capacity to damn, or the energy to comprehend and engage with other societies, traditions, histories."[174]

Ironically, I conclude with the very same warning Simma uses to end his article on the merit of universality in international law. The former ICJ judge finishes by cautioning against compelled constitutionalism (which he fears will lead to fragmentation) or, in whimsical terms, against "forcing [our happiness] into some Procrustean bed."[175] His meaning, I admit, first eluded me. Procrustes is a character from Greek mythology who, rather than accept human variegation, elected to violently elongate or shorten his guests' limbs to ensure they were the right stature for his bed. A Procrustean bed has since come to represent the imposition of uniformity through arbitrary or even violent means. The relevance of this expression for the argument I have sought to make is almost uncanny, even more so since Simma utilizes it to champion normative universality in international law. While I stand by the irony of our competing uses, I submit that this likely has something to do with the subjectivity of our positions.

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[173] "To this extent the vocabularies act as 'ideologies' in the technical sense of reifying, making seem necessary or neutral something that is partial and contested" (Koskenniemi, "Politics", *supra* note 141 at 12).

[174] Said, *Culture and Imperialism*, *supra* note 2 at xx.

[175] Simma, *supra* note 83 at 297.