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Given the freedom to ask anything, what questions ought the international legal scholar explore?: Using Gardam's 'alien' to examine this question

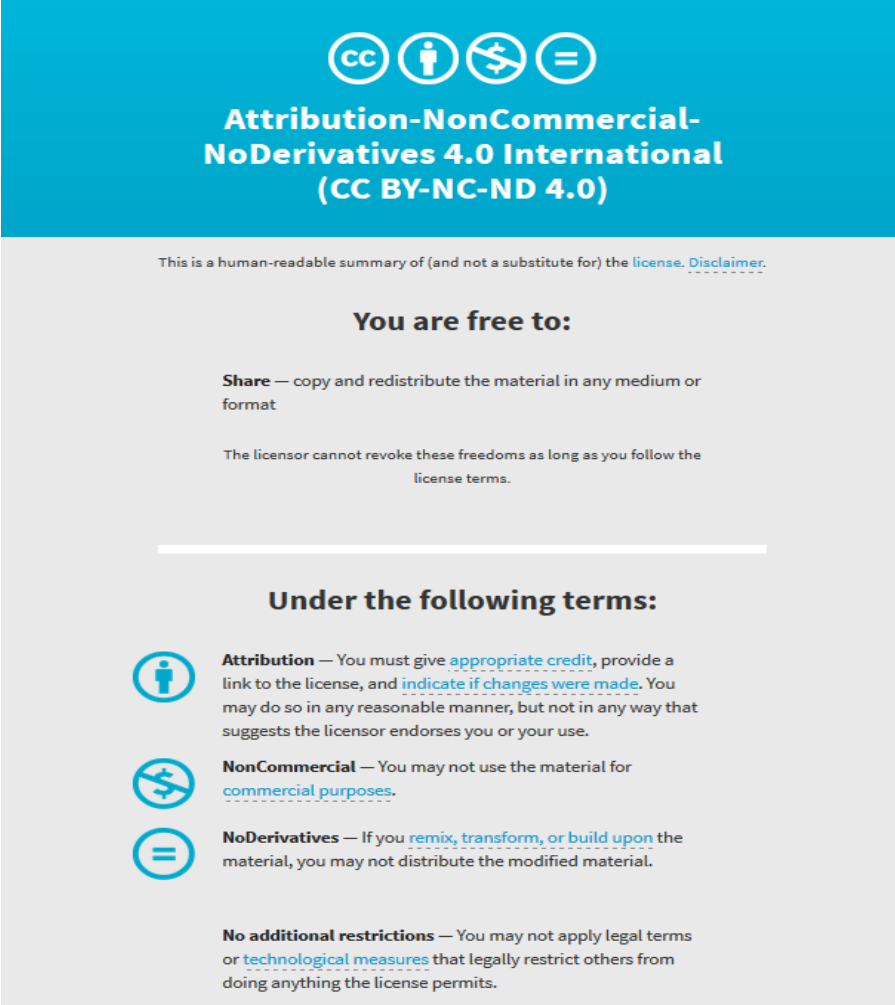
Imagining Law: Essays in Conversation with Judith Gardam, 2016 / Babie, P., Stephens, D. (ed./s), Ch.12, pp.263-278

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Published version <http://dx.doi.org/10.20851/essays-gardam-12>

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29 November 2017

<http://hdl.handle.net/2440/109552>

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GIVEN THE FREEDOM TO ASK ANYTHING, WHAT QUESTIONS OUGHT THE INTERNATIONAL LEGAL SCHOLAR EXPLORE? USING GARDAM'S 'ALIEN' TO EXAMINE THIS QUESTION

REBECCA LAFORGIA

INTRODUCTION

Although Judith Gardam's work dealt with some of the most serious and poignant areas of international law, that of international humanitarian law and aspects of proportionality and gender, her writing was also creative and exploratory. An example of this creativity was her chapter in *Sexing the Subject of Law*, in which she used the device of an alien to investigate what international humanitarian law looks like from the outside. Gardam's chapter was entitled 'An Alien's Encounter with the Law of Armed Conflict'. Her device of using a fantasy character of an alien to investigate what law looks like is adopted in this chapter. I have chosen this as the organising idea of my chapter in honour of Gardam for two reasons: first, in conversation, Gardam said that she enjoyed writing her chapter; and second, she created an intriguing idea that I strongly believe merits exploration and, indeed, reapplying in the twenty-first century. The idea that Gardam created is to understand the players in international

law — the subjects of international law — by examining the 'distinguishing features of these players' and thereby elucidating their 'distinguishing features'.¹

