Crumbs from the Table: The Syrophoenician Woman and International Law

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In this Article I consider a story from the New Testament for what it might say to international law. A woman of Syrophoenician origin, whose daughter is possessed by an evil spirit, asks Jesus for help. Jesus protests, “First let the children eat all they want, for it is not right to take the children’s bread and toss it to their dogs.” The woman replies, “Yes, Lord, but even the dogs under the table eat the children’s crumbs.” Jesus is impressed by this reply and tells the woman her daughter is well. The way in which the story unfolds is crucial because Jesus’ statement is troubling—it could only have been understood as an insult. More critical interpretations say the story folds back on itself: the invitation to life and love implicit in the story undermines the denigrating statement of even the founder and by implication, but only just so, the structures, conceptual and institutional, that make such a statement possible. The Syrophoenician woman’s story implies that those orders and outcomes where some are at the table and others or not, or where some get loaves while others get crumbs, are unacceptable. It also holds out the possibility for reconciliation. I then use the story as a lens through which I examine three recent visions for international law: international law as incorporating a theory of resistance; international law as the temporary resolution of paradox; and international law in service of a comparative-capabilities approach to justice. Much in these visions resonates with the themes of the story; at the same time, each of them raises questions of identity, which in turn leads to questions of alterity, which in turn leads to issues of

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reconciliation which need to be addressed much more fully. Finally, I review a recent attempt by the theologian, Miroslav Volf to articulate a heuristic of making room for the other even though this means being open to changing one’s own identity. I conclude that Volf’s articulation of that heuristic does not present a final solution to the issues under discussion here, but I consider whether, as with the encounter between Jesus and the Syrophoenician woman, so the current “negotiation” among nations, histories and modes of thought offers the possibility for insight and for reconciliation.

I. INTRODUCTION

A few years ago I visited Nicaragua as part of a program sponsored by my university. We traveled by bus to the coffee country outside of Matagalpa, and there on a hot, sunny afternoon, met with members of the Union of Organized Women of Yasica Sur, in a community center the women had built in a hollow beside the road. The president of the group described how 30 years ago, despite the initial opposition of their husbands, she and a small group of women organized to improve the supply of drinking water for their children. Over time, the women moved from the water supply to schools and bridges, and then to providing affordable medical care and medicines. The organization now has about 1000 members and is one of the most effective in the region. Yet the needs are still immense.

Many of the women had walked for over an hour in their best clothes to visit with us. As we listened to them, I heard also my aunts and grandmothers, who did not look so very different from these women, who were just as smart, determined and hard-working, and whose lives were not so very different, except their crop was not coffee: it was sugarcane and pineapple.

There was a question-and-answer period, and the president asked us what we did at home. One of my colleagues shared she was an environmental engineer, who specialized in lakes. The president smiled and said, “We could use you here.” Then I told her I taught international law. The president listened for the translation, regarded me for a time and said, “I am not educated. Your work is too high for me.” So much for my solidarity with the Union of Organized Women of Yasica Sur.
I doubt the president really thought the work of an international lawyer was too high for her. Perhaps I am projecting onto her remark the conversations around the dinner table, when my aunts and uncles expressed their resentment of and bemusement with those more powerful and educated than we, but it seemed in that brief encounter and in the president’s statement were unspoken associations of status, hierarchy, privilege, past injuries and injustices, and more than a bit of disdain. I should not have been surprised by such a reaction. Most of us believe that the dream of a full life is for everyone. If that is so, why shouldn’t a mix of emotions lie just below the surface, when equal persons share unequally in what the world has to offer?

Of course, we could have discussed how the very ground on which the community center stood is tied to the law, as are the rights to the water she wants, as is the market for coffee, as are the international policies that contribute to the situation in which she and the rest of the Organized Women of Yasica Sur find themselves. But the president was already well aware of that, it is only in retrospect that I realize she had much to teach me about the impacts of law in her experience, how the law was actually working itself out. But such a conversation was not possible under those circumstances: she did not know me, and I did not know her, not really, for all the sense of recognition (or was it just nostalgia?) I felt that afternoon. That would have to change before we could talk about the law.¹

¹ With regard to what we are able to teach one another, Chandra Mohanty argues that women like the members of the Union of Organized Women of Yasica Sur provide “the most inclusive viewing of social power.” Chandra Talpade Mohanty, “Under Western Eyes” Revisited: Feminist Solidarity through Anticapitalist Struggles, 28 SIGNS: J. WOMEN & CULTURE 499, 511 (2003) [hereinafter “Under Western Eyes” Revisited].

For a discussion of the challenges facing the region we visited, see Centro de Servicios Educativos en Salud y Medio Ambiente, Diagnóstico de percepciones de violencia hacia niños, niñas y adolescentes, en quince comunidades rurales del municipio de San Ramón, Matagalpa [Diagnosis of perceptions of violence towards boys, girls and adolescents in 15 rural communities of the municipality of San Ramón, Matagalpa] (December 2008), available at http://www.cesesma.org/documentos/CESESMA-percepciones_de_violencia.pdf, at 4, 8. For a discussion of the work of similar women’s groups in an area relatively close to Yasica Sur, see Julie Cupples, Rural Development in El Hatillo, Nicaragua: Gender, Neoliberalism and Environmental Risk, 25 SINGAPORE J. TROPICAL GEOGRAPHY 343 (2004). Finally, a more general discussion of rural women in Nicaragua is given in FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, SITUACIÓN DE LAS MUJERES RURALES EN NICARAGUA [Situation of Rural Women in Nicaragua] (2007), available at
For many, the international response to the various global crises we now face is more reason to suspect the value of international law and those who wield it. Events are still unfolding in connection with the current economic crisis and the challenge it poses to international cooperation, international institutions, and international law in general. The same holds for the international response to climate change. Some wonder about the degree to which older power arrangements will accommodate themselves to what appear to be new economic and political realities, while others wonder just how much of the older order is really changing. All the while, there are concerns about who is being left out and who are the objects, rather than agents, of these changes.

It is common in such times to turn to one’s traditions and convictions for strength and insight to better perceive and respond to present circumstances. This is my purpose here: to draw from the tradition that informs me as I think about international law. In this Article, I explore a theme that arises in a passage from the gospel of Mark. There appears a story that grates on the modern ear: a woman of Syrophoenician origin, http://www.landcoalition.org/pdf/08_FAO_SituacionMujeresRuralesNicaraguaFAO.pdf.

The type of trip I participated in is not without controversy. On the positive side, in addition to the economic benefits to the host country, Thomás J. López-Guzmán & Sandra María Sánchez Cañizares, Desarrollo socioeconómico de las zonas rurales con base in el turismo comunitario. Un estudio de caso en Nicaragua [Socioeconomic development of rural areas based on community tourism: A case-study in Nicaragua], 62 CUADERNOS DE DESARROLLO RURAL 81 (2009), some commentators argue that alternative forms of tourism alert visitors to the issues that face particular communities, Nancy Gard McGehee, Alternative Tourism and Social Movements, 29 ANNALS TOURISM RES. 124 (2002); enable cultural exchanges that are good in themselves, Freya Higgins-Desbiolles, More Than an "Industry": The Forgotten Power of Tourism as a Social Force, 27 TOURISM MGMT. 1192 (2006); and lead to activism upon return to the home country. Nancy Gard McGehee, Social Change, Discourse and Volunteer Tourism, 32 ANNALS TOURISM RES. 760 (2005).

At the same time, such tours can evoke the grand tours associated with the 19th and 20th century social policies of Western Europe. Scholars express concerns that pre-existing biases prevent real learning; that such biases can be imposed in the host country and simply be reinforced while there and upon return, Harng Luh Sin, Volunteer Tourism – “Involve Me and I Will Learn”? , 36 ANNALS TOURISM RES. 480 (2009); and that such trips, particularly because they are more participatory, use up scarce resources and can destabilize communities, R.W. Butler, Alternative Tourism: Pious Hope or Trojan Horse?, 3 J. TRAVEL RES. 40, 41, 45 (1990); DAVID BRUCE WEAVER, SUSTAINABLE TOURISM 46 (2006). One of the reasons for sharing this story is because of the ambiguities it represents.
whose daughter is possessed by an evil spirit, asks Jesus for help. Jesus protests, “First let the children eat all they want, for it is not right to take the children’s bread and toss it to their dogs.” The woman replies, “Yes, Lord, but even the dogs under the table eat the children’s crumbs.” Jesus is impressed by this reply and tells the woman her daughter is well.

Part II discusses this story and its possible meanings. The theological point seems to be that everyone is welcome to life and love, the signs of the new order being ushered in by the founder himself. But the way in which the story unfolds is crucial: Jesus appears to be taking a posture and making a statement redolent of racism, sexism, and nationalism. Some interpreters have tried to gloss over the offense, but by its nature, the less flattering interpretations offer more insight. Under these readings, the story folds back on itself: the all-embracing invitation to life and love undermines the denigrating statement of even the founder himself and by implication, but only just so, the structures, conceptual and institutional, that make such a statement possible. Everyone is invited to the table. Indeed, what is not right is a situation where some are at the table and others are not, where some have loaves and others have crumbs, where some are given the status of children and others are dehumanized. The passage also reveals a subtheme. There has always been in a strand of Christian thought that calls into question strongly held beliefs about the way things are or should be, even if they are made by those of the highest authority. The Syrophoenician woman’s story would imply that those orders and outcomes where some are at the table and others are not, or where some get loaves while others get crumbs, are unacceptable as responses to the various world crises we face.

Parts III and IV explore what the Syrophoenician woman’s story might mean for international law. In Part III.A I discuss three well-known and interrelated critiques: first, international law at worst contributes to massive human suffering and at best is unable to effectively address it; second, international law facilitated western expansion whose effects linger today in former colonies which bear the brunt of human suffering, effects which international law continues to perpetuate; and third, despite recent attempts to rectify this, international law excludes women from its tables in important ways and leaves them with crumbs, not loaves. Of course it can be argued others are also excluded, but the Syrophoenician woman’s story demands an exploration of this argument. Then in Part III subparts B through D, I discuss three attempts to either address those critiques or to pose solutions to questions of international justice, considerations of justice
which many from a post-colonial or feminist perspective argue must be part of international law’s rehabilitation. The first approach involves nascent theories of resistance under international law, proposed by scholars such as Bhalakrishna Rajagopal; the second is the temporary resolution of what Emmanuelle Jouannet argues is the paradoxical nature of international law; and third is a comparative-capabilities approach to justice proposed by Amartya Sen, strongly influenced by Martha Nussbaum.

I argue that each of these approaches represent a common effort that David Boucher sees as informing contemporary international political theory: “an extension of the moral community which posits a certain degree of universalism, while at the same time seeking to preserve difference and respect for diverse identities” (although I am mindful some of the scholars I discuss would not characterize their task in this way). Such writers are not persuaded by the claims of rational choice theory or of economic approaches that emphasize utility maximization. They take seriously the post-modern critique and thus are suspicious of attempts to arrive at final answers, while still rejecting the prospect of radical indeterminism. Irrespective of their grounding, each puts emphasis on the way in which any “solutions” are worked out in the real world. Under these approaches, solutions are tentative, without any sense that they should have precedential effect, even though they acknowledge such solutions will have future consequences. Much in these visions resonates with the themes of the Syrophoenician woman’s story; at the same time, each of them raises questions of identity, which in turn leads to questions of alterity, which in turn leads to issues of reconciliation which need to be addressed much more fully.

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In Part IV, I draw these discussions together by evaluating a recent attempt by the theologian, Miroslav Volf to apply some of the themes implicit in the Syrophoenician woman’s story to the question of reconciliation. Volf’s work, 6 motivated in part by the conflict in the former Yugoslavia, tries to navigate the same landscape as do the three approaches I discuss in Part III. Volf does not focus on social arrangements. Instead, he is concerned with social agents and what kind of persons would be required to live in a just world, and uses concepts of alterity to call for what he terms “embrace,” a heuristic of making room for the other even though this means being open to changing one’s own identity. In the end I conclude that Volf’s articulation of exclusion and embrace does not present a final solution to the issues under discussion here (nor does Volf seek one), but I consider whether, as with the encounter between Jesus and the Syrophoenician woman, so the current “negotiation” among nations, histories and modes of thought offers the possibility for insight and for reconciliation.

Before proceeding, I acknowledge that many who are engaged in these issues do not find a theological perspective meaningful and thus this paper of little interest or relevance. 7 Further, I am not arguing that the

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For a masterful treatment of issues of belief and unbelief and of the possibility of
approach discussed here is representative of any one theological tradition. It is my hope, however, this Article will be seen as part of what Jürgen Habermas terms "reflexive appropriation." In my view, the story of the Syrophoenician woman raises themes and implications that are worth a hearing, but of course it is up to the reader to determine whether this is so. Finally, this Article will be free in its use of terms such as "imperialism," "domination," "exploitation," and "neoliberalism." These too are loaded terms and may cause some readers to balk. But they are part of the literatures I am trying to engage in the Article, literatures which claim that such terms capture the experience of many people in the world, persons whose perspective I am trying in some way to take into account here.

II. THE STORY

As the story is told in Mark, Jesus travels out of his home region of Galilee to the outskirts of Tyre, a port city along the eastern Mediterranean Sea. Jesus stays at a home there and orders that his whereabouts not be known, but a woman, whose little daughter is possessed by an evil spirit, hears that Jesus is there. She enters the house, falls at Jesus’ feet and begs meaningful theological discourse, see generally CHARLES TAYLOR, A SECULAR AGE (2007). Barbara Herrnstein Smith addresses similar issues as they appear in the debates about the significance of evolutionary accounts of religion. BARBARA HERRNSTEIN SMITH, NATURAL REFLECTIONS: HUMAN COGNITION AT THE NEXUS OF SCIENCE AND RELIGION (2009).


9 I am also aware this Article will follow two familiar argumentative structures, both of which are subject to criticism. In one, theology provides a solution to an otherwise intractable conceptual or ethical problem. The weakness of this approach is that over time, plausible non-theological solutions tend to edge theology to the margins of discourse. This leads to a second related approach: an attempt to show either how non-theological solutions were anticipated by theology or can be accommodated by theology. The problem with this approach is related to the problem with the first: in the end theology ends up “baptizing” an otherwise non-theological solution, with the result theology provides no critical value and indeed becomes invested in such a solution.

10 Mk. 7:24-30. The story also appears in Matthew. Mt. 15: 21-28. Although in this section, I refer to the scholarly literature on the story and the New Testament more generally, I cannot claim this discussion is a scholarly exegesis of the passage.

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him to help her daughter. The woman is Syrophoenician by birth, a Gentile.\textsuperscript{11} When the woman asks Jesus to drive the spirit from her daughter, Jesus says, “First, let the children be filled, for it is not right to take the children’s bread and toss it to their dogs.”\textsuperscript{12} But the woman answers and says to Jesus, “Yes, Lord—and the dogs under the table eat from the crumbs that fall from the children.” Jesus responds, “At this word, arise and go. The demon has left your daughter.” The woman returns to her home and finds her daughter lying in her bed with the demon gone.

Like all iconic stories of the New Testament, and given the quantum nature of interpretation, the story of the Syrophoenician woman has been subject to many interpretations. Several frame the story within one of Mark’s larger theological concerns: how to account for a religious movement rooted deeply within Judaism, but which by Mark’s time is attracting non-Jews too.\textsuperscript{13} Some of these interpretations argue Mark uses the incident to illustrate the temporal spread of the religion: the benefits of the kingdom of God need to be offered first to the children of Israel before it can be made available to the Gentiles.\textsuperscript{14}

\textsuperscript{11} One translation reads, “The woman was a Greek, born in Syrian Phoenicia.” Mk. 7: 26 (New International Version 1978). According to Joel Marcus, the Greek term used here could indicate a “Phoenician from the province of Syria” or to a descendent of Phoenicians who had intermarried with Syrians. Joel Marcus, The Jewish War and the Sitz in Leben of Mark, 111 J. Bib. Lit. 441, 445-46 (1992).
\textsuperscript{12} Id. v. 27.
\textsuperscript{13} Christianity began as a movement within Judaism. Anders Runesson, Rethinking Early Jewish-Christian Relations: Matthean Community History as Pharasaic Intragroup Conflict, 127 J. Bib. Lit. 95, 100 (2008). One of the more important results of recent scholarship is a growing understanding that Judaism, as practiced in the first century, was more diverse than depicted in the gospels. See e.g., JUDAISM IN LATE ANTIQUITY (Jacob Neusner et. al. eds. 1996); HYAM MACCoby, EARLY RABBINIC WRITINGS (1988); JAMES C. VANDERKAM, AN INTRODUCTION TO EARLY JUDAISM (2003); STEPHEN M. WYLEN, THE JEWS IN THE TIME OF JESUS (1996). One implication is that in several respects, the contrasts between Jesus, and for example, the Pharisees, were not as sharp as depicted in the gospels. See e.g., HYAM MACCoby, JESUS THE PHARISEE (2003) (arguing that Jesus was not only sympathetic to aspects of the Pharisee movement, but a Pharisee himself). For a discussion of the contours of studies of early Judaism, see William Scott Green, Introduction: The Scholarly Study of Judaism and its Sources, in JUDAISM IN LATE ANTIQUITY I (Jacob Neusner et. al. eds. 1996).
These and other commentators are taken aback by Jesus’ insult to the woman. In Old Testament tradition, dogs “represent . . . the extremity of baseness . . .” Some interpretations attempt to soften the harshness of the language or have that effect, although the demeaning nature of the words is conceded. For example, some commentators point out that the word “dog,” used in the text is the Greek word, kunárion. This is a diminutive that can be translated as “little dog.” Under this argument, the word J. Duncan M. Derrett gives a closely related, jurisprudential account of the story. Under this interpretation, the woman’s reply gives Jesus the legal grounds to provide benefits that belong first to the Jews to Gentiles. J. Duncan M. Derrett, Law in the New Testament: The Syro-Phoenician Woman and the Centurion of Capernaum, 15 Novum Testamentum 161, 165, 171 (1973).

