

Universalising the Particular; or, Hotel and Carrier Bag

Abstract

This chapter explores the relationship between the universal and the particular in international legal thought. I argue that contemporary, formalist international legal thought prefers the universal to the particular, that this constrains the possibilities for international legal thought, and that the universalisation of the particular in and through international law should be pursued. I associate formal universalism with the image of the Bonaventure hotel in Los Angeles, as analysed by cultural theorist Fredric Jameson. Drawing on the feminist literary theory of Ursula K. Le Guin, I associate the universalisation of the particular with the image of a carrier bag and argue for an understanding of international law as a carrier bag in which to convey particulars.

Keywords

universal, particular, dialectics, Ursula K. Le Guin

In this chapter I argue that contemporary international legal thought, through its focus on the maintenance of international law's form and structure, is more concerned with universality than with particularity. I argue that this 'limits a new space for contestation of international law in international legal discourses',¹ and that the universalisation of the particular – making international legal arguments out of particulars, in opposition to approaches that fit particulars into pre-existing, universal international legal structures – is the preferable path.²

Contesting formalism's focus on the durability of international law's form and structure,³ I argue that international law should be seen as something continually and

¹ Conceptual chapter in this collection – p. 17 in current draft.

² Feminist international law scholarship emphasises the importance of the particular – see Karen Knop, 'Eunomia is a Woman: Philip Allott and Feminism' (2005) 16 *European Journal of International Law* 315, 327 (noting, with reference to Seyla Benhabib's work, 'feminism's emphasis on the particular'); Faye Bird, "Is this a Time of Beautiful Chaos?" Reflecting on International Feminist Legal Methodologies' (2020) *Feminist Legal Studies* 179, 186, reflecting on Margaret Jane Radin's feminist legal theory as a 'theory ... built on particularities ... No singular perspective can be wielded in solving feminist ethical questions ... What is taken into account in assessing strategic options relates to the specific problem at hand and the various moving parts which shape it'.

³ On formalism see Jason A. Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project' (2006) 7(12) *German Law Journal* 1045; Justin Desautels-Stein, 'Chiastic Law in the

fundamentally re-made through encounters with diverse, ever-changing particulars. International law does not, I argue, exist as a stable form or structure – a set of practices or methods habitually employed by lawyers and judges – but as an effort to represent lives and realities.⁴ Formalism is my target given its prominence in recent theoretical debate.⁵

I present this argument through a materialist imagery that contrasts hotel and carrier bag. Drawing on cultural and literary theorist Fredric Jameson's work,⁶ I associate the formalist emphasis on form and structure with a particular hotel – the Bonaventure hotel in Los Angeles. Inspired by Ursula K. Le Guin's feminist literary theory – specifically, her essay 'The Carrier Bag Theory of Fiction' – I oppose formalist withdrawal into a stable hotel that affords a universal view-point.⁷ I argue for an image of international law as Le Guin's carrier bag, a flimsy receptacle in which to gather particular things:

If ... one avoids the linear, progressive, Time's-(killing)-arrow mode of the Techno-Heroic, and redefines technology and science as primarily cultural carrier bag rather than weapon of domination, one pleasant side effect is that science fiction can be seen as a far less rigid, narrow field ... Science fiction properly conceived, like all serious fiction, however funny, is a way of trying to describe what is in fact going on, what people actually do and feel,

Crystal Ball: Exploring Legal Formalism and its Alternative Futures' (2014) 2 *London Review of International Law* 263; Jean d'Aspremont, 'The Concept and the Rationale of Formalism in International Law' in Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2011); Matthew Nicholson, 'Walter Benjamin and the Re-Imagination of International Law' (2016) 27 *Law and Critique* 103; Matthew Nicholson, 'Psychoanalyzing International Law(yers)' (2017) 18(3) *German Law Journal* 441.

⁴ See Nicholson, 'Walter Benjamin' (n 3); Nicholson, 'Psychoanalyzing' (n 3); Matthew Nicholson, *Re-Situating Utopia* (Brill 2019); Matthew Nicholson, 'On the Origins of Human Rights' (2020) 5 *European Human Rights Law Review* 512.

⁵ For an illustration of this prominence see Florian Hoffmann, 'International Legalism and International Politics' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 954.

⁶ Fredric Jameson, 'The Cultural Logic of Late Capitalism' in Fredric Jameson, *Postmodernism Or, The Cultural Logic of Late Capitalism* (Verso 1991) 1; Fredric Jameson, 'Spatial Equivalents in the World System' in Fredric Jameson, *Postmodernism Or, The Cultural Logic of Later Capitalism* (Verso 1991) 97.