So, if you like, I am attempting to place myself in the role of an alien with nothing to do during an intergalactic storm but to browse through the law of armed conflict. This alien of mine desires to know something of the beings or the subject(s) described by these documents. What do they look like? What do they value? Are they all the same or are there various types? And, if so, what are their distinguishing features?²

My chapter will use this device of the 'alien' as a form of personified objectivity,³ but rather than examining international humanitarian law, I will take Gardam's alien and consider the question: What is the role of the scholar of international law? The alien will travel through space, first viewing the world from afar,⁴ and then coming into law's orbit, landing and speaking to an individual. At each point, the alien will reflect on the various levels of analysis which scholars could employ in their scholarship. So, for example, the scholar could ask questions that consider the relationship of international law with the whole world, or its relationship with the state or particular individuals. The purpose of this chapter is to consider through the alien's eyes whether there is any obligation for the international legal scholar to approach international law from a particular perspective. It narrows down the question of the international legal scholar's identity through the medium of space and geography, and asks: Is there any particular level of analysis in which international scholars should be engaging — and if so, why?

1 Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 233, 233.

2 Ibid 233-4.

3 Ibid 234: 'Objectivity is a much-criticised tool of lawyers as it allows the identity of the commentator to be hidden. It leads to the sharp distinction between theory and practice, which has been criticised by, amongst others, Margaret Davies in her contribution to this book of essays. Although clearly an imperfect method, particularly when it is unacknowledged, I decided to take objectivity to the extreme and create from myself two separate commentators to see what new insights I might discover'.

4 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986).

This is a relevant question, but it is not an original one. The question has been considered by others. For example, Koskenniemi explored the identity of the international legal academic as hovering between the identities of 'the advisor' and 'the activist'.⁵ This chapter contributes to the identity of the international scholar, which comes from facing the question that anything can be written about when we contemplate the 'vista'. Given that freedom, from which level of analysis should international scholars investigate the law? This is an acute paradox for the international legal academic: if everything is possible, is there any way of choosing a particular level of analysis which is an ideal position for the international legal academic? Others, such as Charlesworth, have argued that particular roles for academic inquiry should include the 'international law of everyday life'.⁶ However, this chapter is somewhat more agnostic; it is written in a tone of detached curiosity in which judgment is suspended. The methodology of this chapter follows that of Gardam's original construction of 'the alien'. The alien travels and observes, and the reflections emerge through the rhetorical device of a conversation between me and the alien at the end of the article. Then the observations are 'revealed'. Therefore, this chapter uses not only the imagery but also the method developed by Gardam in her original work.

The argument and the action of this chapter unfold in four sections. The first section orientates and expands on the device of 'the alien', briefly considering writers who have also dealt with organising ideas of space and geography in international law. The question of the level of analysis, regarding the perspective from which international scholars should or might conceive of their discipline, has been surveyed by international scholars.⁷ These surveys will be reviewed. Therefore, the purpose of the first section is to give normalcy to the idea of the alien travelling. It is a useful and vivid idea; however, the concepts of space, geography and level of analysis on which the journey depends have been dealt with by others, and their work will be introduced.⁸

5 Martii Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 291-3. On geographical dimensions and internal analysis of the identity of the legal practitioner as an 'academic', see Hari M Osofsky, 'A Law and Geography Perspective on the New Haven School' (2007) 32 *Yale Journal of International Law* 421, 448-50.

6 Hilary Charlesworth, 'International Law: A Discipline in Crisis' (2002) 65 *Modern Law Review* 377, 391.

7 On the 'level of analysis' question, see generally J David Singer, 'The Level-of-Analysis Problem in International Relations' (1961) 14 *World Politics* 77, 77-92.