George Howard, A Note on the Short Ending of Matthew, 81 Harv. Theol. Rev. 117, 119 (1988), citing Francis W. Beare, The Earliest Records of Jesus (1962) (“The harshness of the sayings of Jesus . . . still puzzles the Christian reader, who finds it impossible to imagine Jesus addressing the distraught mother in such terms. . . .”); Ralph Martin, Mark: Evangelist & Theologian 211 (1973) (“The term ‘dog’ is one of grave insult and it cannot be denied that an extremely harsh refusal of her request is implied. She is reproached for what she is, by birth and religion.”) (citations omitted).


For a discussion of early interpretations of the story, see Pablo Alonso, La Mujer Sirofenicia en la Interpretación Patrística [The Syrophoenician Woman in Patristic Interpretation] 80 Estudios Eclesiásticos 455 (2005) (discussing allegorical interpretations of the story by early church leaders). The Pseudo-Clementine Homilies, a romance written sometime between the second and fourth centuries CE, contains a more elaborate version of the story: the woman is named Justa, and her daughter, Bernice. Jesus rejects her as a Gentile who engages in unclean eating practices, hence the reference to throwing food to the dogs. Justa’s reply indicates she is willing to forsake such practices and becomes a convert, thus allowing Jesus to heal her daughter. Justa’s husband drives her from the home because of her conversion. Because she is affluent, she is able to remain single and adopts two males as sons. PSEUDO-CLEMENTINE HOMILIES, Book II, chs., XIX-XXI, available at http://www.searchgodsword.org/his/ad/ecf/ant/pseudo-clementineliterature/view.cgi?file=anf08-46.htm. Alan Cadwallader argues that the recasting of the story in the Homilies is an attempt to reassert male hierarchy. Justa, as depicted in the Homilies, “serves the needs of the . . . male characters in the story and the narrative concerns of the male author.” Alan H. Cadwallader, What’s in a name? The tenacity of a tradition of interpretation, 39 Lutheran Theol. J. 218, 231 (2005). This is done in part by embedding the story as a conversation between Clement and Peter. Id. Further, Cadwallader points out, she remains a “widow” for the sake of her faith, yet brings required male authority into the home in the form of her two adopted sons. Id.

“κοινάριον” 2 Exegetical Dictionary of the New Testament 332 (Horst Balz &
softens the harsh term into one, which if not one of endearment, can connote
tolerance bordering on grudging affection.\textsuperscript{19} Another approach is that Jesus
does not really mean what he says: Jesus is testing the woman and uses the
provocative language on purpose to elicit the woman’s faith-filled
response.\textsuperscript{20}

Of particular interest to this Article, however, are commentators who
ground their interpretations in critical narrative approaches, while at the
same time try to understand the socio-economic and historical context out of
which the story might have emerged or in which it was used.\textsuperscript{21} Much New
Testament scholarship has tried to place Jesus, the early church, and the
writings from that period within the socio-cultural milieu of the period.
Michael White, who champions such an approach, argues that one should
think about the historical development of the early church and the writings
which emerge from this period as “a complex set of interactions ranging
across broader and narrower planes of reference.”\textsuperscript{22} Along one axis is the
“macrosociety,” at this time, the Roman Empire, at one end, and the
“microsociety” of Judea, Asia Minor or Egypt—areas where the early
church first developed—on the other.\textsuperscript{23} On the other axis are the forces
which might impact any community: on one end are sociopolitical and legal
forces and on the other are philosophical and religious forces.\textsuperscript{24} Such a
method has its limits: reconstructions of that milieu are based on relatively
scant historical data, and as one might expect, leaves ample room for debate
about the salient features of that milieu, let alone the value of such
reconstructions for matters of faith and tradition.\textsuperscript{25} White concedes that

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Gerhard Schneider eds. 1981). The same word \textit{kunárion}, also appears in the Matthean
version.
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\textsuperscript{19} See \textit{e.g.}, FLOYD V. FILSON, A COMMENTARY ON THE GOSPEL ACCORDING TO ST.
MATTHEW 180 (1960); VINCENT TAYLOR, THE GOSPEL ACCORDING TO ST. MARK 350
(1952).
\textsuperscript{20} FILSON \textit{supra} note 19 at 180.
\textsuperscript{21} This implies at least three contexts for meaning: first, how the story was used and
interpreted when it was first told, probably in oral form; second, how it was used and heard
by Mark’s first audience as the story is integrated into his gospel; and third, how it is
interpreted in the wider church.
\textsuperscript{22} L. MICHAEL WHITE, FROM JESUS TO CHRISTIANITY 14 (2004).
\textsuperscript{23} \textit{Id.} at 15.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} A good discussion of these issues is found in LUKE TIMOTHY JOHNSON, THE REAL JESUS:
THE MISGUIDED QUEST FOR THE HISTORICAL JESUS AND THE TRUTH OF THE TRADITIONAL
GOSPELS (1996). For a recent discussion of a method of using historical-critical methods,
these planes of reference might be an “overly simplified” way of visualizing what was happening in the Greco-Roman and early Jewish world. Yet, in his view, it is helpful to keep in mind that “each one of these areas is at work in any given situation or writing . . .”

Interpretations from this perspective underscore the complex nature of identity and privilege as Jesus and the woman interact. Jesus is Jewish and the woman is Gentile. Yet, as a Galilean, the authenticity of Jesus’ own Judaism could have been subject to question. It was a region only relatively recently made part of the Jewish state, at the periphery of Jewish religious life centered on the temple in Jerusalem. Galilee had also been the base for certain anti-Roman dissident groups. In some circles, Jesus might also be considered a religious outsider.

Jesus and the woman also differ in gender, and the story reflects the inequalities embedded in both religious authority and gender. David Rhoads understands the interaction between Jesus and the woman as a “classic Near Eastern” response of inferior to superior: “[t]he woman clearly treats Jesus as a superior, for he is a healer and a male. She came, fell at his feet, and made a request . . .” At the same time, however much the story might well reflect that hierarchy, it also illustrates how oppressed persons can use what means they have to resist and sometimes outwit and thereby overcome those who oppress them. Rhoads points out that the woman does not contradict Jesus: she extends his proverb instead: “Yes, Lord, but even the dogs eat the crumbs that fall.” According to Rhoads, the woman “honored his rejection and still found a place for her request. Thus . . . she

... tradition and reason to derive a picture of Jesus, see JOSEPH RATZINGER, JESUS OF NAZARETH xi-xxiii (2007). On the more general discussion of how scripture functions as an authoritative source in theology, see DAVID H. KELSEY, THE USES OF SCRIPTURE IN RECENT THEOLOGY (1975).

26 WHITE supra note 22 at 15.
27 Id.
29 Fernández supra note 28 at 100.
31 These forms of resistance are discussed in the now-classic Weapons of the Weak. JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1985).
32 Rhoads supra note 30 at 358.
has . . . cleverly made use of the dynamics of honor and shame in order to
get her question granted.” As Sureka Nelavala puts it, the woman
“defeats Jesus in two ways: first, by pretending she was accepting what
Jesus said and using his argument to her own advantage; second, by paying
no attention to whether Jesus wanted to insult her, while playing smart.”
Thus the story can be interpreted as vindicating the woman’s agency, as
Paolo Freire might put it, her ability to act purposely and reflectively and do
so in the world, and in so doing, have a hand in shaping that world.

That interpretation alone is filled with possibilities for application,
but the narrative raises the possibility of an additional complexity that does
not detract from the woman’s agency, but makes the story even richer in my
view. Recall that the story emerges from a period of Roman occupation.
Hostilities existed between Tyre and Galilee: the Tyrians had killed many
Jews at the opening of the Roman Jewish war. Galilee was considered the
“breadbasket” for Tyre; it is a situation in which the rural poor are
required to provide their wealth to urban centers, and some scholars suggest
the Syrophoenician woman probably belonged to that upper urban class.
Thus, it is possible the Syrophoenician woman is privileged, while the
Galileans to whom Jesus ministered were poor and subservient—it was their
children who were being forced to eat crumbs while Gentiles had loaves.

33 Id. at 358-59 (citations omitted).
34 Sureka Nelavala, Smart Syrophoenician Woman: A Dalit Feminist Reading of Mark 7:
24-31, 118 EXPOSITORY TIMES 64, 68 (2006).
Elisabeth Schüssler Fiorenza views the woman as being less deferential than do either
Rhodes or Nelavala, and has the effect of breaking stereotypes and crossing boundaries: For
Fiorenza, “the woman has broken all the rules of conduct. She has shown no proper
feminine sensitivity at all.” ELISABETH SCHÜSSLER FIORENZA, BUT SHE SAI D: FEMINIST
PRACTICES OF BIBLICAL INTERPRETATION 103 (1993). Further, “[a]lthough Jesus does not
address her directly, brushing away her request, she continues to insist that the boundaries
between inside/outside, private/public, male/female must be crossed.” Id.
36 Rhoads supra note 30 at 370.
37 Id.
38 Gerd Theissen, Lokal-und Sozialkolorit in der Geschichte von der Syrophoenikischen
Frau (Mark 7:24-30), 75 ZEITSCHRIFT FUR DIE neutestamentliche Wissenschaft 202
(arguing the woman belongs to a “tiny Hellenized upper class in the east of the Roman
Empire.”). As discussed earlier, the version in the Pseudo-Clementine Homilies also
depicts the woman as a person of means. Supra note 17.
And yet, the woman’s daughter is possessed by an evil spirit. Paul Hollenbach argues that the many exorcism stories in the gospels are consistent with the prevalence of mental illness which emerges in colonized societies. 39  Hollenbach follows Frantz Fanon’s work40 to argue that “the colonial situation of domination and revolution nourishes mental illness in extraordinary numbers of the population.”41  For Hollenbach, mental illness becomes a “socially acceptable” form of protest against or escape from oppression.42  Evoking Foucault, such maladies are acceptable to those in power because they are also bases for social control, as illness or, as understood by the ancients, demon possession, justify institutionalism, imprisonment, or other forms of banishment from the community. “Through classifying persons as mentally ill,” writes Hollenbach, “society gains control over persons by destroying their selfhood and by degrading persons even further than they were originally.”43  Under this interpretation, that the Syrophoenician woman’s daughter, a child of privilege, is also possessed by an evil spirit, hints at the cost of injustice to those in positions of relative economic power. Just as those in the countryside are being pushed to the periphery, so too the woman’s daughter is in danger of being pushed further out from the center of her circle of relationships and her community. 44  As the narrative is framed and re-framed, the characters trade roles of oppressor and oppressed, superior and inferior.

Hyunjun Bae accepts that the woman is a member of the privileged urban class. As such, the Syrophoenician woman knows she is taking a risk in approaching Jesus. 45  The woman is aware, as Bae puts it, of the

41  Hollenbach supra note 39 at 575.
42  Id. at 576.
43  Id. at 579.
44  Most scholars acknowledge that a major portion of Jesus’ ministry was devoted to healing the sick and performing exorcisms. See e.g., MARCUS J. BORG: JESUS: UNCOVERING THE LIFE, TEACHINGS, AND RELEVANCE OF A RELIGIOUS REVOLUTIONARY 146-50 (2006). Persons afflicted by illness stood outside the ambit of the community, as well as God’s favor. As N.T. Wright puts it, “The effect of these cures [by Jesus]... was not merely to bring physical healing; not merely to give humans ... a renewed sense of community membership; ... but to reconstitute those healed as members of the people of God.” N.T. WRIGHT, JESUS AND THE VICTORY OF GOD 192 (1996). Wright himself is dubious of what he terms “fashionable” interpretations of the story. Id. at 309 n.244.
45  Hyunjun Bae, DANCING AROUND LIFE: AN ASIAN WOMAN’S PERSPECTIVE, 56 ECUMENICAL
“complex set of political, economic and ethnic conflicts, as well as of the intensity of animosity she would confront once she enters this rural area.”\(^\text{46}\) The woman goes to Jesus anyway because she cares for her daughter. She enters the house where Jesus is staying and makes her request. When Jesus says to her it is not right for food for children to be given to dogs, he is exactly right. In his statement he is identifying with the poor: “Yes, your child is in peril, but how can it be right that I help you when our own children are starving and you all are responsible for it?” In his insult, Jesus evokes a second Old Testament image of the dog, not only a base animal, but also one representing “grave, possibly life-threatening danger.”\(^\text{47}\)

There is no arguing with a question like that. The woman can only respond with another truth: yes, the children should be fed first, but even so the dogs eat the crumbs the children let fall. In her reply, she says something Jesus might well have said about his people’s situation (but that case the children eat the crumbs that the dogs let fall).\(^\text{48}\) As discussed above, the woman’s response does not directly contradict Jesus’ statement, but extends it. For Derrett, the Syrophoenician woman bases her claim on Old Testament traditions of charity: “[r]efusal of charity would thus be unthinkable. God shows compassion to all creatures, irrespective of race.”\(^\text{49}\) Judith Gundry-Volf understands similarly the woman’s response as an appeal to “the power of mercy that is not based on privilege through birth or deserts . . . .”\(^\text{50}\)

The exchange between Jesus and the Syrophoenician woman thus opens up space for something the old hints at but needs new expression: despite the many ways in which the two have identified themselves in the past and present, they understand that they, to quote from Bae, “should not let the conceptual framework of the past determine their future, and that they need to shatter together ‘the certainties of centuries’ to create a new reality of life.”\(^\text{51}\) Jesus seems to grasp this new possibility and changes his mind. He says to the woman, “You are right: go on your way, the demon

\(^{46}\) Id.

\(^{47}\) Pedersen supra note 16.

\(^{48}\) Rhoads suggests “[i]ronically, the woman’s proverb may well have expressed the despair of the Galilean’s themselves, that (unlike we Galileans), ‘Even dogs get crumbs.’” Rhoads supra note 30 at 370.

\(^{49}\) Derrett supra note 14 at 173.


\(^{51}\) Bae supra note 45 at 399.
has left your daughter.” The woman returns home to her daughter and finds that it is so.

What then is a possible meaning of the story? The story folds back on itself: if Jesus’ people are indeed suffering, then Jesus’ words ring true, and the woman acknowledges that truth, but, the hostility evident in Jesus’ words still remains. The woman’s reply, a statement Jesus could have made himself, becomes a valid expression of her own situation, and ring true as well. The all-embracing invitation to life and love undermines both the verities and the hostility of the founder himself and by implication, but only just so, the structures, conceptual and institutional, that make “inevitable” the situation in which both Jesus and the woman find themselves. In the new era Jesus purports to herald, everyone is invited to the table. True, it is not right for food to be taken from children’s mouths, but what is ultimately not right are situations in which some have loaves and others have crumbs, where some are relegated to the status of children and others are dehumanized. The passage calls into question constructs about the way things are or ought to be, even if they are made by those considered to be of the highest authority, and it demands equal access to all the good God has to offer to humankind. Gerd Theissen puts it somewhat polemically: the woman’s faith “gives us the right to contradict the highest theological authorities, even Jesus himself, the Bible, God. Wherever we know that theological convictions and traditions result in suffering, we have the right and duty to contradict them.”

III. CURRENT CHALLENGES IN INTERNATIONAL LAW

A. International Law and its Critics

One can argue the past decade has not been a good one for international law. The behavior of states over the past ten years appears to reaffirm the claims of realists, rational choice theorists and critical commentators alike that international law is epiphenomenal, only a tool for exercises of power. Marti Koskenniemi argues in this regard it is

52 Theissen supra note 38 at 46.
interesting how one can almost predict the outcomes of international
decision-making, even though in his view legal argument is largely and
necessarily indeterminate. “[T]he lack of coherence (‘politics’) of legal
argument,” he writes, “is only a preface to the more important point that
[although] all the official justifications of decision-making are such that
they may support contrary positions or outcomes, in practice nothing is ever
that random.”

Along with abuses of power, the foundations of international law as
an intellectual and moral enterprise have been called into question. The
critique of foundations, of course, is nothing new. Koskenniemi’s analysis
of the open-endedness of international legal argument is one of several
which question any attempt to ground international law in some underlying
scheme, or international law’s coherence, or both. Further, in addition to
questions of practice and coherence are concerns that international law is
becoming too compartmentalized or “fragmented” and that much of
international law now takes the form of “managerialism,” to use
Koskenniemi’s terms, in which technical discourse related to issues such as

54 Martti Koskenniemi, The Politics of International Law—20 Years Later, 20 EUR. J. INT’L
L. 7, 9 (2009) [hereinafter The Politics of International Law—20 Years Later].
55 MARTTI KOSKENNIELI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL
LEGAL ARGUMENT: REISSUE WITH NEW EPILOGUE (2005) [hereinafter FROM APOLOGY TO
UTOPIA]. Nathaniel Berman distinguishes between challenges to the status of international
law as opposed to its coherence and argues that there will never be a completely
satisfactory answer to those challenges. Nathaniel Berman, Intervention in a “Divided
World”: Axes of Legitimacy, in FAULT LINES OF INTERNATIONAL LEGITIMACY 115, 118-19
(Hilary Charlesworth & Jean-Marc Coicaud eds. 2010). Nikolaos Tsagourias provides a
good overview of the shortcomings of natural law, positivist and procedural accounts of
international law. NIKOLAOS K. TSAGOURIASS, JURISPRUDENCE OF INTERNATIONAL LAW: THE
HUMANITARIAN DIMENSION (2000). Both natural law and positivist theories of international
law seek a “rational foundation for legal rules which is a matter of knowledge not of
opinion.” Id. at 54. However, “[b]ecause the search for foundations can regress ad
infinitum, the selection of a certain basis is unavoidably subjective.” Id. In this regard, even
an approach which seeks to base law on a set of shared human values is not completely
satisfactory, for as Tsagourias points out, because it simultaneously embraces individualist
criteria based on rational decision but also communitarian criteria based on the negotiated
wishes of particular communities.” Id. As for procedurally based conceptions of
international law, the problem is that the chosen procedures almost invariably embed
substantive values that predetermine procedural outcomes. Id. at 55.