⁷ Ursula K Le Guin, *The Carrier Bag Theory of Fiction* (Ignota 2019). On the value of Le Guin's work for international legal theory – and specifically ideas of utopia in international law – see Ruth Houghton and Aoife O'Donoghue, '"Ourworld": A feminist approach to global constitutionalism' (2020) 9 *Global Constitutionalism* 38; Nicholson, *Re-Situating Utopia* (n 4).

how people relate to everything else in this vast sack, this belly of the universe, this womb of things to be and tomb of things that were, this unending story.⁸

Le Guin opposes heroic narratives. The first hunters were ‘the restless ones who didn’t have a baby around to enliven their life, or skill in making or cooking or singing, or very interesting thoughts to think’ so they ‘decided to slope off and hunt mammoths’.⁹ The cultural ubiquity of the ‘killer story’ of hunting, domination and ‘the Hero’ crowds out ‘the life story’.¹⁰

[T]he men and women in the wild-oat patch and their kids and the skills of the makers and the thoughts of the thoughtful and the songs of the singers ... have all been pressed into service in the tale of the Hero. But it isn’t their story. It’s his.¹¹

Le Guin proposes a ‘new story’ of ‘the thing to put things in, the container for the thing contained’.¹² The ‘carrier bag’ story has priority – it came first: ‘Before ... the weapon ... we made the tool that brings energy home’.¹³ I argue that this feminist, anti-heroic, ‘carrier bag’ theory should be applied to international law – that international law is, in a sense, a carrier bag rather than a heroic, formal-universal hotel – supporting that argument through philosopher Theodor Adorno’s work.¹⁴

A few preliminary clarifications are necessary. First, I am arguing that formalist international legal thought has been *more* concerned with universality than with particularity. This is not to suggest that the particular has no role. It is to maintain that

⁸ Le Guin, *Carrier Bag* (n 7) 36 (paragraph breaks suppressed).

⁹ Ibid 27.

¹⁰ Ibid 33.

¹¹ Ibid 27-28.

¹² Ibid 29.

¹³ Ibid 30.

¹⁴ Theodor Adorno (E.B. Ashton tr) *Negative Dialectics* (Continuum 2007 [1966]); Theodor W. Adorno (Rolf Tiedemann ed, Edmund Jephcott tr), *Metaphysics: Concepts and Problems* (Stanford University Press 2001); Theodor W. Adorno, ‘Marginalia to Theory and Praxis’ in Theodor W. Adorno (Henry W. Pickford tr), *Critical Models: Interventions and Catchwords* (Columbia University Press 2005) 259; Theodor W. Adorno, ‘Subject and Object’ in Andrew Arato and Eike Gebhardt (eds), *The Essential Frankfurt School Reader* (Continuum 2002) 497. On the complementarity of Le Guin’s and Adorno’s work see Nicholson, *Re-Situating Utopia* (n 4) 69-70.

formalism is biased towards the universal, and that this limits engagement with the particular.

Second, in focusing on formalism I am not suggesting that international legal actors – states or international organisations, for example – are irrelevant. But we can only know which actors are relevant, and what their relevance is, when we know what we are thinking about and the sense in which it exists. My focus here is limited to such questions of theory and ontology. We need, as feminist scholar Donna Haraway urges, to consider methods and practices of storytelling before we can tell stories: ‘It matters what stories we tell to tell other stories with; it matters what concepts we think to think other concepts with’.¹⁵

Third, I offer what follows as a mere ‘carrier bag’ of ideas, not a heroic vision of how international law is to be done differently. A heroic narrative of how international law(yers) is(are) to be ‘saved’ from heroic, formal-universal narratives would be just another ‘tale of the Hero’ and ‘I’m not telling that story. We’ve heard it’.¹⁶

Section one addresses formalism’s preference for the universal over the particular. Section two considers the limiting effect of this preference on engagement with the particular through architectural analogies, Fredric Jameson’s analysis of the Bonaventure hotel in particular. Drawing on Le Guin’s and Adorno’s work, section three argues for the universalisation of the particular through international law, for an image of international law as a flimsy carrier bag rather than a shiny, stable hotel.

1. Preferring the Universal

This volume’s editors note, with reference to Martti Koskenniemi’s work, that ‘international law is an exercise of presenting a particular political view as what should be accepted as universal.’¹⁷ In *Gentle Civilizer* Koskenniemi defends international

¹⁵ Donna Haraway, ‘Introduction: Receiving Three Mochillas in Colombia – Carrier Bags for Staying With the Trouble Together’ in Ursula K. Le Guin, *The Carrier Bag Theory of Fiction* (Ignota 2019) 9, 10.

¹⁶ Le Guin, *Carrier Bag* (n 7) 29.