8 For new legal realism, see Howard S Erlanger et al, 'New Legal Realism Symposium: Is it Time for a New Legal Realism?' (2005) 2 *Wisconsin Law Review* 335; Joel Handler et al, 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and

The next section is entitled 'The Travels' and is divided into four thematic explorations. I begin by explaining how the alien sees the world from afar. Indeed, the broadest question the international legal academic can ask and investigate in terms of international law is: what is international law as a whole?⁹ At the second thematic level, the alien travels, still seeing the world from a distance and not landing in any particular place, but nevertheless detecting pattern with some clarity — for example, patterns of deforestation, or of access to wealth and housing, or of development. This detection of patterns is the next point at which the international scholar can operate:¹⁰ exploring historically inherited patterns of inequality and distribution, questioning how and why it occurs. At the third level, the alien lands — perhaps, for the purposes of this chapter, within Adelaide, Australia. This is the nation state. Finally, at the fourth thematic level, the alien comes up to speak to the individual, me, within the office: this is the most particular of the international legal analyses, the 'micro-legal analysis'.¹¹ The last section of this chapter, entitled 'Reversals', arises from this conversation, making observations on the international academic's role.¹²

Differences' (2005) 2 *Wisconsin Law Review* 479. As Handler et al explain, 'This microanalytic approach to institutions offers a solution to the famous macro-micro problem that has long bedeviled social science, that is, the problem of creating explanatory linkages between individual action and collective behavior. It acknowledges that some emergent institutional behaviors arise because similar forces act upon each individual ...': at 491, citing, *inter alia*, James S Coleman, *Foundations of Social Theory* (Harvard University Press, 1990) 21-3; Randall Collins, 'On the Microfoundations of Macrosociology' (1981) 86 *American Journal of Sociology* 984; Edward L Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 *Harvard Law Review* 1393. See also Gregory Fox, 'Book Review: *Diversity and Self-Determination in International Law* by Karen Knop' (2004) 98 *American Journal of International Law* 229, 230, in which Fox explains that Knop approaches the examination of law and self-determination through the exploration of the 'micro-history' (quoting from Knop's text at 11). Michael Reisman's notion of micro jurisprudence distinguishes between 'the role that *state law* plays in the everyday social interactions of people, i.e., in the way state law participates in shaping the way ordinary people perceive their social situations and their conduct in them', instead opting for a 'micro jurisprudence ... premised on ... the nature of everyday, mundane social interactions ... [as having an] element of legality that is inherently embedded in them': Menachem Mautner, 'Michael Reisman's Jurisprudence of Suspicion' (2009) 34 *Yale Journal of International Law* 505, 513 (emphasis in original).

9 Moshe Hirsch, 'The Sociology of International Law: Invitation to Study International Rules in Their Social Context' (2005) 55 *University of Toronto Law Journal* 891, 897.

10 Ibid 906, 907, 926.

11 Ibid 896.

12 Gardam, above n 1, 244: 'How does the description that I have provided above from my alien match the information that I have about the way the world is peopled, what various societies look like and how armed conflict manifests itself? The alien informs me that its overwhelming impression is of confusion'.

SPACE, TIME AND LEVEL OF ANALYSIS

The use of geography in international law is not new;¹³ nor, indeed, is the level of analysis¹⁴ employed in this chapter.¹⁵ The use of geography and 'space' (very loosely, a geographical term) in this chapter is more in line with that of Osofsky, who contends that geography and space need to be conceptualised in both global and pluralistic ways. Osofsky quotes the humanist geographer Yi-Fu Tuan in order to bring geography to bear on the notion of exploring in greater detail this concept of 'place' and 'space': 'In experience, the meaning of space often merges with that of place ... Furthermore, if we think of space as that which allows movement, then place is pause; each pause in movement makes it possible for location to be transformed into place'.¹⁶ The idea of pausing transforms space into place. The alien is 'pausing' at each geographical location, and in doing so, the stopping then becomes a place.¹⁷

The level of analysis that was briefly alluded to in the above introduction is also not a new concept. It has been considered from different perspectives by a variety of authors. The most famous article, by Singer, speaks about the level of analysis generally.¹⁸ According to Singer, '[i]n any area of scholarly inquiry, there are always