To the extent the story of the Syrophoenician woman stands for meta-principles, such as
inclusion or fairness in distribution, Tsagourias would have problems too. For him, meta-
principles are too ambiguous and often conflict with one another. Id. at 57-58.
international finance or climate change masks or defers questions of value on the international level. Yet, those questions of value are also highly contested.

Perhaps this is precisely what should be happening with international law. I have just argued the Syrophoenician woman gives warrant to question beliefs and structures which exclude some from the table and mete out only crumbs. Certainly this is the situation today: the numbers regarding the scale of human suffering and the uneven way such suffering is distributed throughout the world have been cited so often that one almost glosses over them. The Syrophoenician woman may well have been part of the privileged class of her day, but that was not true for vast majority of women in her time or certainly not true for women now, who bear the brunt of global inequality. As is so with the Union of Organized

56 The Politics of International Law—20 Years Later supra note 54 at 9, 15-16.
57 Thomas Pogge describes the situation in a long paragraph worth citing in its entirety:

'Official estimates show 830 million humans chronically undernourished, 1,100 million lacking access to safe water, and 2,600 million lacking access to basic sanitation. About 2,000 million lack access to essential drugs. Some 1,000 million have no adequate shelter and 2,000 million lack electricity. Some 775 million adults are illiterate and 210 million children between five and seventeen do wage work outside their household—often under harsh or cruel conditions . . . . Roughly one-third of all human deaths, 18 million annually, are due to poverty-related causes . . . . People of color, females, and the very young are heavily overrepresented among the the global poor, and hence also among those suffering the staggering effects of severe poverty.'

Thomas W. Pogge, Growth and Inequality: Understanding Recent Trends and Political Choices, 55 Dissent 66, 72 (2008) [hereinafter Growth and Inequality].
Women of Yasica Sur, the needs are still great. If international law plays any role in this situation, then it becomes imperative to question it.

Here I focus on three well-known and interrelated sets of criticisms being made of international law. First, Thomas Pogge and others argue that the great disparities in human well-being are linked to a world economy which law facilitates, an economy governed by “an increasingly dense and consequential system of rules governing trade, investments, loans, patents, copyrights, trademarks, double taxation, labor standards, environmental protection, use of seabed resources and much else.”

Pogge notes that such rules are heavily contested precisely because they have an economic impact. Affluent countries and other organizations are in a better position to shape those rules, while the global poor have almost no voice in that process.  

employment and make up the larger share of the informal employment sector (with the exception of the Middle East).  

59 Growth and Inequality supra note 57 at 72. See also Peter Koller, *International law and global justice, in* LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW 186, 187 (Lukas H. Meyer ed., 2009) (“[I]t becomes pretty clear that the misery in many regions has a lot to do with the prevailing international system, comprising international law as its normative order and international politics as its actual practice.”).

60 Id. Koskenniemi also believes “our practices, institutional and conceptual frameworks somehow help to sustain” this division. FROM APOLOGY TO UTOPIA supra note 55 at 606. This is the structural bias in which “the system de facto prefers some outcomes or distributive choices to other outcomes or distribute choices.” Id. at 605-607.

The disparate impacts and the disadvantages of poorer countries with respect to international law have been the subject of a wide-ranging literature. For discussions of the experience of poorer countries with the international trade regime with dispute resolution, the formation of policy, and the substantive law itself, see e.g., James Smith, *Inequality in International Trade? Developing Countries and International Change in WTO Dispute Settlement*, 11 Rev. Int’l Pol. Econ. 542 (2004) (arguing that procedural rulings by the WTO Appellate Body, such as allowing NGO participation in some disputes, disadvantages poorer countries in the WTO dispute resolution process); Kent Jones, *Green room politics and the WTO’s crisis of representation*, 9 Prog. Dev. Stud. 349 (2009) (discussing the problems poorer WTO members encounter in attempting to influence the formation of WTO policy); (Robert Hunter Wade, *What strategies are viable for developing countries today? The World Trade Organization and the shrinking of ‘development space’*, 10 Rev. Int’l Pol. Econ. 621 (2009) (arguing that WTO substantive disciplines have limited the ability of poorer countries to craft their own development policies, thus perpetuating the disparities between richer and poorer countries).

In the area of climate change, several have argued that poorer countries will be hurt more
Second is the related critique of scholars who have argued that the concepts and doctrines of international law were used in service of, and developed as part of, western colonial expansion,\textsuperscript{61} the impact of which continues to be felt in countries where most suffering occurs. As Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens write, “it is evident that from the times past, international law has provided the powerful with a series of instruments by which to exploit and control the weak, and even provided legal cover for colonial rule,”\textsuperscript{62} This was accomplished in part by devising rules of property and sovereignty that justified colonial expansion and the extermination of indigenous populations and the expropriation of by the adverse effects of climate change than polluter countries and will be less able to respond to those effects. These poorer countries, however, have less ability to influence climate change negotiations. See e.g., John Ashton & Xueman Yang, \textit{Equity and climate in principle and in practice}, in \textsc{Joseph E. Aldy et. al., Beyond Kyoto: Advancing the International Effort Against Climate Change} 61, 61-62 (2003).


\textsuperscript{62} Richard Falk et. al., \textit{Introduction}, in \textsc{International Law and the Third World: Reshaping Justice} 1, 5 (Richard Falk et. al. eds., 2008).
their property, and by setting up standards of “civilization” and later gradations of “statehood” and then “development” which have always identified western states as being on the top of the ladder, with non-western states on the bottom. This was done without meaningful participation by the colonized. These scholars argue such moves under international law created inequalities whose path-driven nature means that the disparities between wealthier and poorer countries, most of them former colonies, linger and receive further impetus from the policies of wealthier and more powerful countries through the mechanisms Pogge describes.

In this regard several scholars are wary of the misuses of concepts such as development and human rights, which in their view can be used to

63 Id.
64 IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW supra note 61 at 267, 311.
65 Several scholars argue (this in line with some of the criticisms raised by Pogge), that the web of international institutions form, to use Bhupinder Chimni’s terms, a kind of quasi state whose purpose is to facilitate and create the conditions for the operation of capital. See generally Bhupinder S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 EUR. J. INT’L L. 1 (2004). See also Challenges of Theorizing Resistance supra note 2 at 410.
66 See e.g., DEVELOPMENT, SOCIAL MOVEMENTS & THIRD WORLD RESISTANCE supra note 2. Rajagopal argues that development as currently understood preserves and has its origins in earlier forms of colonialism. At the same time that understanding of development has itself evolved in response to resistance from the various instantiations of the Third World. Id. at 39-49.
67 See e.g., Manifesto supra note 61 at 16-17 (criticizing an emphasis on private human rights over social rights); Mosope Fagbongbe, The Future of Women’s Rights from a TWAIL Perspective, 10 INT’L COMM. L. REV. 401, 404 (2008) (arguing that the development of human rights law at the same time western influence increases over the Third World creates a contradiction, allowing human rights to serve as both a “taming device” and a “weapon” of struggle) (citations omitted); Balakrishnan Rajagopal, Culture, Resistance, and the Problems of Translating Human Rights, 41 TEX. INT’L L. J. 419 (2006) (expressing concerns that human rights discourse could push out other types of emancipatory discourse taking place in the Third World). Rajagopal in particular argues that international human rights discourse became subsumed under development discourse, as unsuccessful attempts by the Third World to address economic issues caused the Third World to turn to human rights discourse to emphasis economic and social rights. DEVELOPMENT, SOCIAL MOVEMENTS & THIRD WORLD RESISTANCE supra note 2 at 216-18. Thus, for Rajagopol, the tension between universality and cultural relativity that troubles human rights discourse is the same as the tension between modernity and tradition that runs through development discourse. Id. at 212.
replicate the colonial experience and its legacy in the dynamics which Pogge and others criticize.

These claims are not uncontroversial, although I find the general argument to be persuasive.\(^{68}\) What is important for this Article, however, is that the narrative of international law in service of power, largely western in nature, forms part of the discourse of countries that can make legitimate claims to have been impacted by that power. Thus the question emerges, as put by Anghie: “[C]an the post-colonial world deploy for its own purposes the law which had enabled its suppression in the first place?”\(^{69}\) Unless there is a positive answer to that question, the future of international law could be quite small,\(^{70}\) and based on my read of the Syrophoenician woman, rightly so.

Third is the critique of international law scholars informed by feminist theory. I have already discussed that women share an unequal amount of the world’s poverty. In the practice and discipline of international law, Hilary Charlesworth and Christine Chinkin argue that “the absence of women in [its] development . . . has produced a narrow and inadequate jurisprudence that has . . . legitimated the unequal position of women around

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\(^{68}\) A thorough appraisal of these issues requires the input of many fields, each of which has contributed a large literature. Among the evaluative tasks are: tracing the history of western expansion; assessing the political, social, and economic impacts of such expansion on other societies; determining the extent to which that past experience has put into place or set into motion structures and dynamics that both persist and continue to be reinforced by powerful international actors; clarifying the relationship between these structures and dynamics and human suffering; and of course, determining the role international law plays in each of these areas. Besides the literature cited in other parts of this Article, see e.g., Tod Jones, *Liberalism and Cultural Policy in Indonesia*, 13 SOCIAL IDENTITIES 441 (2007) (discussing the impact of liberalism on Indonesian cultural policy in both the colonial and post colonial periods); Marnia Lazreg, *The Colonial in the Global: Where Does the Third World Fit In?*, 26 J. THIRD WORLD STUD. 17 (2009) (arguing that colonialism persists or has been revived with increasing globalization); James D. Sidaway, *Spaces of postdevelopment*, 31 PROGRESS IN HUMAN GEOGRAPHY 345 (2007) (surveying the literature of postdevelopment and linking current trends to colonial and post-colonial legacies in various countries).

\(^{69}\) *IMPERIALISM, SOVEREIGNTY, & THE MAKING OF INTERNATIONAL LAW* supra note 61 at 8.

\(^{70}\) As William Scheurman puts it, “Western ideals of the rule of law and human rights are unlikely to gain a firm footing if they continue to be plausibly associated with economic and social policies which exacerbate the economic misery of hundreds of millions of our fellow human beings.” William E. Scheurman, “The Center Cannot Hold”: A Response to Benedict Kingsbury, in *MORAL UNIVERSALISM AND PLURALISM* 205, 216 (Henry S. Richardson & Melissa S. Williams eds., 2009).
the world rather than challenged it.” Charlesworth argues more recently that a decade of gender mainstreaming (the attempt to integrate issues of concern to women into the major international institutions such as the United Nations) has yielded few results. She points out in 2004, women held 37.4% of UN professional and managerial posts, 83.3% of positions at the lowest professional level, and just 16.7% of positions at the highest staff level. Charlesworth contends that gender mainstreaming has been resisted, as evidenced by inadequate funding and lack of other forms of institutional support. But in Charleworth’s view, perhaps the most crucial failing of mainstreaming is that it does not take into account nuanced understandings of gender, in particular relational and constructive aspects of gender, that render women substantively unequal to men. And by associating gender exclusively with women, current attempts at mainstreaming leave “both the roles of men and female gender identities unexamined, as though they were somehow natural and immutable.”

Dianne Otto raises similar concerns. On the one hand, Otto argues, three recent developments at the institutional level are worth celebrating: first, the use of gender-inclusive language which conceptualize women as full subjects of international law, as opposed to vulnerable subjects in need of protection; second, these initial institutional moves towards inclusion provide a toehold for further advances; and third, the institutional recognition of women’s rights assists in organizing local and international women’s rights movements and organizations. On the other hand, Otto is concerned about institutions selectively engaging feminist ideas in service of its own institutional goals; the lack of accountability in mainstreaming.

73 Id.
74 Id.
75 Id. at 14-15. See also The Boundaries of International Law supra note 71 at 48-50.
76 Id. at 15.
77 Dianne Otto, The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade, 10 MELBOURNE J. INT’L L. 1, 5 (2009) [hereinafter The Exile of Exclusion]. Otto argues these three developments are illustrated by the UN Security Council’s adoption of Security Council Resolution 1325, which recognized the role women play in international peace and security. Id. at 5-9; SC Res. 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 Oct. 2000).
efforts that hamper progress in institutional change, and the persistence of conceptualizing women as dependent and vulnerable. On balance, Otto concludes, “[t]he feminist project in international law is losing ground, even as many are celebrating its victories.”

At the intersection of the postcolonial and feminist critiques of international law is the large literature being produced by postcolonial feminist writers, who argue the “heterogeneous nature of women’s experiences” must include the experience of colonialism and postcolonialism.

[T]he conditions experienced by women in the third world cannot be reduced only to gender or biology; exploitation by multinational capital, the deeply etched racism not only among some indigenous populations, but also in the legacy of colonial relations between “first” and “third” worlds, and a host of other factors all conspire to oppress women.

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78 The Exile of Exclusion supra note 77 at 10. Otto argues that despite the progress marked by Security Council Resolution 1325, that resolution itself and a follow-up resolution, 1820, also illustrates these concerns. Id. at 13-15; SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/RES/1820, (19 Jun. 2008).

Otto points out the earlier work of other scholars who have identified the dangers of mainstreaming in other international settings. The Exile of Exclusion supra note 77 at 9-10, citing among others Sally Baden & Anne Marie Goetz, Who Needs {Sex}When You Can Have {Gender}? Conflicting Discourses on Gender and Beijing, in FEMINIST VISIONS OF DEVELOPMENT: GENDER ANALYSIS AND POLICY 19, 20-12 (Cecile Jackson & Ruth Pearson eds. 1998) (raising concerns about mainstreaming in international development); Shahra Razavi & Carol Miller, Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues, Occasional Paper No. 4, UN Research Institute for Social Development, 1 Aug. 1995, at 67-69 (discussing how gender mainstreaming had been sidetracked in those institutions through lack of senior management support, resources, and expertise, and marginalizing of mainstreaming efforts).

79 The Exile of Exclusion supra note 77 at 15.


Such literature continues to articulate the ways in which social constructions render women as subordinate, but the ways in which such subordination is couched or analyzed can differ from western analogues of similar phenomena. The goal is to deconstruct a single view of “woman” or “Third World Woman,” an object amenable to a single type of analysis and for whom solutions, such as development or modernity, are proposed or imposed. This represents both the danger and opportunity present in meeting groups such as the Union of Organized Women of Yasica Sur. Amalia Sa’ar, for example, concludes that the more binary forms of analyses, such as the public-private distinction used in western feminist analysis, do not capture adequately the way in which power is distributed between men and women in the Middle East, so that other forms of analysis must be developed. More finely-grained understandings of the conditions experienced by women in the Third World lead also to different political agendas and different oppositional strategies. Thus, Amina Jamal suggests that for middle class women in Pakistan, ‘modern’ concepts of citizenship, public space, democracy, and human rights continue to be important ways to counter what she argues are attempts by some forms of Islam to redefine modernity in Pakistan. In contrast, Musa Dube argues that a deployment of essentialized visions of traditional African culture were useful tools during African independence movements, while at the same she recognizes they have been used to subject African women to what she calls double or triple oppression from patriarchy, colonizing cultures and western domination.

82 Amina Jamal, Transnational Feminism as Critical Practice: A Reading of Feminist Discourses in Pakistan, 5 MERIDIANS 57, 59 (2005), citing Deniz Kandiyoti, Reflections on Gender in Muslim Societies: From Nairobi to Beijing, in FAITH AND FREEDOM: WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD 19 (Mahnaz Afkhami ed., 1995); Chandra Talpade Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses, 12 BOUNDARY 2 33 (1986).
84 Jamal supra note 82 at 65-66.
85 Musa W. Dube Searching for the Lost Needle: Double Colonialization and Postcolonial African Feminisms, 5 STUD. IN WORLD CHRISTIANITY 213, 214, 216-17 (1999). As might be expected, these differentiations exist within countries. Aída Hernández Castillo, for example, discusses the differences in priorities of Mexican feminists located in urban areas and indigenous Mexican feminists. R. Aída Hernández Castillo, Entre el etnocentrismo feminista y el esencialismo étnico. Las mujeres indígenas y sus demandas de género [Between feminist ethnocentrism and ethnic essentialism: Indigenous women and their...
From these assessments of international law one senses such complicity in the suffering of significant numbers of people in the world that its status almost naturally brought into question. In these next three sections, I discuss three recent approaches to the issues I have identified, two of which sketch out some role for international law and a third which sets out a view of justice that could serve as a guide for international law. Before proceeding, however, some preliminary remarks are in order to give more background for what follows. As is well known, much of the post-colonial and feminist critiques of international law is informed by concepts taken from post-modernist thought. There is in some strands of both critiques a suspicion of universalism: to say that there are universal concepts such as “civilization,” “development,” the “Third World,” or “woman” or “man” and to give them ontological status as natural parts of the “real” world. Besides the epistemological and ontological problems associated with identifying universally applicable concepts such as liberty or freedom, attempts to universalize are often unsuccessful and are always “formulated from a particular standpoint.” For this reason, such ideals can become grounds for various crusades. They also make possible scales and gradations and the measurement of people or countries based on purportedly universal criteria, which makes oppression possible.

demands of gender], 24 DEBATE FEMINISTA 206 (2001). On the possibility of a transnational feminism, see e.g., Vera MacKie, The Language of Globalization, Transnationality and Feminism, 3 INT’L FEM. J. POL. 180 (2001) (suggesting that an examination of feminism movements in the Asia-Pacific region could help move the focus away from the dichotomy between western and non-western feminisms).