¹⁷ **Conceptual chapter in this collection - p. 8 in current draft** (citation omitted). For a more comprehensive analysis of Koskenniemi’s work than is possible here see Nicholson, ‘Psychoanalyzing’ (n 3).

law's preference for the universal, 'insist[ing] that absent the possibility of building social life on unmediated love or universal reason, persuading people to bracket their own sensibilities and learn openness for others, is not worthless'.¹⁸

International law's function is, apparently, to '[persuade] people to ... learn openness for others' through a process of 'bracket[ing] their own sensibilities'. This is not an unqualifiedly good thing; it 'is [simply] not worthless.' Such realism is a product of the impossibility of 'building social life on unmediated love or universal reason'. This is an "empty" ... negative' universalism,¹⁹ international law as 'the fragile surface of political community among social agents ... who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality'.²⁰

What matters is that disagreements take place 'within [international law's] structure', not the substance of law. Formal international law checks particularity's power:

[W]hen professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding *particular* alliances and preferences ...²¹

The theoretical foundations of this "empty" universalism lie in political theorist Ernesto Laclau's work.²² Drawing on Laclau's thinking, and on Sundhya Pahuja's insistence that "a universal orientation is unavoidable if there is to be law",²³ the editors conclude 'it does not seem possible to articulate any legal discourse, let alone a critique of legal discourses, without a prior universalizing move'.²⁴ This 'prior'-itisation of universality should be resisted, because it de-prioritises the particular. Equally, the idea (in this volume's introductory chapter) that the relationship between universality and

¹⁸ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001) 502.

¹⁹ *Ibid* 504.

²⁰ Martti Koskenniemi, 'What is International Law For?' in Malcolm D. Evans (ed), *International Law* (5th edn, OUP 2018) 28, 46-47.

²¹ Koskenniemi, *Gentle Civilizer* (n 18) 502 (emphasis added).

²² See Nicholson, 'Psychoanalyzing' (n 3), 476-479.

²³ See conceptual chapter in this collection – text at FN 31 (citation omitted).

²⁴ *Ibid* [text after FN 32 in current draft]

particularity is binary is questionable,²⁵ given that binary means '[o]f, pertaining to, characterized by, or compounded of, two; dual'.²⁶ Binary dualism fails to reflect the dynamic instability of the relationship between supposedly separate elements, a point made in feminist critique which seeks to move beyond the 'gender binary' in international law.²⁷

Dialectical thought contests binary dualism. 'Dialectics is [according to philosopher Theodor Adorno] the consistent sense of non-identity. It does not begin by taking a standpoint'.²⁸ In *The Left Hand of Darkness* Le Guin expresses the essence of dialectics in the idea that 'light is the left hand of darkness, and darkness the right hand of light'.²⁹ Neither universal nor particular can be preferred because there is no original duality. There can be no "universal orientation",³⁰ insofar as this would exclude an equal, opposite and simultaneous orientation towards the particular. As feminist international law scholar Gina Heathcote notes, quoting feminist historian Joan W. Scott, "there is no inclusiveness without exclusion, no universal without a rejected particular".³¹

Whilst 'the total rejection of universality from international legal discourses is not an option',³² that is, of course, half the story. It is equally important to recognise the particular as the ground out of which international law (a particular legal argument, a decision or judgment, a norm) grows.³³ The editors recognise this, noting that '[u]niversality has to be deduced from a particularity' and that universality involves 'a hegemonic struggle that aspires to project what represents a particularity as what

²⁵ See the conceptual chapter discussing 'binary opposites' at p. 7.

²⁶ OED Online, OUP, September 2021, <www.oed.com/view/Entry/19111> - definition of 'binary, adj. and n.', accessed 8th September 2021).

²⁷ See Gina Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures* (OUP 2019) 24, critiquing 'reliance on the gender binary ... within international approaches to gender law reform'.

²⁸ Adorno *Negative Dialectics* (n 14) 5.

²⁹ Ursula Le Guin, *The Left Hand of Darkness* (Orbit 1981 [1969]) 199. For discussion see Nicholson, *Re-Situating Utopia* (n 4).

³⁰ See quotation at n 23.

³¹ Heathcote (n 27) 23, quoting Joan W. Scott, *The Fantasy of Feminist History* (Duke University Press 2011) 73.

³² Text at FN 31 in conceptual chapter (citations omitted).

³³ On this theme see Nicholson, 'Walter Benjamin' (n 3); Nicholson, 'Psychoanalyzing' (n 3); Nicholson, *Re-Situating Utopia* (n 4); Nicholson, 'On the Origins' (n 4).

should belong to everyone'.³⁴ The focus here is on what universality takes from particularity, how the universal validates itself by drawing from the particular.