13 Osofsky, above n 5, 440, quoting Myres S McDougal, W Michael Reisman and Andrew R Willard, 'The World Community: A Planetary Social Process' (1988) 21 *University of California Davis Law Review* 807, 808: 'The specialized process of interaction commonly designated international law is part of a larger world social process that comprehends all the interpenetrating and interstimulating communities on the planet. In the aggregate, these lesser communities comprise a planetary community'. See also Osofsky at 442, where the point is made that geography is interwoven with 'politico-legal arrangements': 'Although their analysis focuses on decision-making by the world community, the New Haven School scholarship acknowledges the conception of territorial space — and, in particular, the space of the nation-state — that undergirds current politico-legal arrangements'. Osofsky at 452: 'Just as interdisciplinary inquiry more generally thickens our perspective on legal problems, law and geography analysis allows us to understand the geographic ideas that we use more completely'. But see David S Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 *European Journal of International Law* 25, 27-8: 'Fundamentally, law is not rooted in geography. Rather, law, international law in particular, creates its own geography. While international law may make reference to physical characteristics of the world, its geography is that of a world of ideas which is imposed upon the physical world'.

14 Osofsky, above n 5, 440: 'the New Haven School has a thoughtful analysis of the import of scale, but does not fundamentally define or interrogate what scale is. In particular, its vision of world community engages scale in two senses. First, the "world" is a relevant level worthy of focus. In order to understand international lawmaking, we have to grapple with interactions happening at a planetary level. Second, the "world" scale is inherently multiscale'.

15 On the 'level of analysis', see generally Singer, above n 7, 77-92.

16 Osofsky, above n 5, 445 (the ellipsis is mine), quoting Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (University of Minnesota Press, 1977) 6.

17 Osofsky, above n 5, 445-7.

18 Singer, above n 7.

several ways in which the phenomena under study may be sorted and arranged for the purpose of systematic analysis'.¹⁹ He continues:

Whether in the physical or social sciences, the observer may choose to focus upon the parts or upon the whole, upon the components or upon the system. He may, for example, choose between the flowers or the gardens, the rocks or the quarry, the trees or the forest, the houses or the neighbourhood, the cars or the traffic jam, the delinquents or the gang, the legislature or the legislative, and so on. Whether he selects the micro- or macro-level of analysis is ostensibly a mere matter of methodological or conceptual convenience. Yet the choice often turns out to be quite difficult, and may well become a central issue within the discipline concerned. The complexity and significance of these level-of-analysis decisions are readily suggested by the long-standing controversy between social psychology and sociology, personality-oriented and culture-oriented anthropology, or micro- and macro-economics, to mention but a few.²⁰

Furthermore, the advantages and disadvantages of the above decisions are presented neutrally by Singer, who states that we should own these advantages and disadvantages, depending upon the level of analysis that we choose. Singer's work can be contrasted with writings that are invested in the level of analysis as a theoretical battleground — for example, discussions on the universal and the particular within the context of legal reasoning.²¹ In these works, there is strong disagreement as to the role of the particular or universal.²²

That is not the approach taken in this chapter. Rather, in this section, the advantages and disadvantages of each level of analysis are described as neutrally as possible. The purpose of this chapter is not to resolve a philosophical disagreement, but to link how we write with our identity as international legal academics. If each of the levels of analysis is equally on offer, if each of them is equally defensible philosophically, if we are agnostic to that point, is there anything about our purposes as academics which would sway us to choose one level rather than another?

Sociological approaches to international law have also employed the level-of-analysis method. For instance, we see Hirsch usefully employing the

19 Ibid 77.

20 Ibid.

21 Zenon Bańkowski and James MacLean (eds), *The Universal and the Particular in Legal Reasoning* (Ashgate, 2006); Rubin, above n 8. See also Rubin at 1425, where he argues for 'a synthesis of scholarly discourse', and at 1437, where he argues for a 'microanalysis of institutions'.

22 Michael Detmold, 'The End of Morality: Radical and Descriptive Particularity' in Zenon Bańkowski and James MacLean (eds), *The Universal and the Particular in Legal Reasoning* (Ashgate, 2006) 83, 94: 'In *The Unity of Law and Morality* I argued that law reduced to morality. I now think that whilst the unity is right, the truth is that morality reduces to law. All questions that now pass for moral questions really are legal questions. The reason for this is that Hegel was quite wrong: law is particular, not universal'.

level-of-analysis approach in his sociological work.²³ Here, Hirsch offers a similarly detached view to that of Singer, reviewing the advantages of each. This chapter approaches the question in a similar manner, distancing itself from a theoretical claim of resolving the level of analysis,²⁴ examining the practical function of the international legal academic who writes on international law and offers reflections on what is the best level to undertake and why.