Rhoda Howard-Hassman provides a interesting schematic of what in her view is the “complex reality that characterizes the lives of most women, and that is increasingly characteristic of the lives of women in the non-Western world.” Rhoda E. Howard-Hassmann, 24 MICH. J. INT’L L. 227, 236 (2002). Using a sociological approach, Howard-Hassmann argues a woman has her own identity and at the same time has overlapping commitments to a number of groups: family, job, private interests, religion, friendships, community and country. Id.

This complexity does not imply that points of view are incommensurate. Rather, “[t]he challenge is to see how differences allow us to explain the connections and border crossings better and more accurately, how specifying difference allows us to theorize universal concerns more fully.” “Under Western Eyes” Revisited supra note 1 at 505.

Id. at 106-107.

On the misuses of the universal concepts in contact with other peoples, see IMPERIALISM,
The suspicion of universalism is closely tied to concerns about essentialism: to believe that one can get to the heart of what it is to be a woman or a man, Asian, African, or European, and then base one’s actions on those purportedly essential aspects. As Charlesworth and Chinkin put it, such essentialism “confuses social relations with immutable attributes” and thus excludes other possibilities for social relations that would better respond to the complexity that makes up the human being in the world.\textsuperscript{88} Thus one of the goals appears to be particularity that has a greater appreciation for the nuances of human life and could allow for greater individual thriving, a set of rich communities of the kind envisioned by Iris Young.\textsuperscript{89} As I will show, the approaches described in the next three subparts respond in some way to these theoretical critiques.

B. Resistance and International Law

The Union of Organized Women of Yasica Sur are an example of persons whom some have constructed as powerless, but who have decided how they will constitute themselves, by marshalling collective intelligence and capacities and thereby enabling them to live out a part of the lives they have imagined for themselves. In doing so they have resisted a great deal of what the world has constructed for them.

It is in these kinds of social movements that some scholars wish to find a different role for international law. Traditional international law, in their view, does not adequately take into account how people are using social movements to resist developments in international law perceived as harming their lives. Social movements have impacted the international level: scholars such as Obiora Chinedu Okafor, Balakrishnan Rajagopal, Muthucumaraswamy Sornarajah argue that social movements outside of traditional institutions of power have enjoyed varying levels of success in the reduction of agricultural subsidies, access to medicines, foreign investment, and the use of interpersonal landmines.\textsuperscript{90} As Sornarajah writes,
“the rise of power in international law is being met with sufficient resistance on the basis of ethical and justice-related notions through other bases of power by non-state actors which are gathering significant countervailing strength to affect international relations.”

Rajagopal argues that if international law is to remain relevant to the Third World, it must develop a theory of resistance that accounts for legitimate protest movements as more than a distraction at best and as threat at worst. Rajagopal draws from the literature of social movements to urge that their features (coherence through, but not identical with, institutions such as non-governmental organizations; inclusion of many individual and corporate actors; employing various forms or resistance and protest; and basing their organizations on shared beliefs and “collective identities”) lead to the formation of a new kind of cultural politics that extend beyond the poles of liberalism and Marxism. “[W]hen movements deploy alternative conceptions of women, nature, race, economy, democracy, or citizenship that unsettle dominant cultural meanings, they enact a cultural politics.”

According to Rajagopal, such politics is distinguished from other definitions of that term. It broadens the domain of politics to include contests that occur in traditional political institutions and elsewhere. It also involves issues of meaning and value, not simply issues about who has access to resources. As opposed to an emphasis on social harmony, cultural politics views conflict among the classes as “at the heart of politics.” Some social movements also engage in defining their own ways to negotiate between tradition and modernity and thus redefine modernity itself. Finally,

-supra note 2 at 399-400; Muthucumaraswamy Sornarajah, Power and Justice: Third World Resistance in International Law, 10 SINGAPORE Y.B. INT’L L. 19 (2006).
91 Sornarajah supra note 90 at 25.
92 Challenges of Theorizing Resistance supra note 2 at 400. As Diane Otto puts it, it is quite possible for subaltern speech to be described as “a ‘clamor,’ the spread of ‘rumor,’ the noise of ‘the mindless rabble,’ the disorganization of ‘the traditional community,’ and the impulse of ‘religious fanaticism.’” Diane Otto, Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference, in LAWS OF THE POSTCOLONIAL 145, 167 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999) [hereinafter Subalternity and International Law].
93 Id. at 408-11.
94 Id. at 411-15.
95 Id. at 416, citing CULTURES OF POLITICS/POLITICS OF CULTURES: RE-VISIONING LATIN AMERICAN SOCIAL MOVEMENTS 7 (Sonia E. Alavarez et al. eds., 1998).
96 Id. at 417.
Rajagopal argues that “identities do not result merely from individual choice, but from relational activities among a group of people who unite to achieve a common purpose in the form of a movement.” Thus, Rajagopal emphasizes that identity is socially determined and suggests that the right to identity is relational as well.

Rajagopal continues by urging that a theory of international resistance needs to address four issues: first, the nature of power in international society that is to be resisted; second, the nature of human liberation to be sought; third, the strategies to be used; and fourth, the role of the postcolonial state in such resistance. Here, Rajagopal finds the work of Foucault, Fanon, Antonio Gramsci, and Partha Chatterjee helpful in suggesting how such a theory might be fleshed out. Of course, each of the questions Rajagopal raises and his tentative responses provide rich

97 Id.
98 Id.
99 Id. at 421.
100 Id. at 421-32. From Foucault, Rajagopal takes the concept of “governmentality,” an understanding of power that goes beyond government institutions and asks how government is practiced; in Rajagopal’s view, the concept reflects better the experience of the Third World in which “most effective power has shifted to apparatuses of government that are both above and below the state, as well as to domestic and transnational private actors,” and has taken on a bureaucratic cast. Id. at 422 citing THE FOUCALT EFFECT: STUDIES IN GOVERNMENTALITY 102-103 (Graham Burchell et. al. eds., 1991). From Fanon, Rajagopal finds useful the insights that liberation cannot be equated with nationalism; that mass action need not be based on pure economic strength; and that various forms of capitalism creates different possibilities for reform. Id. at 423-26, citing FANON supra note 40 at 35-106, 148-205. On this latter point, see also Bhupinder S. Chimni, Co-option and Resistance: Two Faces of Global Administrative Law, 37 N.Y.U. J. INT’L L. & POL. 799, 806-11 (2006) (arguing that developments in India show how global administrative law can serve as grounds for reform even as such law facilitates global flows of capital). Rajagopol finds useful Gramsci’s understanding concept of hegemony as self-perpetuating form of common assent as opposed to simple domination by force; his concept of a “molecular” from of passive revolution that allows for change even when other forces prevent more systemic forms of resistance; and his analysis of the role intellectual elites play in hegemony. Challenges of Theorizing Resistance supra note 2 at 426-30, citing ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quinten Hoare & Geoffrey Nowell Smith eds. and trans., 1971). Finally, Rajagopal uses Chatterjee’s work to sketch the contours of the relationship of social movements to the post-colonial state. In particular, for Rajagopal, Chatterjee has rightly identified the unique role development has taken on for legitimizing the post-colonial state and challenged the purported neutrality of the state in the development process. Id. citing PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS (1993).
opportunities for discussion, but the question this approach arises for purposes of this Article derives from his view that conflict drives cultural politics. Under such a theory, how does one settle such conflicts? Is it important to account for and then mediate conflicts that could well arise between various social movements, as opposed to the conflict which arises between those movements and the hegemony which they resist? If it is important to do so, what are the mechanisms for doing so? On the one hand, perhaps it is more important at this stage of the critique to focus on what it is that social movements struggle against as opposed to what they struggle for. This seems to be the case for Rajagopal. On the other hand, these two sets of questions are opposite sides of the same coin.

Rajagopal does sketch some of the contours of cultural politics as movements relate to other movements. He does so by defining civil society broadly to extend to groups that are often marginalized in more traditional conceptions of such society. Several of the social movements Rajagopal describes demand a redefinition of claims to territory based on collective rights and social relations and on autonomy as opposed to sovereignty. Rajagopal is quite clear, however, that there would be contestation among social movements. He believes Habermasian forms of deliberative democracy mark an advance from more traditional forms of liberalism by

101 I appreciate in this regard conversations with Tayyab Mahmud, who reminds me in the context of post-colonial studies more generally that the work of understanding the history of international law in the context of colonialism and its current impacts is far from over. For an example of his contributions to this literature, see Tayyab Mahmud, Colonial Cartographies and Postcolonial Borders: The Unending War in and around Afghanistan, [add final citation after placement] (forthcoming 20__) (discussing among other things how colonial demarcation of borders influence the current conflict in Afghanistan and Pakistan).

102 Writing in 2003, his primary interest is in understanding how social movements might impact the current doctrines and principles of international law. Id. at 262.

103 Chimni, for example, suggests some form of democratic socialism. Manifesto supra note 61 at 21. Such ideals would be realized through reform instead of revolution and would be open to reliance on market institutions. Id. at 4, and thus does not develop fully how such ideals would be realized.

104 Id. at 263.
creating room for civil society, so it may be Rajagopal foresees techniques such as incomplete theorization among groups will enable various movements to negotiate and co-exist. But Habermas and some deliberative democratic thinkers see a stronger role for the state in permitting the kind of diversity social movements represent than it appears does Rajagopal. In my view, eventually a cultural politics of resistance will need to work out how international law will allow for this kind of diversity, perhaps through concepts like subsidiarity, various forms of autonomy for people groups, etc.

C. The Temporary Resolution of Paradox

A recurring issue in the debates on international law is how to prevent absolutes such as the rule of law from becoming ideology used to mask exploitation. Emmanuelle Jouannet attempts to address this question in a recent article, Universalism and Imperialism: The True-False Paradox of International Law? In that article, Jouannet characterizes the relationship between international law’s universalism and imperialism as paradoxical:

It is paradoxical because it is both one and the other, it is an instrument for universalization and a reflection of ambivalent particularities: a means of domination and a space for cooperation and emancipation.

107 Challenges of Theorizing Resistance supra note 2 at 412.
108 As Cass Sunstein explains it, incompletely theorized agreements are theoretical compromises that allow persons with different points of view to reach on agreement on one level of abstraction while not reaching agreement on other levels. Cass R. Sunstein, Designing Democracy: What Constitutions Do 44 (2001). I discuss this concept in somewhat more detail in my discussion of Sen’s comparative approach. See infra text accompanying notes 186-87.
109 Habermas, for example, sees one of the roles of formal legislatures as selecting and justifying policies that have already been “discovered” through interactions in the public sphere. Jürgen Habermas, Between Facts and Norms 307 (William Rehg trans. 1996) [hereinafter Between Facts and Norms].
110 The problems of ideology are discussed in connection with the concept of democracy in Susan Marks, The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology (1999). Marks’ analysis of ideology is found in chapter 1, id. at 1-29, and then used throughout.
111 Jouannet supra note 3.
112 Id. at 406. See also Martti Koskenniemi, International Law and Imperialism, in
Jouannet traces this paradox through the development of international law from its classical formal stage to what she understands to be the contemporary, “substantive” understanding of international law, a law that posits a common good or common set of values for all humankind, most salient in the body of human rights law.113 Just as formal universalism of international law lent itself to imperialism, so too can its substantive form. This is because the values informing substantive international law will from time to time need to be protected, sometimes by force, and there remains a continuing suspicion that such values continue to be western in origin and perspective.114 “The new legal values of contemporary international law,” Jouannet writes, “are drawn from a particular—Western—culture, but can be applicable if they are genuinely recognized as legitimate by those to whom they are applied.”115 However, “they will not be recognized as such unless they are based on a common ethics or a global culture that, for the moment, does not exist.”116 But if there is no such common ethic or culture, does the avoidance of essentialism imply the indeterminacy of cultural relativism?117

CONTEMPORARY ISSUES IN INTERNATIONAL LAW: A COLLECTION OF THE JOSEPHINE ONOH MEMORIAL LECTURES 197, 198 (David Freestone et. al. eds., 2002) (“There is an ambivalence about international law. Sovereignty and international governance seem both good and bad, liberating and threatening at the same time: neither provides a recipe against domination.”).

113 Id. at 380-87. Jouannet points out that she does not mean that international law has adopted “a particular form of religion, culture, morality or conception of happiness.” Id. at 388. Instead, ideas embodied in international law, such as democracy and human rights,

express a juridical and liberal conception of ‘justice’ that should remain neutral vis-à-vis the varying conceptions of the good, and aim instead to respect the plurality of subjective individual values and goods, the internal plurality of each state, and the cultures, religions and opinions of each individual.

114 Id. at 389.
115 Id. at 390.
116 Id.
117 Charlesworth and Chinkin discuss this difficult issue in connection with genital mutilation. THE BOUNDARIES OF INTERNATIONAL LAW supra note 71 at 222-29. For a discussion of the various perspectives of third-world scholars on the issue of culture and rights, see INTERNATIONAL LAW FROM BELOW supra note 2 at 209-212.
One of the implications of Jouannet’s claim that both formal and substantive versions of international law have imperial aspects is that the problem cannot be resolved by trying to remove the normative aspects of concepts such as democracy, equality, or inclusion, and recasting them in legal terms, such as principles. Such an approach has the advantage of taking international law outside of the ambit of what could be conceived as a culturally determined ethics. However, this does not avoid Jouannet’s paradox: even if inclusion can be shorn of its normative character and cast as legal principle, the result looks like a return to a more formal conception of international law, which Jouannet has just argued was also used in service of imperialism. The concern is that such formalism is itself value laden and culturally bound. Further, if the post-colonial critique is right that the application of formal international law had a role in creating inequalities that persist to the present, because of the path-driven nature of social developments, the application of legal principles could continue to have disparate impacts and perpetuate inequality.  

Jouannet’s own response to the paradox of universalism and imperialism is interesting in that it calls for situating international law within a particular kind of “anthropology” not culturally determined, which values human dignity, freedom, and cooperation, and in so doing raises questions of identity. She notes, “the formation of identity has become a crucial theme of contemporary reflection on law.” Of course, she is not alone in this regard. Much of contemporary thought, including the feminist and post-colonial streams, has been influenced by concepts of identity and alterity. As Boucher puts it, “[t]he fundamental question that links political theory and international relations theory is simply ‘who are you?’ or self-

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118 See e.g., Ha-Joon Chang, Kicking Away the Ladder: The “Real” History of Free Trade (2002). Chang argues that although the current international trade regime embodies principles such as free trade and the protection of intellectual property, developed nations engaged in trade protection and had relatively lax intellectual property standards during the formative years of their economies. Id. at 2-3, 59-64. Thus, Chang argues, to prevent developing nations from using the very strategies that helped enrich developed countries, in the name of free trade, has the effect of allowing developed countries to enjoy economic growth and then kick away the ladder. Id. at 135. On the moral implications of western contributions to global inequality, see Thomas Pogge, Real World Justice 9 J. ETHICS 29, 38-39 (2005) [hereinafter Real World Justice].

119 Jouannet supra note 3 at 403.

120 Id. at 405.
referentially ‘who am I?’”\textsuperscript{121} These questions are relevant to international relations because human life is lived in the “context of social institutions which are constitutive of our identity.”\textsuperscript{122} One such institution is the nation,\textsuperscript{123} which Boucher argues continues to be “the sustainer of all of our cultural, social, and political institutions and practices” and as such, “is the predominant agent though which citizens are collective actors on the world scene.”\textsuperscript{124}

Seen through this framework, problems on the international level reflect the dynamics of identity at any level of organization. To conceive of identity as being constituted by one’s social relations sets into motion a self-reinforcing dynamic because in Boucher’s terms, one’s self-perception impacts what one chooses to do, with whom one associates, to whom one will give her allegiance, etc.\textsuperscript{125} But this immediately raises the issue of recognition. “Self-identification is of little value without recognition, recognition by those with whom one wishes to be associated, and externally by those whose acknowledgement of one’s identity is deemed important.”\textsuperscript{126} A tension arises from the possibility that one will not be so recognized and thus be excluded.\textsuperscript{127} The Catch-22 is that such exclusion might be inevitable: it might be that “every community is based on an exclusion.”\textsuperscript{128}

Jouannet points to four developments in international legal practice and scholarship that could help overcome the paradox of international law, but only temporarily. First, she points out that if one puts to the side conflicts over national security, negotiation within certain international institutions has begun to take on a level of nuance and complexity such that “the defense of . . . interests is intermixed with the possibility of sharing or

\textsuperscript{121} Boucher supra note 5 at 378.
\textsuperscript{122} Id.
\textsuperscript{123} Boucher distinguishes the nation from the state. “A state is a community of people with an aspiration to be politically self-determining, and the state is the set of political institutions that they aspire to achieve. Id. at 389 (citations omitted).
\textsuperscript{124} Id. at 387.
\textsuperscript{125} Id. at 378.
\textsuperscript{126} Id. at 379.
\textsuperscript{127} A classic literary example is Ralph Ellison, Invisible Man (Vintage Books ed. 1972) (1952).
\textsuperscript{128} The Gentle Civilizer of Nations supra note 53 at 517. See also Boucher supra note 5 at 379 (‘The state is also founded on patterns of exclusion and inclusion, patterns which are historically contingent and thus not pre-ordained.’)
accepting the position of the other." 129 This relates to her second point, that new “trends of thought” could overcome some aspects of the post-modern critique of universalism. These new trends allow for a “refounding of reason and a certain universality of values” through an emphasis on what she terms “practical rationality” and “inter-subjectivity.” 130 Third, because in Jouannet’s view cultural conflicts are at bottom existential, in which values are implicated, and thus beyond the reach of negotiation and argument, these must be addressed through a process suggested by Habermas, one of ‘reflexive appropriation.’ 131

Finally, Jouannet argues that scholarship drawing from psychoanalysis has identified a deep ambivalence in the self, an ambivalence that manifests itself in social institutions and international law. 132 For Jouannet, this might be the heart of the problem with international law. To be ambivalent is to have negative and positive feelings about oneself and the other. These mixed emotions of hate and love and attraction and repulsion, are lived out in the self, one-on-one relationships, and in larger groups.