I argue, by contrast, for an approach focused not on a universal that draws from the particular, but on the universal need to ground every legal argument, decision and norm in the particular, in lives and realities now. The concern, in much recent international legal theory, has been to demonstrate the continuing potential of a universal international legal structure: 'Overwhelmed by anxieties of control over reality ... international law has retreated into itself to such an extent that Martti Koskenniemi can declare "international law's objective" to be, among other things, "always ... international law itself"'.³⁵ The editors express the conviction that international law is rooted in universality: 'One could say that the question of universality may even be the starting point of any international legal discourse that seeks global outreach and global authority'.³⁶ Maintaining the ability to heroically drop international law's structure – treaties, customary international law, *jus cogens*, and obligations *erga omnes*, for example – onto whatever crisis, human rights violation or conflict comes next, crowds out the idea that the structure itself may need to be re-made every time it engages with a particular situation.³⁷ In Le Guin's terms, 'the tale of the Hero' needs to be replaced with the carrier bag.³⁸

I am arguing for a shift from a theoretical-ontological approach focused on the maintenance of form or structure, to one that emphasises the representation of particulars in and through international law.³⁹ On this view international law's formal language of treaties and customary international law, for example, is replaced by nothing more substantial than the imperative to ground every argument and decision in the particular:

³⁴ pp.7-8 in conceptual chapter.

³⁵ Nicholson, 'Walter Benjamin' (n 3) 104, quoting Martti Koskenniemi, 'What is International Law For?' in Malcolm D. Evans (ed), *International Law* (3rd edn, OUP 2010) 32, 52.

³⁶ Conceptual chapter p.1.

³⁷ See Nicholson, 'Walter Benjamin' (n 3).

³⁸ See quotations from Le Guin at n 11 to n 14.

³⁹ For the fully developed version of this argument – which is grounded in the work of Walter Benjamin – see *ibid.* On 'representation' see Walter Benjamin (John Osborne tr), *The Origin of German Tragic Drama* (Verso 1998 [1963, written 1925]) 27: 'It is characteristic of philosophical writing that it must continually confront the question of representation'.

[T]here is no set of texts or concepts which the practitioner must use; the responsibility for constellating texts, concepts, aspects or fragments of reality to be included in or excluded from the representation rests with the practitioner.⁴⁰

This does not mean that international law's methods and concepts (treaties, customary international law) are completely abandoned; they remain particular aspects of the realities that must be engaged. But they become exactly that – *particular* parts of those realities – rather than universal frames or forms through which reality is seen.

Why would this shift be necessary? How does a bias towards the universal impose 'limits [on the] space for contestation ... in international legal discourses'?⁴¹

2. An LA Hotel (and a Californian House)

In an effort to answer these questions, the next few paragraphs deliberately break from direct discussion of international law and focus on heroic architecture. My hope is that the abruptness of this break affords a fresh perspective on international legal theory, a means of visualising the limitations of a formalist approach by imagining it in concrete, architectural form. To do that I want to consider, first, the Westin Bonaventure hotel in Los Angeles, *via* Fredric Jameson's analysis of it.⁴²

What distinguishes the Bonaventure for Jameson is its desire to stand alone: '[T]he Bonaventure aspires to being a total space ... it does not wish to be a part of the city but rather its equivalent and replacement or substitute'.⁴³ The hotel's exterior is a 'great reflective glass skin',⁴⁴ presenting the hotel as 'the distorted images of everything that surrounds it'.⁴⁵ The Bonaventure's attempt to simultaneously deny and dominate the outside world is, Jameson suggests, best represented by the BonaVista

⁴⁰ Nicholson, 'Walter Benjamin' (n 3) 119-120.

⁴¹ See quotation at n 1.

⁴² Jameson, 'Cultural Logic' (n 6).

⁴³ Ibid 40.

⁴⁴ Ibid 42.

⁴⁵ Ibid.

lounge, '[a] Revolving Bar on the 34th Floor Serving Dazzling Views':⁴⁶ 'You are ... offered a contemplative spectacle of the city itself, now transformed into its own images by the glass windows through which you view it'.⁴⁷ For Jameson the Bonaventure is a 'postmodern hyperspace' that 'has finally succeeded in transcending the capacities of the individual human body to locate itself'.⁴⁸

Jameson analyses the Frank Gehry house in Santa Monica, California as another example of postmodern architecture as self-contained, isolated space.⁴⁹ This 'new' house is 'the reconstruction of an older, very conventional frame dwelling' in which "the original structure pokes up from inside the new structure".⁵⁰ In an interview with Gehry, from which Jameson quotes, the interviewer suggests that "the old house was the core, and the new house is the wrapper", noting that "the house looks unfinished and rough".⁵¹ This is a place of "numerous contradictory perspective lines going to numerous vanishing points above and below a wide variety of horizons".⁵²

"For Gehry the world vanishes to a multitude of points, and he does not presuppose that any are related to the standing human being. The human eye is still of critical importance in Gehry's world, but the sense of center no longer has its traditional symbolic value."⁵³

Whilst there may be no "center," no universal perspective and no "the world," there is "Gehry's world", contained within "the wrapper".⁵⁴ On Jameson's view of 'wrapping' as an architectural practice this establishes a 'spatial quarantine or cordon sanitaire' that makes external complexities observable and tolerable.⁵⁵ The Bonaventure's hotel bar

⁴⁶ <<https://www.marriott.com/hotels/travel/laxbw-the-westin-bonaventure-hotel-and-suites-los-angeles/?program=spg>> accessed 8th September 2021.