The last introductory concept discussed in this section is the idea of considering the identity of the legal academic. This idea was considered by Koskenniemi.²⁵ In *The Politics of International Law*, Koskenniemi outlined a number of roles in which international law operates, and evaluated the identities of the players within those roles, including the role of the 'academic'.²⁶ Here, Koskenniemi examined Bourdieu's use of the concept of the 'juridical' field and explored the various identities that arose within and from this field. Underscoring the contested quality of the role of the academic, Koskenniemi noted:

The academic's position is much less stable than that of the activist or the advisor, hovering as it does between the two: a commitment to a relational and, if possible, scientifically argued vision of rule of law; and a wish to be associated with those positions of influence that are available to government advisors.²⁷

Koskenniemi's exploration of the academic's role in this chapter referred to the academic as lacking responsibility in terms of actual political judgment, and suggested that if they decided to engage with advising the government, they would be 'howl[ing] with the wolfs'.²⁸ This places the international academic in a very precarious setting. Indeed, the work is a criticism of the international legal scholar as

23 Hirsch, above n 9; Moshe Hirsch, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System' (2008) 19 *European Journal of International Law* 277.

24 Detmold, above n 22.

25 The idea has been taken on by Bowring. See Bill Bowring, 'What is Radical in 'Radical International Law?' (2011) 22 *Finnish Yearbook of International Law* 23 <<http://ssrn.com/abstract=1982159>>: 'However, it is to be hoped that the scholar or for that matter practitioner, freed of illusion, eyes wide open, will not simply relapse into the armchair, but will find ways to employ her legal competence and skills modestly in the service of collective resistance and struggle. If not, she will fall into a striking performative contradiction'. Bowring's observations are cogent, but I do not consider the idea of the 'armchair' as offensive; my objective is to reflect rather than to critique. Therefore, the approach of this article does not even subscribe to an ethos of pluralism; it is more detached than that. See generally Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87.

26 Koskenniemi, above n 5, 271-93.

27 Ibid 291.

28 Ibid 292.

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'being without responsibility to anyone about his or her statements'.²⁹ Koskenniemi continues:

For both the activist and the advisor, the academic may seem like the true cynic, falling short of a commitment to ideals or to power, enjoying both the privilege of academic freedom, which elevates the academic to the status of the truth-speaker, and occasional counselling work that satisfies the academic's quest for practical relevance.³⁰

Koskenniemi is making generalities about how we can move to critique, advise and use indeterminacy to proffer our interpretations. But in the end, we know, always and completely, that we can withdraw back to academic isolation. The purpose of this chapter is to embrace that academic isolation. We are not actors, or soldiers, or aid workers; we do not run orphanages, or clear land mines, or create foreign policy. We have been given a type of secular freedom — a role in education that, while not perfect, does not answer to generals, to business, or to human needs for food and care. Given this freedom and isolation, is there something that we should be writing about as international academics? The purpose of this chapter is in part to face a paradox of the international legal academic — namely, that if everything is possible, is there any way of absolving or living up to a more responsible identity as an international academic?

THE TRAVELS

The Alien Sees the World from Afar

The travels are put in one section because this is not an attempt to critique or to reconcile the level of analysis. It is an overview of the alien and what she sees. This section contains a broad overview of what the level of analysis does, and presents an indicative scholar from each section. The first issue to consider is the broad level — the alien enters the orbit and sees our planet from afar. At this point, she might ask: What is international law for? What does international law do for this planet? This level of analysis, asking what international law is for from the perspective of all, is rarefied and conceptually difficult. This level is asking the scholar to humanly conceive what an international order could do. Any answer to the proposition of what international law can do for the whole (that is, deliver stability, peace, justice, a world society) has always been subject to ready critique.³¹ Yet there is a pressing reality to the

29 Ibid 293.

30 Ibid.

31 Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301, 301-2: 'The New Haven School of International Law offered a significant, process-based rejoinder to the realism and positivism that had dominated international relations theory

idea, geographically, spatially, that we can imagine 'the whole'.³² If we can imagine it — if we know the world exists — necessarily, asking what international law is for has a compelling practical logic to it. Indeed, the useful function of asking this very question is exhibited by Dworkin's last work.³³

The logic of asking the 'big question' is impeccable, yet the answer is almost always flawed. Scholars who look at the whole have to accept the paradox of their position: that they have the benefit of a real and pressing question that has, with almost certainty, a deeply contested answer.