129 Jouannet supra note 3 at 398.
130 Id. at 401 (emphasis supplied). Jouannet does not expressly identify what those trends of thought are. My guess is Habermas’s theory of communicative action and his attempt to ground law and democracy from such action is an example of inter-subjective thought to which Jouannet is referring. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans. 1984); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans. 1987); BETWEEN FACTS AND NORMS supra note 109.
131 Jouannet supra note 3 at 401-402. Habermas’ more recent discussions of this process appear in BETWEEN NATIONALISM AND RELIGION supra note 8.

According to Jouannet, the insight that such an ambivalence is present in all we do in the end gives us greater freedom to act, even though there is a deeper awareness that ones behavior on the international level is at bottom irrational:

If . . . our conduct, individual and collective is ambivalent, then even our most formal ideals and legal rules are equally so; and we must thus accept the need to struggle against that which we view as wrong, and to impose that which we consider to be best, without seeking to pretend that the solutions we propose are the fruits of rational or legal reason.\(^{133}\)

The approach Jouannet proposes does have the benefit of enabling one to act in the world with a sense of humility but without a nagging feeling of guilt.\(^{134}\) A question we might ask, however, is if human conduct is embedded in an ambivalence which is pre-rational, to what extent can we “trust” this aspect of ourselves? As discussed earlier, Jouannet speaks of a human anthropology, not culturally determined, which values human dignity, freedom, and cooperation.\(^{135}\) But human ambivalence appears not to be part of this anthropology.\(^{136}\) If that is so, our struggling against what we view as wrong and imposing what we consider to be best appears to

\(^{133}\) *Jouannet supra* note 3 at 405.

\(^{134}\) There is a sense in which Rorty reaches the same result, although he writes in terms of the capabilities of language. For him too, it is not rationality or legality which leads liberal society to have an aversion to cruelty. It is the warp and woof of modern life, most importantly in our literature. *Richard Rorty, Contingency, Irony, and Solidarity* 141-88 (1989). (Rorty would probably argue that the story of the Syrophoenician woman as literature, proves his point.)

Martha Nussbaum explains the human propensity for “bad behavior” through psychoanalytic concepts as well. She argues such bad behavior stems from the anxiety and shame of incompleteness each person experiences at infancy as it dawns on him or her that “good things” do not always come instantaneously. Such pain leads to shame and revulsion that is projected outwards “onto subordinate groups who conveniently symbolize the problematic aspects of humanity, those from which people want to distance themselves.” Martha C. Nussbaum, *Radical Evil in the Lockean State: The Neglect of the Political Emotions*, 3 J. MORAL PHILO. 159, 164 (2006) [hereinafter *Neglect of the Political Emotions*].

\(^{135}\) *Jouannet supra* note 3 at 403.

\(^{136}\) *Id.*
stems from other parts of ourselves, the part of identity disconnected from
values rationally conceived, the part that is fundamentally ambivalent. We
might well be engaged in struggle and imposition and be completely wrong
under the circumstances.  

We seem to act with the knowledge that there
are no better reasons for our actions other than that we take them.  

A second question we might ask is where the Third World fits within
the psychodynamics of ambivalence and their temporary resolution. Jouannet concludes “we are compelled to take responsibility for the
ambivalences of international law . . . and the constitutive ethnocentrism of
its ideas and its values,”139 and to “take responsibility of international law
for non-Western peoples . . .”140 Presumably, “we” refers to the west. If this
is linked to the other claim we must struggle or impose, the Third World
seems the object of such fights or impositions or out of the picture (in either
case excluded) or, equally engaged in fights and impositions. Jouannet partly
anticipates this: the paradox of international law can be overcome, “but only
ever in a temporary and provisional manner, through the use of ‘universal
pragmatics’, bit by bit alongside the development of international
society.”141 I will have more to say about the temporary and incremental
nature of solutions in the next section. But for now I raise another issue

137 Nussbaum argues that the shame and disgust that motivate bad behavior in relation to
others can be overcome in part through the cultivation of compassion through public
institutions and public education as part of a type of civil religion. Id. at 169. See
generally MARTHA C. NUSSBAUM, UPHAVEALS OF THOUGHT: THE INTELLIGENCE OF
EMOTIONS (2001); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME

138 These are same questions Rorty asks of the ironist for whom there is no vocabulary that
is somehow in touch with some outside reality, that does not derive from herself, RORTY
supra note 134 at 73, namely, is it possible to be a “private self-creator and a public liberal?” Id. at 85. On the ironist’s conception, human solidarity is a matter of “a common
selfish hope, the hope that one’s world—the little things around which one has woven into
one’s vocabulary—will not be destroyed.” Id. at 92. As for public purposes, for Rorty, “it
does not matter if everybody’s final vocabulary is different, as long as there is enough
overlap so that everybody has some words with which to express the desirability of entering
into other people’s fantasies as well as into one’s own.” Id. at 93. Although there are no
valid reasons to care about suffering—all the ironist can hope for is “making sure that she
notices suffering when it occurs.” Id.

139 Jouannet supra note 3 at 406.

140 Id. citing M Xifaras, Commentaire, in DROIT INTERNATIONAL ET IMPÉRIALISME EN
EUROPE ET AUX ÉTATS-UNIS [International Law and Imperialism in Europe and in the
United States] ___ (Emmanuelle Jouannet & Hélène Ruiz-Fabri eds. 2007).

141 Jouannet supra note 3 at 403.
raised by the possibility of fundamental ambivalence within each person and put so well by Boucher: “The question then becomes not that of the rational egoist, who asks, ‘Why should I be moral?’ but instead ‘Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?’”\textsuperscript{142} It is a question both Jesus and the Syrophoenician woman could well have asked.

D. Tentative International Justice

1. A Comparative-Capabilities Approach to Justice

Falk, Rajagopal, and Stevens argue that a theme emerging from the post-colonial critique of international law is the belief that “international law is not an alternative to other narratives of justice . . . but is simply one more terrain on which contestation over the contours of justice take place.”\textsuperscript{143} This strikes me as entirely correct. Reinhold Niebuhr anticipates this view: legal norms are “compromises between the rational-moral ideals of what ought to be, and the possibilities of the situation as determined by given equilibria of vital forces.”\textsuperscript{144} One might disagree about the extent to which rationality informs our sense of what ought to be; but law is related to, and yet does not replace, justice. An international law that seeks to serve a broader portion of the world community must be engaged in questions of international justice.

The past 20 years has seen a great deal of work in international ethics and justice, so much so that it is hard to make out even the roughest contours of the field.\textsuperscript{145} The debates in the area coalesce around a number of

\textsuperscript{142} Boucher supra note 5 at 400.
\textsuperscript{143} Falk et. al. note 62 at 5.
\textsuperscript{145} Ramon Das gives a good summary of the counters of the field. Ramon Das, Ethics and International Affairs, 4 Phil. Books 329 (2007).

See e.g., Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law (2004) (arguing for a system of international law that ensures access to institutions to vindicate basic human rights); James Brassett & Richard Higgott, Building the Normative Dimension(s) of a Global Polity, 29 Rev. Int’l Stud. 29 (2003) (providing an overview of different approaches to international justice and suggesting a pragmatic perspective derived from Rorty); Nigel Dower, Global Economy, Justice and Sustainability, 7 Ethical Theory & Moral Practice 399 (2004); Rainer
interlocking issues. Much of the literature has engaged with the possibilities of extending Rawl’s theory of justice to the international level, a debate sparked by Rawls himself with his publication of *The Law of Peoples*. This is one aspect of larger questions related to relationship between justice as understood from the perspective of the person and justice manifested in states or other institutions. There are also empirical and empirical and empirical perspectives.


148 David Armstrong, *Law, Justice and the Idea of a World Society*, 75 *Int’l Aff.* 547 (1999) (arguing that although globalization has changed what it means to be a state, how states interact, and how they make international rules, any unfairness which arises from globalization will be addressed at the state level); Mervyn Frost, *Justice and Sovereignty*, 104 *Theoria* 54 (2004); Byron Kaldis, *World Justice, Global Politics and Nation States: Three Ethico-Political Problems*, 7 *Eur. Legacy* 167 (2002);

philosophical debates about the nature of global inequality and global justice, which in turn lead to questions of distributive justice and whether and how one should respond to such inequality.

In this section I discuss a recent book by Amartya Sen, *The Idea of Justice*, which ties together a number of themes that have emerged from Sen’s much larger body of work. The approach taken by Sen is intriguing for several reasons. As an initial matter, it purports to defer questions about universally applicable norms or ideal institutions, and thereby negotiates the obstacles set by the post-modern critique of universals. As I will discuss below, Sen’s approach takes on a family resemblance to forms of deliberative democracy, in turn influenced by Habermas. His approach thus reconnects to Jouannet’s sense that post-critical developments in philosophy might help solve the paradox for a time, as well as to some of the remarks of Rajagopal. Second, the results of Sen’s approach are necessarily tentative, thus bringing us back to the issue of tentative versus definitive justice outcomes which are also raised in both Rajagopal and Jouannet’s respective approaches.

Sen argues that the international community should turn from questions of what he terms “transcendental justice” to questions of “social realizations” that would result from comparing and then choosing between various social policies. Transcendental justice refers to establishing justice through the design of just social arrangements. According to Sen, Rawls’ *The Laws of Peoples* represents such an approach. However, Sen argues the search for just social arrangements is hampered by two problems: first, the approach is not feasible because debates about the foundations of social arrangements (for example, whether they should be based on utilitarian or Rawlsian perspectives, cosmopolitan or state-oriented principles, etc.) are irresolvable.

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152 *The Idea of Justice* supra note 4.

153 Id. at 5-7.

154 Id at 5-6.
Second and perhaps more importantly, the design of just institutions cannot tell us what to do in specific instances: an understanding of just social arrangements is neither necessary nor sufficient in helping persons make choices that raise issues of justice. Sen argues, “If we are trying to choose between a Picasso and a Dali, it is of no help to invoke a diagnosis . . . that the ideal picture in the world is the Mona Lisa.” A vision of an ideal set of social arrangements is beside the point: “the possibility of having an identifiably perfect alternative does not indicate that it is necessary, or indeed useful, to refer to it in judging the relative merits of two other alternatives.” Nor are social institutions sufficient: one could try to decide whether the Picasso or Dali is closer to the Mona Lisa, but this becomes nonsensical and arbitrary. “The characterization of spotless justice [in the form of just social arrangements] would not entail any delineation whatever of how diverse departures from spotlessness would be compared and ranked.” Thus for Sen, ideal social arrangements and social choices have no meaningful connection.

In Sen’s view it is better to turn away from social arrangements as the locus of justice towards a comparative approach, “an agreement, based on public reasoning, on rankings of alternatives that can be realized.” There are several distinct features this framework. One is Sen’s belief that public reasoning is the vehicle for social comparison. Such reasoning provides the objectivity and impartiality Sen believes is needed in a comparative approach, but objectivity in this respect has less to do with capturing some objective truth than it does with the ability of a particular point of view to withstand the scrutiny of those with other points of view.

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155 Id. at 15-16, 96-105.
156 Id. at 15.
157 Id. at 102.
158 Id. at 15.
159 Id. at 99.
160 Koskenniemi shares this intuition. He is also led to downplay the role of international legal institutions in addressing questions about the distribution of what he terms “material and spiritual values.” FROM APOLOGY TO UTOPIA supra note 55 at 604. Inasmuch as institutions are themselves a set of rules and procedures, they too are indeterminate, such there can be no sense that institutions work towards a common good. Id. The result in practice is that different societies demand different things of the same institution, while common solutions proposed by institutions affect different societies in different ways. Id.
161 THE IDEA OF JUSTICE supra note 4 at 17, 86.
162 Id. at 45-46. Sen is aware of both the limitations of reason and acknowledges the powerful role emotions play in human behavior. Id. at 48-51. For Sen, however, that
For Sen, such public reasoning is closely linked to democracy, conceived as “government by discussion.” The phrase, which Sen attributes to Walter Bagehot, is meant to encompass the work of proponents of deliberative democracy such as Habermas, as well as the work by those such as Rawls, Bruce Ackerman, Seyla Benhabib, Joshua Cohen, and Ronald Dworkin.

A second feature of Sen’s approach is his suggestion that social choice theory can provide the means to compare and rank alternatives. Social choice tries to determine the conditions under which societal choices among various alternatives are coherent. Kenneth Arrow has been the interlocutor for much of Sen’s work. Arrow’s Impossibility Theorem states that it is impossible to devise any system of mapping individual preferences onto a social welfare function and at the same time satisfy relatively modest conditions we would assume would be part of any acceptable group decision making process. Much of the subsequent literature in social choice theory has responded to the Impossibility Theorem by relaxing one or more of the reasons has limitations does have limits does not mean it should be abandoned; indeed the solution to bad reasoning is better reasoning. Id. at 49. Further, for Sen reason and emotion do not necessarily conflict, and in any case, even emotion benefits from an assessment via reason. Id. at 50-51.

Id. at 324.

Id. Sen finds instances of such democracy in the histories of non-Western areas to argue democracy is not purely a Western tradition. Id. at 329-32. See also Amartya Sen, Democracy as a Universal Value, 10 J. DEMOCRACY 3, 12-16 (1999) (arguing that Asian and democratic values are not necessarily in conflict). Koskeniemmi is similarly attracted to this form of deciding what to do “here and now.” FROM APOLOGY TO UTOPIA supra note 55 at 544-45. He also believes decision-making involves reconciling “incompatible suggestions for how to solve normative problems,” a process which involves public discussion and criticism: “The legitimacy of critical solutions . . . [lies] in the openness of the process of conversation and evaluation through which it has been chosen and in accepts the possibility of revision—in the authenticity of the participants’ will to agree.” Id. at 545.

KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Arrow proposes several conditions. First, every set of possible orderings of preferences should be admissible. Id. at 24. Second, there should be a positive relationship between social orderings and individual preferences: if every individual’s preference for a particular state rises, one should see it rise in any corresponding social ordering. Id. at 25-26. Third, any social ordering should be independent of irrelevant alternatives. Id. at 26-27. Fourth there should be unanimity: the social welfare function representing citizens’ preferences should not be imposed. Id. at 29. Finally, there should be no dictatorship; that is, there should be no one person whose preferences are the sole basis for the choices made by a society. Id. at 30. Arrow goes on to show formally that no majority voting system can satisfy all these conditions. Id. at 46-59.

Sen’s emphasis on social choice theory gives birth to other features that distinguish the comparative approach. To overcome the Impossibility Theorem, Sen proposes that societies engage in “interpersonal comparisons of well-being and relative advantage.”\footnote{167 The Idea of Justice supra note 4 at 93. Permitting interpersonal comparison of utilities is one means of allowing for consensus. The Possibility of Social Choice supra note 166 at 355-57.} Sen thus departs from much of welfare economics, first because he believes that interpersonal comparisons are possible, and second because he does not believe utility should be the ‘indicia’ of social welfare. With regard to interpersonal comparison, Arrow’s theorem presumes incommensurate utility curves, in keeping with the general view in economics that there is “no warrant for taking measurements of utility from different individuals and combining them into meaningful aggregates.”\footnote{168 Daniel Read, Experienced utility: Utility theory from Jeremy Bentham to Daniel Kahneman, 13 THINKING & REASONING 45, 56 (2007). Read, who champions a form of experienced utility proposed by Daniel Kahneman, gives good overview of the major developments in utility theory as he compares and contrasts experienced utility with other approaches.} This raises two issues: first, whether “certain experiences are universally worse or better than others” and second, whether the magnitude of the experience for one person is comparable to that of another.\footnote{169 Id. at 57.} Utility theory has developed from one about mental states to a theory about ordinal preferences with no cardinal values. Preferences thus lack content—strictly speaking they cannot be related to states of mind and have only descriptive, not normative, value. As Daniel Read puts it, “we would like our account of rationality to tell us such things as whether it is rational or irrational to smoke, to overeat, or to undersave. . . [R]ational choice theory, because it does not put constraints on what people ought to want, does not rule them out.”\footnote{170 Id. at 46}

As just discussed, Sen overcomes impossibility by allowing for interpersonal comparisons and by proposing what he views are better criteria
than the maximization of preferences for purposes of social choice. The two concepts are closely related. Interpersonal comparisons make it possible to move beyond the constraints of pareto-optimization just discussed. As Arrow notes, “[t]he paradoxes in social choice theory arise in good measure from the assumed incomparability of different individual’s preference intensities.” He continues, “[i]f one were to drop this restriction, the utilitarian solution of adding up the individuals’ utilities would satisfy all the other conditions usually suggested.”

Sen, however, is dubious of mental satisfaction as the basis of evaluating choice. One of his most significant contributions to social choice theory is his showing that even in situations where several of Arrow’s conditions are relaxed, it is impossible to reconcile even modest Pareto-based decisions with a strongly held liberal belief that individuals should have freedom to choose particular outcomes (such as the color of one’s room or what book one will read). This result puts in question whether pareto-efficiency alone can serve as the basis for social choice.