⁴⁷ Jameson 'Cultural Logic' (n 6) 43.

⁴⁸ Ibid 44.

⁴⁹ Jameson, 'Spatial Equivalents' (n 6).

⁵⁰ Ibid 108, quoting Barbara Diamonstein, *American Architecture Now* (Rizzoli 1980) 43-44.

⁵¹ Ibid 109, quoting Diamonstein (n 50) 43-44.

⁵² Ibid 115, quoting Gavin Macrae-Gibson, *Secret Life of Buildings* (MIT Press 1985) 12.

⁵³ Ibid 116, quoting Macrae-Gibson (n 52) 16.

⁵⁴ See text at n 51.

⁵⁵ Jameson, 'Spatial Equivalents' (n 6) 101.

effects something like this ‘spatial quarantine’, converting Los Angeles’ complex realities into a sanitised, saleable ‘dazzling new perspective on the “City of Angels”’.⁵⁶

I am suggesting that international law – by preferring an “empty”, formal universal to the particular – has situated itself in a ‘postmodern hyperspace’ much like that of the Gehry house or the Bonaventure.⁵⁷ I argue that international law uses “empty” universalism like a ‘cordon sanitaire’ that makes heroic engagement with inestimably complex particulars tolerable and, in a limited sense, viable, ‘limit[ing the] space for contestation ... in international legal discourses’ in a spatial,⁵⁸ bordering way. International law and international lawyers are, I suggest, required to stay within the formal ‘cordon sanitaire’ of methods, concepts and practices – treaties, customary international law, *jus cogens*, for example – for fear of contamination and a loss of heroic perspective if they step beyond it.⁵⁹

A sense of international law as a hotel or house from which to safely view realities is, I suggest, implicit in Koskenniemi’s insistence that:

In the absence of agreement over, or knowledge of, the “true” objectives of political community – that is to say, in an agnostic world – the pure form of international law provides the shared surface – the only such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion – “outlawry” – of the other. In this sense, international law’s value and its misery lie in its being the fragile surface of political community among social agents – States, other communities, individuals – who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality.⁶⁰

⁵⁶ <<https://www.marriott.com/hotels/hotel-information/restaurant/details/laxbw-the-westin-bonaventure-hotel-and-suites-los-angeles/5962356/>> accessed 8th September 2021.

⁵⁷ I am grateful to Dr. Ruth Houghton of Newcastle University for helping me to develop my thinking on this point.

⁵⁸ See quotation at n 1.

⁵⁹ On these themes see Nicholson, ‘Walter Benjamin’ (n 3); Nicholson, ‘Psychoanalyzing’ (n 3).

⁶⁰ Koskenniemi, ‘What is International Law For?’ (n 20) 46-47.

This connects with Koskenniemi's wider defence of universality in international law in terms of an "empty" ... negative' universal that 'represents the possibility of the universal' by 'resist[ing] reduction into substantive policy, whether imperial or particular'.⁶¹ This perspective exists above or apart from the particulars of human lives and experiences.

To maintain 'universal terms' in the Cold War era international lawyers could not, Koskenniemi suggests, allow international law to become a substantive instrument of U.S. anti-communism.⁶² That would have involved the loss of the "empty" universalism that sustains and validates their practice, a descent into particulars and partiality. For Koskenniemi international lawyers must avoid 'the ultimate transgression, the cynicism of letting the ideal of universality fall the moment when something about the realization of one's particular preferences is obstructed by it'.⁶³

Koskenniemi defends '[f]ormalism's utopian moment' because it involves 'a practice of decision-making that persists in time and through which the aspirations of self-determining communities remain alive – even as (or perhaps precisely because) the universal they embody remains only a "horizon"'.⁶⁴ Laclau is more explicit about the regulatory overtones of "empty" universalism: '[A]s the demands of various groups will necessarily clash with each other, we [?] have to appeal – short of postulating some pre-established harmony – to some more general principles in order to regulate such clashes'.⁶⁵ This formal, "empty" universalism, and the 'we' it invokes, lives, I suggest, in Gehry's house, behind a 'cordon sanitaire,' inside a "wrapper" that preserves the future of international law's apparently 'civilized' (recalling the title of Koskenniemi's book, *The Gentle Civilizer of Nations*) regulatory system. This is the thinking of the regulators rather than the regulated, of a 'we' that looks out, perhaps from an elevated, even revolving hotel bar, on the lives of 'various groups', and seeks to order them.