The Alien Detects Patterns of Inequality

The alien continues the descent, begins to see patterns of difference and naturally asks questions relating to these emerging differences.³⁴ Perhaps she sees deforestation in certain areas, some people having more housing than others, pollution in one area and not in another, differences in terms of gender from one area to another, differences in work patterns, different levels of development and population density across different continents.³⁵

The alien can still see connections and comparisons between societies because she has not landed within one particular state. She can ask questions such as: Why is this here?, and: Why is this pattern here and not elsewhere? This is the level of analysis in which the 'why' question is prominent. Yet the question of which 'why' is chosen is in the eye of the observer.³⁶ Many relational questions could be asked at this level

in the United States since the close of World War II. Whereas international relations realists viewed international law as merely a product of state power relations, and positivists dismissed international law entirely because it lacked both sovereign commands and a rule of recognition, scholars of the New Haven School studied law as a social process of authoritative decision making'.

32 Osofsky, above n 5, 440, quoting McDougal, Reisman and Willard, above n 13, 808.

33 Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy and Public Affairs* 1, 31.

34 See Osofsky, above n 5, 444: 'The New Haven School approach, as articulated in *Jurisprudence for a Free Society* and the works that precede it, provides a means for engaging the transforming dynamics amongst space, time, institution, and crisis ... Territory and place still matter deeply, according to the New Haven School proponents, but they have to be put into a simultaneously global and pluralistic context'.

35 This area is represented here as a visual imagery of travel by the alien; however, it is a well-traversed category. See, for example, Hirsch, above n 9, 906, where he describes this as the social conflict perspective, drawing on the writing of Wallerstein, at 907-9, and feminist scholars. Hirsch goes on to translate this to international law, for example, treaty interpretation: at 928. This article is concerned with the role of the scholar who undertakes this role.

36 Charlesworth states the matter in a succinct manner: 'An initial problem with the crisis model of international law is that it assumes that the elements of the crisis are uncontroversial, that the "facts" are ripe for picking by an analyst': Charlesworth, above n 6, 382.

of analysis — for example, questions about wealth distribution, gender, environment or poverty.³⁷ In fact, the questions are flowing thick and fast for the alien, and so she could ask of international law: Did it cause this? Did it create this? This level involves a critique of international law's role in naturalisation or creation of patterns, as Charlesworth puts it, in the context of gender, although the comment could also be applicable to a range of categories: 'Other forms of systematic violence, or structural discrimination against women, do not constitute a crisis for international lawyers. This is rather seen as part of the status quo and not truly the business of international law'.³⁸ Can international law contribute to changing the patterns that the alien sees? Is modifying these patterns even a reasonable aim of international law? The overarching sense of the 'why' question is dominant at this level. International law, in some ways, will be implicated in asking and answering 'why' we have patterns that are different and unequal.

The scholar at this level has much work to do. Answering the 'why' question involves contextual sociolegal scholarship, and it is difficult work because of the fluidity and patterns of overlapping relations in social life. As Cotterrell explains, 'it should be unsurprising that new regulatory forms have been shaped to frame these kinds of relations. Sociolegal scholarship is already extensively mapping and analysing these new forms of regulation in environmental, commercial, human rights, information technology, and many other fields'. In the face of regulatory flux and underlying social dynamics, '[s]ociolegal studies can help to redraw the legal map, emphasising how and why the changing character of the social in transnational and intranational contexts forces change in structures of regulation'.³⁹

However, the patterns have a degree of subjectivity. Why choose patterns of deforestation? Why not choose patterns of gender?⁴⁰ So, in the first instance, scholars must think of why they have chosen those particular relational ideas. Then, the 'why' question is never going to deliver a certain answer (or a set range of answers). Not surprisingly, then, the scholar will be left with further 'whys'. At this level, scholars have the advantage of knowing that they are looking at what can be broadly called 'inequality'.