Instead of equating welfare with utility, Sen is well-known for proposing a system that maximizes human freedom and human capabilities. Under Sen’s framework, freedom has two aspects, the first goes to the opportunity to pursue one’s objectives and the second goes to the process of choosing. It is important for Sen that a person eventually achieves a

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171 Sen views the choice of criteria or indicia as a choice of information: what information is available and will be considered relevant or irrelevant in evaluating a particular choice? DEVELOPMENT AS FREEDOM supra note 4 at 57.
173 Id.
174 Sen of course is aware under some views preferences say nothing about what motivates the preference in question, only that preferences can be arranged in a particular ordering.
175 With regard to the ability of preference-based frameworks to help or account for decision-making, in my view the truth lies somewhere “in-between,” in the sense that preference-based explanations have done a pretty good job of accounting for the behavior of elected officials in representative forms of government. For a discussion of the literature and a preference-based model of foreign policy formation, see generally Mark A. Chinen & Lana J. Ellis, Matters of Preference: Tracing the Line Between Citizens, Democratic States, and International Law, 19 TRANSNAT’L L. & CONTEMP. PROBS. ___ (2010).
177 Sen discusses some of the issues raised by this argument in THE IDEA OF JUSTICE supra note 4 at 309-14.
178 THE IDEA OF JUSTICE supra note 4 at 228; DEVELOPMENT AS FREEDOM supra note 4 at
desired objective, but also that she is not forced into arriving at it. In championing human capabilities, Sen’s work echoes and has been influenced by that of Martha Nussbaum. Nussbaum is also concerned with the life choices available to humans, particularly to women. Both Sen and Nussbaum are critical of resource-based or preference-based measures of human well-being. Nussbaum argues that such measures raise distributional questions that cannot be answered by resource-based approaches alone. Moreover, Nussbaum agrees with Sen that resource-based approaches do not account for the fact that humans vary in the ability to convert resources into “functionings.” To use one of her examples, a pregnant or lactating woman needs more nutrition than does a nonpregnant woman. Nussbaum argues in turn that preference-based measures are flawed because preferences are endogenous: they are taken as given and do not take into account that a person with a lack of access to adequate food and water might have a very different preference set if she were to have such access. Under the human capabilities or capacities approach, the question

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17. THE IDEA OF JUSTICE supra note 4 at 228; DEVELOPMENT AS FREEDOM supra note 4 at 17. Sen distinguishes between comprehensive outcomes, ” outcomes in which both the outcome and the methods or reasons associated with an outcome are taken into account, and “cumulative outcomes,” ones in which only end-states are considered. THE IDEA OF JUSTICE supra note 4 at 22-23.


179 Id. at 127. Sen also uses functionings to refer to actual living out of activities in the world. DEVELOPMENT AS FREEDOM supra note 4 at 74-76.

180 Id. at 127. Sen uses functionings to refer to actual living out of activities in the world. DEVELOPMENT AS FREEDOM supra note 4 at 74-76.

181 Id. at 127. Sen also uses functionings to refer to actual living out of activities in the world. DEVELOPMENT AS FREEDOM supra note 4 at 74-76.

182 Id. at 127-28. Nussbaum is also unconvinced about a human rights approach for three reasons. First, human rights are highly contested. Second, human rights language continues to focus on civil and political rights even though social and economic rights are closely intertwined with political rights. Third, the rights of women have traditionally been excluded from the human rights paradigm—no accident, in Nussbaum’s view, in part because civil and political rights have been associated with the public sphere, from which women have been traditionally excluded. Id. at 128-29.

With regard to Nussbaum’s third point, see also Ivana Radačić, Human Rights of Women and the Public/Private Divide in International Human Rights Law, 3 CROATIAN Y. EUR. L. & POL’Y 443 (2007) (arguing that international human rights law has tended to perpetuate the public/private distinction); Pamela Scully, Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence, 23 EMORY INT’L L. REV. 113, 116-17 (2009) (expressing concerns that recent UN resolutions decrying sexual abuse of women during armed conflict has the effects of enhancing stereotypes of women as victimized and
for evaluation is whether a person has the opportunity to engage in what one would normally think of as part of a good life.\textsuperscript{183} This involves not only ensuring what falls under concepts of political and civil liberties, but also access to resources and knowledge that allow a person to function in the world as a full human person.\textsuperscript{184} A person is not required to take advantage of that opportunity, however.\textsuperscript{185}

Both Sen and Nussbaum urge that a human capabilities approach will by necessity be multi-faceted. Social choice decisions could focus on any number of factors or capacities that enable a human being to function in the world, such as literacy, birth rates, access to health care, etc.\textsuperscript{186} This fact leads to a final distinctive point for Sen’s comparative approach: any public choice made through this approach will encompass a plurality of reasons for a particular decision and be partial and tentative.\textsuperscript{187} To return to Sen’s illustration of paintings, this must be the case because under the comparative approach, various social actors are simply being asked to choose between a Picasso and a Dali. If the actors select the Picasso, there is any number of reasons why each member of the group would have done so. Thus, that choice in itself can have no bearing on what would happen if a Rothko now becomes available. Further, because decisions are highly dependent on the circumstances, the fact a group chose a Picasso to decorate an office does not mean it will chose a Picasso for a residence.

\textsuperscript{183} Nussbaum’s framework conceives of the human being as “a dignified free being who shapes his or her own life, rather than [is] passively shaped or pushed around by the world in the manner of a flock or herd animal.” \textit{Capabilities and Social Justice} supra note 179 at 130.

\textsuperscript{184} \textit{Id.} at 132.

\textsuperscript{185} As Nussbaum points out, it is important that people be given the option not to take advantage of various life opportunities because it enables persons to engage in practical reason in their particular life circumstances. There is a difference, however, between a person who chooses to fast, and a person who starves. \textit{Id}. Further, focusing on capability as opposed to function prevents a society from forcing a person to perform particular functions. \textit{Id.} at 133.

\textsuperscript{186} \textit{Id.} at 132-33; \textit{The Idea of Justice} supra note 4 at 106, 233.

\textsuperscript{187} \textit{The Idea of Justice} supra note 4 at 102-105, 107.
2. Implications for International Law

The last subpart has spent a substantial amount of time on the comparative-capabilities approach to questions of justice. In my view, a lengthy discussion is merited. It is fair to say other approaches to international justice, such as those extending liberal concepts to the international level, those concerned with access to and development of resources, and those based on human rights and democracy have been criticized by scholars as taking on an ideological cast used to justify impositions. ¹⁸⁸ This is not to say that just because those approaches have been criticized they should be rejected. Still, since one of the concerns of this Article is how international law is received and operates in parts of the world and among people where there is suffering, it is worth exploring a view that purports to avoid a particular kind of ideology. ¹⁸⁹

¹⁸⁸ See generally MARKS supra (cautioning against the ideological uses of democratic liberalism as applied outside the West).

Second, such an approach is intriguing because it acknowledges that the lives of a large number of people could be significantly improved by if extreme poverty were eradicated or given access to health care. On the problem and the need for such improvements, see e.g., Thomas W. Pogge, Human Rights and Global Health: A Research Program, 36 METAPHILOSOPHY 182 (2005). At the same time, the comparative approach avoids some of the formal and practical conundrums raised by a purely pareto-optimizing approach to societal questions discussed above.

As might be expected, the capabilities approach has also generated a wide literature which has tried to assess whether it serves as a viable alternative to standard economic accounts of development. Wiebke Kuklys provides among other things a good overview of attempts in the literature to implement various aspects of Sen’s approach, in particular addressing the difficulties in measuring human capabilities. WIEBKE KUKLYS, AMARTYA SEN’S CAPABILITY APPROACH: THEORETICAL INSIGHTS AND EMPIRICAL APPLICATIONS (2005).

For a good example of how a human capabilities understanding of development (in conjunction with public goods theory) would impact international intellectual property law, see Margaret Chon, Intellectual Property and the Development Divide, 27 CARDOZO L. REV. 2821 (2006).

¹⁸⁹ As an initial matter, it should be pointed out that Sen himself is aware of the kinds of criticism raised by scholars of post-colonialism. For his views on issues of identity, see AMARTYA SEN, THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN CULTURE, HISTORY AND IDENTITY 85 (2005) [hereinafter THE ARGUMENTATIVE INDIAN]; AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (2006).

In reviewing Sen’s work, Vishanthie Sewpaul notes that Sen agrees “[t]he need to resist colonial dominance, is of course important.” However, Sen insists, “it has to be seen as a fight against submissive compliance, rather than as a plea for segregation and localism.” Vishanthie Sewpaul, Challenging East-West value dichotomies and essentialising
Capabilities as Universals. Both the post-colonial and feminist critiques of international law discussed earlier in this Article are wary of the universal. Does a comparative-capabilities approach adequately address these concerns? The obvious way in which universals arise is through the emphasis on human capacities or capabilities, and Nussbaum has been unapologetic in her claim such capacities or capabilities have broad application. Nussbaum puts the issue sharply: in her view, there are certain functions, such as the use of reason, which distinguish animal life from human life. She is particularly interested in “the level at which a person’s capability is ‘truly human,’ that is worthy of a human being.”

Nussbaum thinks in this regard “we can produce an account of truly human functioning that commands a broad cross-cultural consensus, a list that can be endorsed for political purposes by people who otherwise would have very different views of what a complete good life for a human being would be.” From this quote it is evident Nussbaum understands that such a list might be derived as a result of compromise.

This raises the issue whether such a list could be uncontested, and not just at the margins. For example, Arrow himself supports freedom as a basic value, but he asks (without concluding) whether even freedom enjoys universal acceptance. He observes that sometimes people appear to abandon freedom by electing autocratic governments, they fight against freedom (e.g. the Civil War), and are sometimes afraid of freedom. It may be then that
discourse on culture and social work, 16 INT’L J. SOC. WELFARE 398 (2007). Id. at 404, citing THE ARGUMENTATIVE INDIAN at 85. In this vein, Sewpaul makes the point: “Simply because certain ideas, values, theories and technologies are linked to the West, they should not be condemned or rejected.” Id. Moreover,” she adds “given the historical, cultural and intellectual interconnections across the globe, it is often hard to differentiate what is Western and what is Eastern.” Id. As discussed earlier, Sen argues that elements of authoritarianism and democracy are present in both Western and Eastern traditions. Sewpaul also points out that even science, often associated with the west, was valued and heavily influenced by Islamic and Chinese culture. Id. I happen to agree with this perspective: one way to frame the issue addressed in this section is whether there might be ways in which a comparative-capabilities approach could be subject to resistance.

190 Capabilities and Social Justice supra note 179 at 130.
191 Id. at 131. Although she does not write from a human capacities perspective, Jouannet also tries to distinguish between “anthropological” as opposed to cultural commonalities. Jouannet supra note 3 at 403. For a discussion of Nussbaum’s concept of universals, see SABINA ALKIRE, VALUING FREEDOMS: SEN’S CAPABILITY APPROACH AND POVERTY REDUCTION 32-34 (2002).
192 Freedom and Social Choice supra note 172 at 58-60. On the later point, Arrow cites
there is no theory of justice, whether transcendental or comparative, that can be coherent without some vision of what makes a person human, but which then is always subject to criticism as culturally determined. Jouannet may be right that the paradoxical nature of international law is persistent.

Comparison as Institutional Critique. Another question raised by the comparative approach is how it might respond to the structural effects of earlier attempt to live out grand visions of just social arrangements. Under the comparative approach we learn nothing from particular results that can be used to answer the question of social arrangements. As discussed, Sen is explicit in this regard: just as the transcendent approach is neither necessary nor sufficient for comparison, so too the comparative approach yields no results that have any bearing on transcendent understandings of justice. This raises two sub-issues. One is whether a comparative approach is essentially a conservative one. Sen’s approach dovetails well with deliberative forms of democracy to avoid parochialism as social choices are made, so that the comparative approach finds itself compatible with a deliberative vision of democracy. Moreover, Sen’s famous work on the relationship between forms of government and famine has shown a relationship between social arrangements (in particular democracies) and human well-being. One problem with this approach, however, may be that because it is based in compromise, it is unlikely to result in substantial institutional change.

This is an objection I think worth raising but in the end one that is to be dismissed. Pogge appears to be of this view. Pogge groups Sen with other development economists who in Pogge’s mind are “overwhelmingly focused on relating the persistence of serve poverty to local causes—bad governance, sexist culture, geography, and much else—while leaving unstudied the huge impact of the global economic order to the incidence of poverty worldwide.” Recall that Pogge argues the problem is far more

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Eric Fromm’s classic *Escape from Freedom*. *Id.* at 59 n.22. *ERIC FROMM, ESCAPE FROM FREEDOM* (1941). One could of course characterize such fear of freedom as pathological, but to do so would open oneself to the criticism of Foucault.

193 **THE IDEA OF JUSTICE supra** note 4 at 104-105.


195 **Real World Justice supra** note 118. Although numbers are improving, 21 percent of the world’s population lives with less than a dollar a day. *HUMAN DEVELOPMENT REPORT*
systemic: more advantaged citizens of affluent countries are responsible for severe poverty in the world.\textsuperscript{196} They do so by “shaping and enforcing the social conditions that foreseeably and avoidably cause the monumental suffering of global poverty . . .”\textsuperscript{197} Such conditions on the international level prevent the poor from gaining access to natural and financial resources.\textsuperscript{198} Citizens of wealthy countries thus violate an ethical duty to do no harm.\textsuperscript{199}

My purpose here is neither to defend the Sen’s work nor to evaluate fully Pogge’s scathing critique of the current international system; indeed much of Pogge’s analysis and conclusions is compelling. It seems however, that regardless of Pogge’s assessment of the causes of world poverty, the method he uses to convince his readers of his position and the solutions he proposes share several features with the comparative approach. As an initial matter, Pogge’s concern is with persons who live in extreme poverty whose situation is one recognized as a matter of justice by most people. Advocating, as Pogge, does for a compelling issue of justice is precisely what the comparative-capabilities approach asks us to do “through the elimination of what seen as cases of manifest justice.”\textsuperscript{200} Further, Pogge takes an “ecumenical” approach in trying to convince readers who have different views of justice of his position: he is trying to “convince the adherents of all the main views now alive in Western political thought.”\textsuperscript{201} To do so, Pogge expressly fields “parallel arguments that address and appeal to diverse and often mutually incompatible moral conceptions and beliefs.”\textsuperscript{202} Thus, with respect to historical conceptions of social justice (which Pogge associates with John Locke), Pogge concedes that there might

\textsuperscript{196}Id.; \textsc{World Poverty and Human Rights supra} note 149.
\textsuperscript{197} \textit{Real World Justice supra} note 118 at 33.
\textsuperscript{198} \textit{World Poverty and Human Rights supra} note 149, chapters 4 and 6.
\textsuperscript{199} \textit{Real World Justice supra} note 118 at 34-46.
\textsuperscript{200} \textit{The Idea of Justice supra} note 4 at 26.
\textsuperscript{201} \textit{Real World Justice supra} note 118 at 36.
\textsuperscript{202} \textit{Id.}
be disagreement “about the conditions an historical process must meet in order for it to justify gross inequalities in life chances.”\textsuperscript{203} However, he argues,

\begin{quote}
The relevant historical crimes were so horrendous, so diverse, and so consequential that no historical-entitlement conception could credibly support the conclusion that our common history was sufficiently benign to justify even the radical inequalities in starting positions we are witnessing today.\textsuperscript{204}
\end{quote}

Similarly, Pogge tries to address what he terms consequentialist conceptions of social justice (an approach he associates with Rawls among others), which tend to focus on fair equality of opportunity, particularly as compared with alternative social arrangements. Again, Pogge acknowledges there any number of consequentialist approaches. However, he argues that “our global economic order does not even meet the very weak requirements that form the common core of the various consequentialist theories of economic justice defended today.”\textsuperscript{205} If Pogge is successful in making his case and in causing the world community to act, Pogge will have followed at least part of the procedure suggested by Sen: allowing a plurality of reasons for why one might identify and address a particular issue of justice.\textsuperscript{206}

Finally, although Pogge’s critique is systemic, the solutions he proposes are incremental. This is intentional because it is important for Pogge that any response to the problem of severe poverty be politically feasible as well as effective. (Indeed, that there are modest and realistic alternatives that would cause less harm to those in severe poverty is part of what makes the moral argument so compelling in Pogge’s view.) Pogge

\begin{footnotesize}
\footnotesize\textsuperscript{203} \textit{Id.} at 38.
\footnotesize\textsuperscript{204} \textit{Id.}
\footnotesize\textsuperscript{205} \textit{Id.} at 43.
\footnotesize\textsuperscript{206} \textit{See} THE IDEA OF JUSTICE supra note 4 at 107. In this way, both Sen and Pogge can also be seen to “universalize” the particular issue with which each of them is concerned to cut through all theoretical conundrums. To be sure, what is identified as an obvious issue is cabined, but within that narrower context, one concern is that the identified issue (e.g., climate change, health) can lead to the creation of language games, each with a set of “universals” that ground that particular issue. In that sense, do such discrete issues then also present dangers of essentialism and imposition? There might be no good way to distinguish between the identification of clear issues of justice for deliberation and the fragmentation which concerns Koskenniemi. \textit{Supra} text accompanying note 56.
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argues therefore that a global resources dividend be given for poverty eradication, a dividend equivalent to one percent of global product, about $320 billion annually, or about 86 times the amount currently given by affluent countries to the developing world for social services.\textsuperscript{207} Such a dividend would require changes in policy on the international level;\textsuperscript{208} however, in light of the sums spent to stimulate world economies in response the global recession,\textsuperscript{209} even the amount Pogge proposes seems less formidable. Moreover, one would presume such a dividend would not be paid indefinitely: those in extreme poverty who would benefit from the dividend would need it less as their life chances improve.\textsuperscript{210} Any approach to justice, comparative or otherwise, which acts within a world of Koskeniemmi’s “structural bias” must be incremental if it is to work.\textsuperscript{211}

\textit{The ‘Residue’ of Comparisons.} Another question is whether the comparative approach can account the unintended consequences of the “residue” of comparative decision-making. As discussed, a public decision, for example, how much to spend on education, will result from a series of partial evaluations and inconsistent reasoning, and by definition has a temporary cast to it. Nonetheless that decision will almost always have a continuing or permanent impact on social arrangements as well as on capabilities.\textsuperscript{212} Further, because nothing in the comparative approach prevents it from being applied to large, albeit discrete issues, it has the

\begin{footnotesize}
\begin{enumerate}
\item[207] Real World Justice supra note 118 at 37, 50.
\item[208] Pogge himself characterizes this as a “small” change in international property rights. Id. at 50. In a similar vein, Hillel Steiner proposes a global resources tax. Hillel Steiner, \textit{Just Taxation and International Redistribution}, in GLOBAL JUSTICE 502 (Ian Shapiro & Lea Brilmayer eds. 1999).
\item[210] However, by characterizing the dividend as a property right, Pogge intends that persons in severe poverty have an entitlement to such payments.
\item[211] As James Brassett and Richard Higgott put it, “‘It is all very well to suggest ethical utopias but quite another thing to find agreement on their contents, or ‘convince’ the deep structures of political, social, economic, and psychological interests at work in the global polity of their desirability.’” Brassett & Higgott supra note 145 at 31. Brassett and Higgott suggest a pragmatic approach derived from Rorty. Id. at 32, 45-54.
\item[212] This is a feature of any cultural tool, including a comparative approach. J.M. Balkin, \textit{Cultural Software} (1998).
\end{enumerate}
\end{footnotesize}
potential to have significant impacts on social arrangements, yet, as discussed above, the comparative approach says nothing whether such arrangements are either wise or desirable. This last point becomes a potential critique, not just of the comparative approach, but of any account of justice that results in temporary solutions, subject to reevaluation at a later time, including the results of social resistance and the temporary resolution of paradox. Just as there may be no way to proceed without positing something common among human beings (no matter how much one’s identity is impacted, indeed constituted, by one’s social relations) so too there may be no way to instantiate particular and temporary solutions to problems without letting loose in the world precedential effects that persist over time, impacting the very social relations these approaches as yet do not fully address. This leads to a final point I save for the next section.