⁶¹ Koskenniemi, *Gentle Civilizer* (n 18) 504.

⁶² Ibid 497-509. For analysis see Nicholson, 'Psychoanalyzing' (n 3).

⁶³ Ibid 508-509.

⁶⁴ Ibid 508, citing Ernesto Laclau, 'Subject of Politics, Politics of Subject' in Ernesto Laclau, *Emancipation(s)* (Verso 1996) 47.

⁶⁵ Ernesto Laclau, 'Universalism, Particularism and the Question of Identity' in Ernesto Laclau, *Emancipation(s)* (Verso 2007 [1996]) 20, 26. On the connections between Koskenniemi's and Laclau's work see Nicholson, 'Psychoanalyzing' (n 3).

Ruti Teitel's 2011 book *Humanity's Law* offers a further example of "empty," formal, heroic universalism.⁶⁶ Teitel invokes 'The Global Universal' to argue for the existence of a post-Cold War global legal order 'converg[ing] on a rule of law that is aimed at the recognition and preservation of humankind in global politics'.⁶⁷ 'Humanity law,' for Teitel, 'affords a language and a framework that are capable of recognizing the claims and interests of multiple actors in preservation and security, both individual and collective'.⁶⁸ It offers 'a substantive and determinate but open-ended and contextually applied normativity'⁶⁹ – something akin to Koskeniemi's 'assumed universality'.⁷⁰

Discussing the invocation of humanity and military intervention in the context of U.S.-led action in Afghanistan (2001) and Iraq (2003), Teitel concludes that 'just wars [should] be waged justly, in ways that are in keeping with the very humanity rights that inspire the use of force in the first place'.⁷¹ The question of whether, for example, Iraq should or should not have been invaded in 2003 is, it seems, too substantive.

Given the "empty[ness]" of his universalism, it is perhaps surprising that Koskeniemi critiques Teitel's argument for what he sees as a lack of concern with realities: 'What is *done* by ... speech [that employs the 'vocabulary of humanity'] ... eludes her. Questions as to whom it empowers, or whose preferences are implicit within it, are broached hardly at all'.⁷² Teitel responds that she 'set out not to praise humanity law but to understand the phenomenon that Koskeniemi admits ... is real – that is, the ascendancy of humanity-based discourse "in diplomacy and international institutions"'.⁷³ Koskeniemi quotes Proudhon ("whoever invokes humanity wants to cheat"),⁷⁴ and Teitel replies 'the phenomenon ... is real'. What is the 'reality' of the universalism being discussed here?

⁶⁶ Ruti G. Teitel, *Humanity's Law* (OUP 2011).

⁶⁷ Ibid 203.

⁶⁸ Ibid 216.

⁶⁹ Ibid 216-217.

⁷⁰ See text at n 20 and n 60.

⁷¹ Teitel, *Humanity's Law* (n 66) 218.

⁷² Martti Koskeniemi, 'Humanity's Law by Ruti G. Teitel' (*Ethics & International Affairs*, 13 September 2012) <<https://www.ethicsandinternationalaffairs.org/2012/humanitys-law-by-ruti-g-teitel/>> accessed 8th September 2021.

⁷³ Ruti G. Teitel, 'A Response to Martti Koskeniemi's Review of Humanity's Law' (*Ethics & International Affairs*, 31st May 2013) <<https://www.ethicsandinternationalaffairs.org/2013/a-response-to-martti-koskeniemis-review-of-humanitys-law/>> accessed 8th September 2021.

⁷⁴ Koskeniemi, 'Humanity's Law' (n 72).

Teitel sees humanitarian universalism as ‘a way of framing political conflict’, a ‘discourse’ (Teitel describes her book as ‘my account of the rise of human-centered discourse in international law’).⁷⁵ The frame or “wrapper” that holds the various fragments together is the focus:

While the book does not espouse a formal fusion of rules or doctrines, I argue that humanity law provides a framework that both legal and political actors employ in today’s world ... Most international legal scholarship focuses on individual regimes or tribunals, as if they operated in a relatively self-contained way. But under that approach, it is easy to miss the evolution of a jurisprudence that is being generated by a normative and interpretive framework that operates across these divides, and connects the mandates and decisions of diverse tribunals and institutions.⁷⁶

Capturing a global reality or definitively answering questions about the possibility of universal governance is, it seems, impossible. Perhaps recognising this, Teitel does not attempt anything so modern or all-encompassing. Taking familiar elements of international legal discourse – *jus ad bellum*, *jus in bello*, international human rights law, international criminal law⁷⁷ – Teitel supplies a “wrapper”, incorporating those elements into a wider frame labelled ‘humanity law’. This is not simply ‘*jus ad bellum* + *jus in bello* + international human rights law + international criminal law,’ but it is not *not* that, just as the Gehry house is not ‘a house’ but also not *not* a house. Gehry wraps kitchen + lounge + bedroom + bathroom, and Teitel does something structurally similar with the post-9/11 international legal order.