37 Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243; Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

38 Charlesworth, above n 6, 389.

39 Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 *Journal of Law and Society* 632, 641.

40 Charlesworth, above n 6, 382.

Imperialism is, however [as Chimni explains], not simply the function of a certain conception of the political but equally of a certain kind of economics. Entrenched modernity has always been allied with capitalism driven by the logic of accumulation. Capital cannot rest until it has annihilated space.⁴¹

The scholar can be buoyed by the idea that patterns do exist, so there is a degree of reality. But what is reality? Noting the omission of a 'Third World Approaches to International Law (TWAIL)' paradigm from a symposium on method in international law published in the *American Journal of International Law* in 1999, Anghie and Chimni point out:

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World. Two important characteristics of TWAIL thinking emerge from this. First, the experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states.⁴²

In the second instance, the task here for the international legal scholar is to be aware of the impact of power relations and to evaluate international law accordingly.⁴³ Such awareness, as Anghie notes, 'is surely a crucial task for any discipline that claims, however problematically and tenuously, to be concerned about the promotion of justice'.⁴⁴

International legal scholars at this level may be energised by the idea that patterns are not inevitable, and therefore feel a degree of activism and constructivism in their project. Indeed, '[o]ne way forward is to refocus international law on issues of structural justice that underpin everyday life'.⁴⁵ But international legal scholars will naturally become mindful of a negative aspect to their evaluation of international law at this level: they cannot solve the 'why' of inequality. The patterns of inequality are living things; they are emerging; they are not always clear; they are reconnecting to other forces — historical, economic, political and legal.

The 'why' is a constant, and inequality is an important question, but there is movement here. Academics at this level have the advantage of knowing they are in for a struggle in maintaining the interdisciplinary requirements for successful tackling of the 'why' question — for selecting the pattern that is significant and then for

41 BS Chimni, 'Legitimizing the International Rule of Law' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 290, 301. See also Bowring, above n 25, 10, drawing on the reference to a 'class approach to international law' as suggested by Chimni.

42 Anghie and Chimni, above n 37, 78.

43 Ibid.

44 Anghie, above n 37, 290.

45 Charlesworth, above n 6, 391.

holding on to moving patterns of multiple causations while trying to link all of this meaningfully to international law. It is a difficult task that requires judgment, skill and real-world engagement.

Landing the National

Next, the alien lands. At this point, she arrives in Adelaide. This is where Judith Gardam lived and taught, and the alien has arrived here again. And the alien asks: What does international law do in Adelaide, in Australia? Here, the scholar of international law is on firmer footing. Metaphorically, the alien has landed, but so, too, has the international scholar. There are clear lines of what international law is at a domestic level, although to say there are clear lines does not mean that there is perfect clarity. There is also ambiguity about how we implement treaties, about what international law Australia abides by.⁴⁶ Compared with the other levels of analysis, though, the capacity to describe international law at a national level and argue for how it should be formed or interpreted, or incorporated, is a more stable proposition.⁴⁷

The scholar at this level has that advantage of stability, of the capacity to describe, the capacity to recommend. Here, the scholar of international law has a clearly contoured reality. The limitation of this level is that we know there is so much more to international law than Adelaide, or indeed Australia. This knowledge means that there is always a sense that scholars could be doing more. Yes, they are accurately describing and arguing within their own community, and in that sense, they are concrete and grounded. Yet there is a realisation that they are implicated, in some way, in how patterning and inequality have been, and are, formed internationally. But for their scholarship's relevance and coherence, it is necessary to assume that international law was a discrete and uncomplicated matter.⁴⁸ For the domestic international legal scholar, then, the advantage is a reality and certainty. This is a great advantage of this level of analysis, but the disadvantage is a sense of always not quite seeing the whole picture, always having the echo that this is not everything. Put differently, a sense of being too grounded has its limitations.

Indeed, most contemporary international legal scholars eschew an overly positivistic approach to their work, recognising that the doctrinal quest for 'the law' is a rather disconnected enterprise, explaining little of how international

46 Hilary Charlesworth et al (eds), *No Country Is an Island: Australia and International Law* (University of New South Wales Press, 2006).