E. Resistance, Ambivalence, Immanence and the Self

Each of the approaches discussed in the last three subparts offers ways international law might better enable larger numbers of people to be present at the table and to share in a common meal. Common themes run through each approach. Rajagopal, Jouannet and Sen are not persuaded by the claims of rational choice theory or of approaches to economics that emphasize utility maximization. They either take seriously the post-modern critique or circumvent it, and thus each approach does not purport to arrive at final answers; yet, each rejects the prospect of radical indeterminism. Irrespective of their grounding, each emphasizes that any “solutions” must worked be out in the real world. Such solutions are tentative, without any sense they should have precedential, let alone totalizing, effect. How well do these approaches suggest a new vision for international law that answers better the critiques of widespread suffering, colonial legacies and the suppression of women discussed in Subpart A?

With respect to a theory of resistance, international law would do well to recognize, respond to, and embody the norms which would emerge as various groups counter world developments with their own set of ideas about how they wish to live, particularly if this is an important way silenced  

213 Perhaps this is one reason why Nussbaum parts with Sen by exploring how a human capacities approach would be implemented by the state. See generally FRONTIERS OF JUSTICE supra note 4.
214 (expressly with regard to Rajagopal and Jouannet and impliedly with regard to Sen)
women and men in the Global South are making their way to the table and claiming a part of the loaf. But as I discussed earlier, at some point such a theory of resistance will in my view need to say more about how social movements will allow others to sit at the table and not exclude them, particularly because the cultural politics that drive such movements envision conflict.

The same is true with the temporary resolution of paradox. It may be that the attraction and repulsion we feel both for ourselves and others, and which becomes manifest in the universalist and imperialist aspects of international law, is tempered by honest deliberation—Habermas’ communication to understand. However, to base our acceptance of the need to “struggle against that which we view as wrong and to impose that which we consider to be best” on a level which by definition encompasses both our devils and better angels is worrisome, precisely because of how violently that ambivalence can manifest itself. As is true with a theory of resistance, it is unclear under this view how international law can be prevented from becoming just “an epiphenomenal summary of . . . configurations of power . . . at any particular moment.”

Finally, international law that facilitates a comparative approach to justice, in which human capabilities serve as the measure of human wellbeing is attractive (and of course the work on human capabilities has already influenced the way in which international organizations such as and the United Nations Development program assess human well-being). Nussbaum’s capabilities approach is expressly intended to increase the life chances for women. At the same time, the capabilities approach is tied to ideas about the commensurability of human experience, decisions which are at bottom beliefs about the human being itself. For reasons that go beyond the scope of this paper I do believe in such commensurability, but I doubt whether there will be a satisfactory way to distinguish between a common human anthropology, to use Jouannet’s phrase, and particularized human culture.

Of greater interest for purposes of this paper is the comparative aspect the comparative-capabilities approach. In addition to the questions I raised in the last subpart, there is another question, a variation of the question posed to the theory of resistance and to the temporary resolution of

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paradox. As discussed above, the comparative approach echoes deliberative understandings of democracy and to avoid parochialism, foresees a diverse number of persons at the table where social decisions are made. This seems exactly right, but here is where my encounter with the president of the Union of Organized Women of Yasica Sur comes to mind. As I said in the Introduction, before she and I could even begin to have had a meaningful conversation about the law, the way in which we related to each other would have had to change. It is an open question whether there are any good reasons why she or I would have wanted to do that. Why would we have wanted to sit at a common table in the first place? This is the question that motivates the discussion of the next, final Part.

IV. A PLACE AT THE TABLE AS ONE’S OWN

A. Exclusion and Embrace

That the vision of all persons around a common table has been far from being realized, even among adherents of Christianity, is of course an understatement: the table has served as the place of exclusion as much as a place of inclusion. In this Part, I turn to a theological exploration of some of the themes raised in Syrophoenician woman’s story, as well as in the discussion in Part III. In a 1996 book entitled Exclusion and Embrace, Miroslav Volf responds to the ethnic conflicts in the former Yugoslavia, where he was raised, and in Los Angeles, where he then taught and lived. His primary question is how one might foster “social agents capable of envisioning and creating, just, truthful, and peaceful societies, and on shaping a cultural climate in which such agents thrive.”

To do so, Volf appropriates postmodern concepts of identity and alterity and in so doing employs the same vocabulary used by several post-colonial and feminist scholars. Again, some further background is appropriate, although this Article cannot do full justice to “othering” as used it is used in post-colonial, feminist, and other forms of scholarship.

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216 Exclusion & Embrace supra note 6. Volf writes about his own experience of being interrogated by Yugoslav security officers as a potential security risk during the 1980s in The End of Memory supra note 6 at 3-6.
217 Id. at 21 (emphasis removed). Thus, like Sen, Volf is not primarily concerned here with designing an ideal set of social arrangements. Id. at 19-21.
Othering appears to find its roots in Hegel’s master-slave relationship: Hegel argues that self consciousness requires an encounter with the other. However, such an encounter of one consciousness with another with its own world view calls into question that of the first. Inevitably, the two self-consciousnesses can co-exist only if one is subordinated to the other. 218

Although the implications of Hegel’s thought are subject to debate, the master-slave dialectic has informed modern academics who have focused on oppression and subordination of various peoples. Frantz Fanon and Edward Said do so in the context of colonialism, 219 as does Simone de Beauvoir in her analysis of the subordination of women. 220 This recalls the concerns raised by feminist critiques of international law discussed in Part II. Here I elaborate further because it helps to ground Volf’s thought. Feminist scholars have used the other to show how conceptions of women as inferior has played into and reinforced dominant legal narratives, for example, in contract law. 221 Feminist legal theorists have also pointed out the ways in which laws assume a male default. “Much political thought that is apparently neutral in abstracting from the particularity of sex difference begins from a self-understanding that is historically male, and thus from a particularized understanding after all.” 222 This assumption of a male default implies a biased vision of gender equality: “for women to be treated as equal, they must be treated as men, like men, because equality is premised on men.” 223 The “equal treatment” that women are entitled to is therefore treatment as men. One possible result of othering, therefore, is oppression of the other and impoverishment of the self, in this sense: “Where one’s own identity is shaped without any relationship, reciprocity, or mutual respect for

those defined as ‘other,’ what is valuable becomes deeply and profoundly biased in the direction of one’s own identity.”

Volf asks how persons can live in relation to one another without falling into the dynamic of exclusion: exclusion which arises either from labeling the other as enemy or from subsuming the other under one’s own terms. For Volf, any answer to that question must somehow respond to the problem of enmity between individuals and peoples, and as a theologian, for Volf, such an answer centers on Jesus’ death by execution, which for Volf represents the unreciprocated donation of the self for others. Volf concedes that such self-donation is “scandalous,” not only because it is foolish but because it is irresponsible:

The ultimate scandal of the cross is the all too frequent failure of self-donation to bear positive fruit: you give yourself for the other—and violence does not stop but destroys you; you sacrifice your life—and stabilize the power of the perpetrator.

Jesus’ execution stands for the possibility that one’s self-giving will be for nothing, and furthermore, might only serve to strengthen someone who seeks to do you or others harm. Volf is not saying everyone must someday lay down his or her life for an enemy. However, each is called to embrace the other. Volk acknowledges that “embrace” can be too familiar in some cultures and too distant in others. For, him the important point about the concept is this: “The will to give ourselves to others and ‘welcome’ them, to

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224 John A. Berteaux, What Are the Limits of Liberal Democratic Ideals in Relation to Overcoming Global Inequality and Injustice?, 6 Hum. Rts. Rev. 84, 93 (2005) (arguing that liberal ideals have been shaped to legitimate inequality and injustice in liberal states: as a consequence the application of liberalism to other parts of the world can have the same result).

225 Self-donation in Volf’s framework thus goes beyond the kind of reciprocal altruism described by Robert Trivers, who argues in the context of biology that altruism among unrelated individuals is plausible if it is returned. Robert L. Trivers, The Evolution of Reciprocal Altruism, 46 Q. Rev. Biology 35 (1971). Under some circumstances, such an approach would exceed the strong version of Peter Singer’s maxim of preventing “bad things from happening unless in doing so we would be sacrificing something of comparable moral significance.” Famine, Affluence, and Morality supra note 151 at 241.

226 Exclusion & Embrace supra note 6 at 26.
readjust our identities to make space for them,” he writes, “is prior to any judgment about others, except that of identifying them in their humanity.”

Such an approach is necessary, in Volf’s view, to avoid the dangers of universalism on the one hand, and particularity on the other. And yet, Volf contends, some commentators who emphasize particularity often embed persons within separate interpretative communities or language games that in the end are incommensurate, thereby sowing the seeds of conflict. Volf himself denies the incommensurability of such games, and thus aligns himself with scholars such like Jouannet, Sen, and Nussbaum, but he accepts that “along with new understandings and peace agreements new conflicts and disagreements are permanently generated.”

Making room for someone else, even an adversary, requires a person to suspend for a moment universals such as justice and right and wrong. At the same time it requires the suspension of particularities by which one is identified, such as gender, class, and ethnicity, in order to welcome the other in all of his or her particularities. But any such “peace agreement” is in the end, temporary, and needs fresh negotiation.

What about instances when there are legitimate grounds for enmity, as in the case of oppressor and oppressed? Volf believes that oppression remains an important way of naming what happens in the world, and what must be fought, but in Volf’s view, both the oppressed and the oppressor need to change their ways of living because both oppressed and oppressor contain elements with the potential for perpetuating hostility between persons. The oppressor who repents needs to engage in superabundant

227 Id. at 29.
229 EXCLUSION & EMBRACE supra note 6 at 108. Volf himself argues against incommensurate language games.
230 Id. at 109 (“The incommensurability is not universal but always local, temporal, and partial, just as the commensurability is.”)
231 Id. For a detailed discussion of the unintended consequences of social tools, see BALKIN supra note 212 at 32-39.
232 Id. at 103. Volf give three reasons: The concept of oppression evokes a sense of disempowerment and victimhood. Moreover, in real conflicts, the lines between oppressor and oppressed quickly blur. Finally, in his view, the construct does not provide guidance once the oppressed are liberated. Id.
restitution. The oppressed who repents needs to forego envy and enmity: envy because it only legitimates the ideologies used by dominant persons to justify why things are; enmity because it motivates turning the behavior of the dominant into the behavior of the dominated.234

Afterwards comes forgiveness. Volf argues there can be no true forgiveness without justice, but forgiveness is necessary because strict restorative justice can never be satisfied.235 “Only those who are forgiven and who are willing to forgive will be capable of relentlessly pursuing justice without falling into the temptation to pervert it into injustice.”236 Further, forgiveness is necessary to overcome what Volf calls double exclusion: exclusion of the enemy from the community of human beings and the exclusion of the self from the community of excluders.237 Finally, Volf argues the last step in reconciliation is a kind of “nonremembering.”238 In his view, no final redemption is possible without some kind of redemption of the past.239 Volf believes that such redemption cannot come about through reflection: that is, providing an ultimately satisfying account of great suffering. To do so raises the unsolvable problem of theodicy.240 Since “no theodicy can succeed, the final redemption is unthinkable without a certain kind of forgetting.”241

Volf tries not to be utopian: he does not envision a final reconciliation in this life. That too would lead to a universalism that would perpetuate the kind of cycle he seeks to avoid.

233 Id. at 118.
234 Id. at 115-16.
235 As Charles Griswold writes, “Forgiveness is a virtue against the background of a narrative about human nature and its aspirations that accepts imperfection as our lot.” GRISWOLD supra note 8 at 14.
236 EXCLUSION & EMBRACE supra note 6 at 123.
237 Id. at 124. Volf believes, however, in the value of rage at oppression. Volf refers to the imprecatory Psalms in which the Psalmist calls on God to wreak vengeance on his enemies. Id. at 123. Volf argues that the expression of rage before God is necessary to prevent the double exclusion: “[B]y placing unattended rage before God we place both our unjust enemy and our own vengeful self face to face with a God who loves and does justice.” Id. at 124.
238 Id. at 131-40. Volf explores these themes further in THE END OF MEMORY supra note 6.
239 EXCLUSION & EMBRACE supra note 6 at 135.
240 Theodicy refers to the problem of reconciling the existence of God with the existence of evil. See “theodicy” in ANTHONY C. THISELTON, A CONCISE ENCYCLOPEDIA OF THE PHILOSOPHY OF RELIGION 306 (2002).
241 EXCLUSION & EMBRACE supra note 6 at 135.
From the postmodern critique of emancipation . . . we can learn that we must engage in the struggle against oppression, but renounce all attempts at the final reconciliation; otherwise, we will end up perpetuating oppression. From the limitations inherent in the projects of liberation . . . we can learn that the struggle against oppression must be guided by a vision of reconciliation between oppressed and oppressors, otherwise it will end in “injustice-with-role reversal.”

Thus, “[b]oth the modern project of emancipation and its postmodern critique suggest that a nonfinal reconciliation in the midst of the struggle against oppression is what a responsible theology must be designed to facilitate.” What can be hoped for now is a way of living with the other, expressed in embrace, which ends in a letting go “so that ‘the negotiation of difference,’ which can ‘never produce a final settlement,’ may be continued.”

Volf’s analysis of embrace captures central aspects of theological understandings of Jesus’ execution. At the same time, it is the very characteristics of embrace, this will to give ourselves to the other and welcome them, that make embrace both tantalizing and threatening as a heuristic for social relations. First, such an embrace is marked by a fluidity of identities, as discussed above. Second, Volf requires that embrace be possible even within relations in which the strong seek to dominate the weak and the weak will seek to subvert such power. This is the resistance of which Rajagopal speaks. Under those circumstances, embrace is understood as “nonsymmetric” because self-sacrifice will sometimes be needed to embrace the other. Third is the “underdetermination of the outcome.” In Volf’s view, embrace can lead to any number of outcomes:
“we can never know in advance how the reshaping of the self and the other will take place in embrace.”\textsuperscript{248} Finally, such an embrace is risky: because a true embrace is asymmetric and underdetermined, “I . . . make a movement of the self toward the other, the enemy, and do not know whether I will be misunderstood, despised, even violated or whether my action will be appreciated, supported, and reciprocated.”\textsuperscript{249}

The dynamics of embrace are not restricted to interpersonal relations on the small scale. For example, embrace is needed to ‘resolve’ competing accounts of justice. Here, a person who stands within what might possibly be several overlapping traditions of justice is asked to engage in “double vision,” a process in which one tries, albeit imperfectly, to reverse one’s perspective and to see from the perspective of the other. In a move that resonates with but does not mimic Sen, such an encounter might not lead to complete agreement, it might simply reinforce one’s own vision, but it might also result in the enrichment or correction of one’s own view.\textsuperscript{250} At the same time, such a double vision does not mean neutrality: those who stand within the biblical tradition must always be suspicious of the perspective of the powerful.\textsuperscript{251} This is “not because the powerless are innocent but because the powerful have the means to impose their own perspective” through argument, propaganda, and force.\textsuperscript{252}

At this point, Volf must leave his primary project of imagining social actors to the question of social arrangements. He is aware that the asymmetry and under-determination attendant in embrace may seem to go too far: embrace cannot serve as the basis for social life because it is too risky and volatile.\textsuperscript{253} For this reason, Volf contemplates social actors living within covenant communities.\textsuperscript{254} Because covenant itself is neutral in respect of oppression (apartheid South Africa can be understood as a covenant among dominant peoples), to prevent social covenant from becoming another avenue of oppression, it must be informed from an outside force. For Volf, that source is morality, one that is in turn informed

\begin{itemize}
\item \textsuperscript{248} Id. at 147.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id. at 212-13. This is how Volf interprets the Syrophoenician woman’s story. 213-14.
\item \textsuperscript{251} Id. at 219.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. at 147-48.
\item \textsuperscript{254} This is opposed to social arrangements based on social contract. Id. at 148-50.
\end{itemize}
by theology, and finally, Volf’s theological grounding of that covenant is found in the same dynamic he understands informs Jesus’s execution: that of God’s embrace of humankind even though (in the Trinitarian scheme) humankind ended up executing that God. God repairs the covenant even though God has not broken it, and refuses to allow the covenant to be undone.

Here, in my view, is where Volf’s vision of embrace runs into some difficulties as one tries to imagine how embrace would work itself out in social relations. The first goes to a question well beyond the scope of this Article. For a person who stands in the Christian tradition, the answer to the question, “Why should I welcome someone to the table?” is “Because God welcomes us.” The question then becomes whether Volf’s approach is convincing for someone who does not stand within that tradition—are there satisfactory non-theological reasons why I should welcome my enemy to the table?