Teitel’s ‘humanity law’ offers a heroic, ‘hyperspace’ vision.⁷⁸ Like the Bonaventure hotel’s bar, this is an exercise in creating an unreal reality / real unreality. Teitel offers a study of ‘the rise of human-centred *discourse* in international law’;⁷⁹ a study of the reality of a formal language, rather than a study of the realities it seeks to regulate.

⁷⁵ Teitel, ‘A Response’ (n 73).

⁷⁶ Teitel, *Humanity’s Law* (n 66) 6.

⁷⁷ See *ibid* 5-6.

⁷⁸ ‘hyperspace’ - see text at n 48.

⁷⁹ Teitel, ‘A Response’ (n 73) (emphasis added).

This is presented in phrases that sound like a product is being sold: 'Born at a moment of great uncertainty and flux in global affairs, humanity law supplies a new discourse for politics';⁸⁰ 'what we see is the emergence of transnational rights, implying the equal recognition of peoples across borders. Such solidarity exists across state lines and in normative terms, constituting an emerging global human society.'⁸¹ Who are Teitel's 'we'? Where are 'we' sitting? How much did it cost to get in?

3. Carrier Bags (and 'the Whole Problematic History of Ontology')

Behind these questions of formal, "empty" universality, or Teitel's discourse of 'humanity law,' versus a focus on the particular, on lives and realities, sits what Theodor Adorno describes as 'the whole problematic history of ontology ... the history of the relation of the universal to the particular, or of possibility to reality'.⁸² This connects with the opposition – which Adorno explores through Aristotle – between form (on the side of the universal) and matter or reality (on the side of the particular).⁸³ '[I]t is precisely the notion that the idea or the noumenal, the intelligible sphere, is more real than the empirical, which really forms the core of the metaphysical tradition'.⁸⁴ For Aristotle 'the universal or the form (they are the same thing in Aristotle) is, just as it was for his teacher Plato, the higher reality'.⁸⁵

A sense of the form, the discourse, as 'the higher reality' underpins Koskenniemi's and Teitel's thinking. Their thinking, with its preference for the universal, for form, echoes the logic of the Bonaventure hotel's bar with its 'contemplative spectacle of the city itself',⁸⁶ or the Gehry house with its 'cordon sanitaire'.⁸⁷ International law's form, its discursive structure, becomes the frame, the place, from which international lawyers view the world. My argument is that this formal preference for the universal should be reversed; that it is time, to borrow a phrase from Adorno, to recognise 'the

⁸⁰ Teitel, *Humanity's Law* (n 66) 216.

⁸¹ *Ibid* 225.

⁸² Adorno *Metaphysics* (n 14) 38.

⁸³ *Ibid* 37-38.

⁸⁴ *Ibid* 37.

⁸⁵ *Ibid* 35.

⁸⁶ See Jameson quotation at n 47.

⁸⁷ See Jameson quotation at n 55.

primacy of the object';⁸⁸ the primacy of the things thought about rather than the subject doing the thinking or the form within which she thinks.

This implies a vision of international law not as a discourse, form or structure, but as a means of representation:

[N]o longer a set of forms or methods ... but, to borrow Walter Benjamin's term, an 'idea' – something constantly remade by every attempt to represent present reality ... a 'pure means' of representation ... a means of presenting an image of what is, what was, and what should be to an audience.⁸⁹

In place of a prioritisation of 'the universal ... the form ... [as] the higher reality',⁹⁰ this approach conceptualises form or structure as something created in and by a process of representation.⁹¹ This rests on a dialectical view of the relationship between form and matter, between universal and particular. Adorno explains the two key positions in western philosophy in terms of an opposition between 'the idea that what is directly given, the immediate facts of consciousness, should be posited as primary' and the idea that 'primary status is given to the pure concept'.⁹² Rejecting both of these positions, Adorno adopts the dialectical position that '[t]he only possible answer is that each of these principles ... always implies the other, or that, in Hegel's language, the two principles are mediated by each other'.⁹³

I am arguing, then, for a mediated understanding of the relationship between the universal and the particular in international law, in place of the preference for the universal that has, in the ways sketched above, dominated formal international legal thought. Adorno opposes the idea of 'the autonomy of form',⁹⁴ insisting, in its place, on 'the mediateness of form'.⁹⁵ At present, I suggest, international law is biased

⁸⁸ Adorno 'Marginalia' (n 14) 265: 'The primacy of the object must be respected by praxis'; Adorno, 'Subject and Object' (n 14) 502: 'The object's primacy ... is the corrective of the subjective reduction, not the denial of a subjective share'.