The second difficulty arises in the relationship between the self and the community, a problem identified by Reinhold Niebuhr in Moral Man and Immoral Society. Volf’s approach is far from reducible to a chicken-and-egg problem, but it is fair to ask whether the community, which both encourages us to take the risk of embrace, yet protects us from its inherent uncertainty, is itself sometimes called to risk embrace. Communities have incorporated aspects of what can be described as embrace in response to past harms, work which of course is extremely important: South Africa and other countries who have devised means to address mass injustices serve as the best examples. Forgiveness for past wrongs is hard enough. But what about present or immanent injustices, particularly threats? Volf is clear that embrace is precisely what is necessary to fight such injustices, but how so? It is one thing for me to risk embrace, but quite another to ask my family or members of my community to do so. Or is it?

If I distinguish between personal and community responses to the other, this opens up space for a theory of embrace for me, but a community theory that allows responses to the other that begin to resemble exclusion, at least in their results. Perhaps one can derive an ethic such that I

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255 Id. at 151.
256 REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932).
257 Volf describes how his parents’ community enabled them to forgive people who were responsible for the death of one of their children. FREE OF CHARGE supra note 6 at 211-14.
258 To be fair, Volf does distinguish between exclusion, to treat the other as enemy, to
personally, perhaps even encouraged and supported by my community, might sacrifice for someone outside that community. But my community might feel itself morally obligated not to; in fact it might feel obligated to respond in ways that do not look like embrace, and the scale of corporate harm that could result might extend much farther than any personal embrace. Moreover, because self identity depends on the relations that constitute the community, one wonders whether a community which must sometimes respond in what seem to be exclusionary ways can provide the kind of support, the right kind of validation, that would allow even individuals to embrace. As a result, Volf’s depiction of the ways in which we share aspects of both oppressor and oppressed and his description of how we could overcome the ‘logic’ of othering seems to capture an important aspect of Christian theology, and I believe, a way forward. At the same time, further work must be done to explain how communities are supposed to live this out.

ignore, or to subsume him, id. at 67, and judgment, the ability to identify when others seek to harm or to subsume, the ability to recognize exclusion. Id. at 68. Moreover, in other portions of his work he says that embrace is necessarily reciprocal—it is entirely possible the other will not wish to embrace the self. Id at 142. But unless Volf is calling for pacifism as a social, not just an individual, policy, a community’s resistance to the other, based on a judgment the other seeks to exclude it, could have the same downward spiraling effects as action motivated by exclusion. Perhaps we will have better motives for resistance, and such motives might temper that resistance, but it is unlikely the other will care. The other will view what we have done as exclusion. 259 Id. at 156. It is unfortunately not within the scope of this Article to compare and contrast self-donation with the large literature that articulates an ethic of care. As Selma Sevenhuijsen describes it, such an ethic “focuses on values such as attentiveness to the need for care, willingness to accept responsibility for others, as well as for the results of actions, and responsiveness.” SELMA SEVENHUISEN, CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS OF JUSTICE 71 (1998), citing JOAN C. TRONTO, MORAL BOUNDARIES 127-37 (1993). An ethic of care also involves “attention to specific contexts and situations, and the opening up of a moral dialogue in which outcomes are not determined in advance.” Id.

Virginia Held argues an ethic of care presents rich possibilities for a theory of international justice. For Held, the ethic begins with the idea it is not so much that we enter into relationships as it is that we are already in them and are defined by them, relationships which can exist in situations of unequal power and can be “unchosen.” VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL 156 (2006). (In this sense, the ethic is ‘realist’). In that context, “moral life is populated by caring relations in which the interests of the self and other are mingled, and trust is crucial,” id. at 157. This view of relations impacts law because in Held’s view such relations must exist before law. Id. Caring relations can be extended globally and can serve as common ground. “Caring
B. The Syrophoenician Woman and International Law

It can be argued this discussion of one theological framework for reconciliation has taken us far afield from the encounter between Jesus and the Syrophoenician woman.\footnote{260} Nowhere in the story do we see a step-by-step persons will draw on the understanding of care that can be developed from actual experiences of caring and being cared for, often across divergent cultures. \textit{Id.} Such caring and being cared for then can serve as a critique of views of the international relations and economic practices that interfere with such caring relationships. \textit{Id.} at 161, 163-64. Finally, Held is sensitive to the critique of postcolonial feminists and suggests that a focus on effective care can avoid some of those concerns. \textit{Id.} at 165. \textit{See also} RUTH E. GROENHOUT, CONNECTED LIVES: HUMAN NATURE AND AN ETHICS OF CARE 21-51 (2004) (describing the understanding of human nature in an ethic of care, as well as the ideals implicit in such an ethic); PETA BOWDEN, CARING: GENDER-SENSITIVE ETHICS (1997) (discussing an ethic of care in the context of the roles of mothering, friendship, nursing and citizenship).

One can see even in this cursory and incomplete description potential areas of engagement and critique between an ethic of care and self-donation, as well as with many of the issues of concern in this Article. Volf also appreciates the relational nature of identity, \textit{EXCLUSION & EMBRACE supra} note 6 at 66, and as just discussed has a vision of persons being in covenant communities. He also acknowledges the ethic of care’s insight that a communal understanding of identity impacts one’s concept of justice. \textit{Id.} at 225. At the same time, it appears under an ethic of care that the essential dynamic between the self and the other need not begin with threat to the self which results in exclusion. Put in another way, this Article has focused primarily on the encounter between the Syrophoenician woman and Jesus and the ways it addresses potential enmity. It has spent almost no time on the relationship between the woman and her daughter, and the ways in which that relationship impels the woman’s actions and words. That exploration would require another article. However, I do think it is appropriate in international law to discuss, as this Article does, situations in which people do not care for one another.

\footnote{260}I recognize the irony of a paper that discusses a variety of responses to current critiques of international law but focuses on only one theological viewpoint from only one faith tradition. I acknowledge this shortcoming, but can only speak out of the tradition in which I stand and know best. For a discussion of how other faith traditions might address similar issues see e.g., SALLIE B. KING, BEING BENEVOLENCE: THE SOCIAL ETHICS OF ENGAGED BUDDHISM 202-28 (2005); (discussing Buddhist concepts of justice and reconciliation); Ahmet Alibašić, \textit{The Place for Others in Islam}, 3 COMP. ISLAMIC STUD. 98 (2007) (discussing a basis for co-existence under Islam); Hans KÜNG & WALTER HOMOLKA, \textit{HOW TO DO GOOD AND AVOID EVIL: A GLOBAL ETHIC FROM THE SOURCES OF JUDAISM} (John Bowden trans., 2009) (a collection of essays by the authors and others providing the basis for a global ethic from Judaism).

The Sarvodaya Shramadana Movement of Sri Lanka is an example of a major development organization deeply informed by Buddhist thought. See A.T. Ariyaratne, Sarvodaya Shramadana Movement: Towards a Global Perspective from a Rural Experience
step formula for embrace, nor in fact do we see any indication that such an embrace is called for: in the narrative, the encounter is brief, there is no indication Jesus and the woman meet again, and there appear to be no grounds for further relationship, if in fact such a relationship is called for. Finally, surely the framework of “othering” is a post-modern overlay onto the story and can at best only be found in its interstices.

And yet, what is powerful about the story is that it lends itself to interpretations both imaginative and yet faithful to the general outlines of the narrative. The narrative does in fact use terms such as “woman,” “Syrophoenician by birth,” “children,” and “dogs,” which allow the reader to conclude the author has experienced divisions based on gender, nationality, religion and economic class. The initial hostility with which Jesus treats the woman, who in some circumstances is constructed as inferior and in others as part of a class that has benefited from the exploitation of a people with whom Jesus identifies, indicates a full recognition of underlying enmity, even in the encounter between someone who is supposed to represent the best God has to offer and someone else; and of beliefs and institutions whose inclusions have led to exclusions, to the detriment of others. Thus, if the story does indeed stand for an insight that all belong at the table and that any dehumanization of others, such that some have loaves and others crumbs, is unacceptable, then the need for a means of reconciliation without setting into motion a cycle of exclusion does arise. The story in combination with Volf’s image of embrace imagines a way to respond to social conflict, and thus might the kind of imagined reality Kosekeniemi calls for. At a minimum, the encounter leads to insight, which in turn, at least for a moment, allows Jesus and the woman to see one another in new way, and someone’s suffering is alleviated as a result.

In his review of the theologian Hans Küng’s attempt to frame a global ethic, Richard Falk admires the man but criticizes the result. Falk argues that attempts like Küng’s tend to end in an emphasis on the golden rule and an admonition to treat others humanely. For Falk such an

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261 FROM APOLOGY TO UTOPIA supra note 55 at 557.
Ethic poses two conceptual problems. On the one hand such ethics can be viewed so abstractly that they are either irrelevant or too vague to guide behavior and policy—they become platitudes. On the other, if they purport to guide behavior, the implications can seem too radical in light of “the distribution of power and privilege in the world,” such that the ethic becomes utopian and again irrelevant. Further, Falk argues, any ethic must identify the agents who will live it out in relation to the state and to the market. Apropos to those admonitions, I spend the remainder of this Article discussing some of the ways in which the Syrophoenician woman’s story might be lived out in international law.

As an initial matter, I agree that a phrase like “everyone is welcome at the table” runs the danger of irrelevancy or inapplicability because of its abstraction, but not always: the phrase “Third Word” also serves as a heuristic, as Falk understands: terms and phrases like these are shorthand for a series of complex meanings and underlying realities. We cannot do without them, and they serve powerfully to orient the way we understand and shape reality. Statements like them were the very things that made the transformative encounter between Jesus and the Syrophoenician woman possible. The questions, “Who is at the table and who isn’t?” and “Who is receiving bread and who is left with crumbs?” can and do influence the way international law is understood and either influence or criticize how international actors behave. As for who is to live out the story on the international level, it can be argued it is already occurring in the approaches discussed in Part III: the social movements Rajagopol and others describe; the conversations taking place at some of the international forums, one of

264 Falk supra note 260 at 77.
265 Id. For Falk’s own understanding of the role spirituality plays in international affairs, see Richard Falk, Politically Engaged Spirituality in an Emerging Global Civil Society, REVISION (Spring 2003), at 2.
266 Falk et. al. supra note 62 at 3-4.

In my view, questions such as those motivate the “method” proposed by Charlesworth and Chinkin in respect to the inclusion of women in international law: to first ask whether women are literally present in international institutions, then explore the vocabulary of international law and the disparate impact of purportedly neutral concepts on women, which in turn raises questions how those concepts reflect deeper constructions of gender. THE BOUNDARIES OF INTERNATIONAL LAW supra note 71 at 49-50.
the factors that help to resolve Jouanet’s paradox; and Sen’s vision of a wide range of peoples engaged in social choice. These are particular visions of people at the table, although each raises their own sets of issues, as I have described above.²⁶⁸

But are parts of the story irrelevant because they are utopian, particularly if Volf’s self-donation is a logical implication of the narrative? A response to that question has two aspects. Recall Volf argues the appropriate response of an oppressor to past oppressions is superabundant restitution.²⁶⁹ If we are persuaded by the arguments I have described, that the West participates, through international law, in the suffering of women and men elsewhere, then the Syrophoenician woman’s story puts into the foreground and validates calls like Pogge’s to establish a global dividend and to reshape property rights to acknowledge the claims poorer people have on the world’s resources. It also supports the international community’s halting efforts to remedy the legacies of an arguably colonial and exploitative past, efforts which recognize to some extent the impacts that western industrialized countries have had on the distribution of the world’s wealth and on the global environment.²⁷⁰ At the same time, the “principle” of restitution calls for a serious hearing of arguments that each of these “efforts” are just window-dressing or ineffective or both, neither addressing the real concerns of poorer countries, nor allowing for meaningful

²⁶⁸ There are other, more specific examples of how this approach could impact international law. Margaret Chon, for example discusses how an approach that takes into account the agency “of groups and individuals with relatively less voice and representation in formal legal structures” would reshape aspects of international copyright law. Margaret Chon, Intellectual Property “From Below”: Copyright and Capability for Education, 40 U.C. DAVIS L. REV. 803, 816 (2007).

²⁶⁹ This “principle” is lived out in the New Testament story of Zacchaeus. Lk. 19:1-10. Zacchaeus is a tax collector, who after encountering Jesus, says “Look, Lord! Here and now I give half of my possessions to the poor, and if I have cheated anybody out of anything, I will pay four times the amount.” Lk. 19:8.

²⁷⁰ These doctrines include special and differentiated treatment and the generalized system of preferences in international trade and principles such as “the polluter pays” and “common but differentiated responsibility” for environmental harms in international environmental law. United Nations Framework Convention on Climate Change, art. 3, ¶ 1 (common but differentiated responsibility and polluter pays), art. 4, ¶ 1 (common but differentiated responsibility), May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 170; United Nations Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (June 14, 1992).
participation at the international table.\textsuperscript{271} Finally, if such efforts are not forthcoming and international law plays a role in justifying that result, then the story gives grounds for unmasking such law as ideology.

On the other side, Volf asks people who have suffered because of the actions of others more advantaged than they to turn away from envy and enmity. Given the complex ways in which we are constituted and identified and how we all capable of doing good and ill to one another, in my view Volf is right, because to yield to either is to perpetuate the very thing one is trying to resist. Anghie is mindful of this. He observes:

\[\text{[M]any Third World states which have been the victims of colonialism have themselves been imperial in their ambitions and practices, if not in relation to other states then in relation to minorities and indigenous peoples within their borders. Imperialism[]}\text{ is not by any means a purely western practice.}\textsuperscript{272}\]

Anghie believes alterity plays a vital role in this problem. “The construction of the ‘other’ \ldots is crucial to the extension and universalization of international law.”\textsuperscript{273} He continues, “Complex issues arise as to whether it is possible to somehow imagine the ‘other’ and behave towards it in some different and non-imperial way.”\textsuperscript{274} This is exactly the question embrace tries to address: it is not so much how one constructs the other as it is whether one will embrace the other, no matter how he is constructed, and in all the complexity that impacts that construction. But as I discussed above, it is still not completely clear how communities are to live this out.

On this latter point, however, it seems obvious from my encounter with the Union of Organized Women of Yasica Sur that I cannot presume to speak to them, or to anyone who has been disadvantaged by others, about what they should or should not do. Listening seems more in order. In a recent essay, Upendra Baxi writes that various movements taking place within the Third World have succeeded in identifying a set of normative expectations being paid serious attention on the international level: equal

\textsuperscript{271} \textit{Supra} note 60.
\textsuperscript{272} \textit{Imperialism, Sovereignty, & the Making of International Law} \textit{supra} note 61 at 319.
\textsuperscript{273} \textit{Id.} at 318.
\textsuperscript{274} \textit{Id.}
rights for women; the norm against torture and cruel, inhumane and degrading treatment; indigenous rights; a fresh appreciation for social, economic and cultural rights; and sustainable development.\textsuperscript{275} Baxi adds to these norms a somewhat longer list of expectations persons in the Third World have of international law, including expectations of “coequal discourse;” “global reparative justice;” and “fair versus free trade.”\textsuperscript{276} Each of these expectations emerges from and represents the lived experience of people and deserve to be regarded.

Yet I wonder whether international law and lawyers will listen; thus, who is at the table and who is not, and who receives loaves and who does not, remain powerful questions. Obiora Okafor argues in a recent essay it is highly unlikely that in the near and middle-term, international law will be fully responsive to two major areas of concern for most Africans: the reduction of severe poverty and agency.\textsuperscript{277} For Okafor, the reduction of agricultural subsidies is an important step in addressing African poverty, and although he is encouraged by the fact that such subsidies are a subject of the Doha Development Round, in his view, the glacial pace of those negotiations confirms “the law’s historical tendency to reflect and respond more effectively to the economic worries and demands of the North, and to be at the same time much less responsive to the socioeconomic challenges facing most African peoples.”\textsuperscript{278} Similarly, Okafor joins others in worrying that the formal and informal ways in which international finance is governed has taken important economic decisions to the international level, thus reducing African agency.\textsuperscript{279} He writes, “There is . . . little reason to suppose that the countries of the North that currently dominate our global order will

\textsuperscript{275} Upendra Baxi, \textit{What may the ‘Third World’ Expect from International Law?}, in \textit{INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE} 9, 17 (Richard Falk et. al. eds., 2008).
\textsuperscript{276} Id. at 18. The entire list includes: 1) the expectation of territorial non-aggression; 2) the expectation of gender equality and justice; 3) expectations regarding duties of assistance; 4) expectations concerning “global confessional politics;” 5) expectations of addressing new forms of “human rightlessness;” 6) expectations regarding human-rights based practices of human development; 7) expectations regarding sustainable development as they impact nuclear proliferation; 8) expectations of equal respect for all minorities; and 9) expectations regarding the subsuming of market principles to human rights. \textit{Id.} at 18-19.
\textsuperscript{277} Okafor supra note 90 at 100, 103-104.
\textsuperscript{278} Id. at 99.
\textsuperscript{279} Id. at 100-104. \textit{See also supra} note 60.
willingly concede to Africans the level of agency that they desire.” I understand that claims such as Okafor’s are not uncontested, but if he is even partially correct, then international lawyers have much work to do.

V. Conclusion

In the end, the current debates over international law and the way it can and has been used for both good and ill is a reflection of a larger set of questions about what we are justified in doing to one another. The Syrophoenician woman teaches that if international law will always be used for harm, we must abandon it. But in doing so we would be saying more about ourselves than about international law: we would be saying harm is all we are capable of doing. But of course this is only part of the story. The encounter between the Syrophoenician woman and Jesus also points to the possibility for insight and reconciliation. Despite the enormous difficulties of such a task, international law should do all it can to make this so.

\footnote{\textit{Id.} at 103.}