⁸⁹ Nicholson, 'Walter Benjamin' (n 3) 106.

⁹⁰ See Adorno quotation at n 85.

⁹¹ See Nicholson, 'Walter Benjamin' (n 3) for the full argument.

⁹² Adorno, *Metaphysics* (n 14) 42.

⁹³ *Ibid* 43.

⁹⁴ *Ibid* 73.

⁹⁵ *Ibid*.

towards an autonomous concept of its form – a form that has a de-contextualised character, something like the Bonaventure's bar, the preserve of a particular 'we,' of international lawyers, who seek to 'regulate' the world from behind a 'cordon sanitaire.'⁹⁶ In place of this concept of its form international law should, I argue, pursue a mediated concept of form – a form formed, and continually re-reformed out of the objects, the lives and situations that it seeks to represent, a form formed and re-formed by the lives and realities that it would 'regulate.'⁹⁷

International law is, then, a flimsy carrier bag, a means of conveying things, a thing with little utility until particular things are placed in and conveyed by it, a thing that is stretched, re-shaped and re-purposed each time it is filled.⁹⁸ It can be picked up and filled by anyone, regardless of training or expertise, and it can carry whatever anyone wants to put it in.⁹⁹

This 'carrier bag' argument matters in international law because 'we've all heard all about the sticks and spears and swords' – the 'Gentle Civilizers' or 'men of 1873'¹⁰⁰ – 'but we have not heard about the thing to put things in'.¹⁰¹ This is an idea of international law as something more concerned with carrying and showing stuff to audiences than with 'heroic' ideas of civilisation and humanity. The fostering of such heroic outcomes by international law is, after all, difficult to imagine in view of the current particulars of Afghanistan. Flimsiness and the openness of showing and conveying seem somehow more 'now'.

Adorno insists that 'the truth of ideas is bound up with the idea of their being wrong'.¹⁰² He maintains that it is important 'to free yourselves from a collection of clichés and ideas which have been foisted on you'.¹⁰³ In this spirit 'we' should, I suggest, cast off the injunction to remain behind the 'cordon sanitaire' of international law's existing form – its formal language, its existing concepts and methods – and move beyond

⁹⁶ On 'regulate' see Laclau quotation at n 65; 'cordon sanitaire' – see Jameson quotation at n 55.

⁹⁷ See Nicholson, 'Walter Benjamin' (n 3).

⁹⁸ Le Guin, *Carrier Bag* (n 7).

⁹⁹ On these themes see the quotation at n 40, and Nicholson, 'Walter Benjamin' (n 3).

¹⁰⁰ Koskenniemi, *Gentle Civilizer* (n 18) 502 – see Nicholson, 'Psychoanalyzing' (n 3) for analysis.

¹⁰¹ Le Guin, *Carrier Bag* (n 7) 29.

¹⁰² Adorno, *Metaphysics* (n 14) 144.

¹⁰³ Ibid 137.

scholarship that studies the ‘reality’ of international legal discourse. What is important, now, is to think about ways to represent now, not ways of maintaining existing forms.¹⁰⁴ We need flimsy carrier bags, not stable, shiny hotels.

If that means something to you, if you think this argument has value, then you might want to pick up this carrier bag of an intervention – containing formalist literature on international law (Koskenniemi and Teitel), Gehry’s house, the Bonaventure hotel, and, most importantly, Le Guin’s feminist concept of the carrier bag – and add what you want to convey to it. If this looks useless to you, if this bag cannot hold the stories you have been told / that you choose to tell yourself, you can throw it away or bury it at the back of the cupboard and carry on with more ‘important’, ‘heroic’ projects. Perhaps, when you come home from your quest, you will find it, and maybe you will need it to carry something.

‘[W]e’ve all heard all about all the sticks and spears and swords ... the long, hard things’,¹⁰⁵ but ‘there are seeds to be gathered.’¹⁰⁶ The seeds of a ‘new story’ are out there,¹⁰⁷ in the particulars, buried in the soil of realities. We won’t find them if we keep telling the same formal, heroic, universal stories.¹⁰⁸

¹⁰⁴ See Benjamin (n 39) 29: ‘[T]ruth-content is only to be grasped through immersion in the most minute details of subject-matter’. On the value of this perspective for international law see Nicholson, ‘Walter Benjamin’ (n 3).

¹⁰⁵ Le Guin, *Carrier Bag* (n 7) 29.

¹⁰⁶ Ibid 37.

¹⁰⁷ Ibid 29. On methods for telling a ‘new story’ in and about international law see Houghton and O’Donoghue (n 7).

¹⁰⁸ See Le Guin, *Carrier Bag* (n 7) 33.



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