47 The above capacity could also have productive comparative analysis. See generally Matthew Bloom, 'A Comparative Analysis of the United States's Response to Extradition Requests from China' (2008) 33 *Yale Journal of International Law* 177.

48 Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9.

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law actually operates, how it affects decisions, interacts with municipal law, and shapes norms.⁴⁹

Finally, the alien comes to the law school, a law school in which the alien's existence was created back in 1997 by Gardam. And the alien comes this time to speak to me, and the alien will only meet one human.⁵⁰ She offers me nothing in terms of the resolution of the level of analysis. Each had its own contributions; each could describe and contain a narrative of earth. Unlike her conversation with Gardam, which revealed objective observations regarding international humanitarian law, the project has been too big and she can only say that each level held relevance and interest for the international scholar.

REVERSALS

There is nothing that points to one level of analysis being superior to another. Each has its potential to represent the experience of international law. However, the travels are important to replicate. In giving the overview and having a deeply agnostic view of any particular level, then, my chapter has by this point invoked visual imagery in considering the act of writing. In making our choice of area and level, we are like the alien we chose to enter and land in a space. This imagery of entering a space is important because it sets us up for what Certeau states is the most important question:

A final point remains to be determined, the most important one: how does *time* articulate itself on an organized space? How does it affect its 'breakthrough' in the occasional mode? In short, what constitutes the *implantation of memory in a place* that already forms an ensemble?⁵¹

Certeau's formulation of this question is also the question of this chapter — that is, given that we exist as scholars and can choose anything, how do we make a breakthrough, contribute to a pre-existing space?

He goes on to say that the way of breaking through is through a response that is⁵² '*singular*. Within the ensemble in which it occurs, it is merely *one more detail* — an action, a word — so well-placed as to reverse the situation'.⁵³

49 Janet Koven Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 *Yale Journal of International Law* 393, 394.

50 See Gardam, above n 1, 244.

51 Michel de Certeau, *The Practice of Everyday Life* (Steven Randell trans, University of California Press, 1984) 86 [trans of: *L'invention du quotidien. Vol 1, Arts de faire* (first published 1980)] (emphasis in original, underlining added).

52 Ibid 86-7.

53 Ibid 88 (emphasis in original).

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Academics writing within their chosen ensemble/space/level have the potential to provide a singular response, and write a 'word so well-placed as to reverse the situation'. This is often described as originality, a contribution, something useful; but at its best, it is a reversal of time and memory. Certeau's concept of 'reversal' only makes sense when we see writing as occurring in a space that we enter, which has its own pre-existing universe and gravity and time. That is the innately visual contribution that Gardam's alien device and travels gives: to see our embodied selves as international law writers within space, and to give a physicality to the struggle, power and purpose of international scholarship, which can enter an area and reverse an omission, literally pulling and reversing the laws and imagery that govern that space through a word.

A reversal cannot always be assumed to be for the good. Like any intervention, it may not be. But in studying the omissions, carefully checking for events, individuals and thoughts that are not there in the space, there is a natural tendency towards restraint, towards the mitigating impulses of caring for details and, perhaps, towards intuition. Orford's writing in the context of international trade is an example of such a reversal. She reflects on the classroom experience of teaching international trade, in which, through teaching and scholarship, the endless forward and closed category of international trade seems impenetrable:

Later in the subject, we moved to look closely at the work of international economic institutions and trade agreements, using human rights texts and norms to critique the forms of law that trade agreements require states to enact. In particular, we talked about whether these trade agreements constrained democratic participation and those civil and political rights designed to enable that participation. At this point, the mood shifted quite dramatically. The critique became sharper, yet a sense of hopelessness also began to grow. As one student said dully: 'But there is no other way, there is no alternative.' I felt that the discussion was deadened the more I talked about the nature of the legal forms mandated by the various agreements and their relation to human rights norms. Instead of engagement and of opening texts out to alternative readings, this discussion seemed to produce an exhausted acceptance of the inevitability or necessity of sacrifice and punishment in order to reach the goals of development or economic integration. Why did the appeal to democracy and human rights when read with capitalism produce this sense of closure? We all know (don't we?) that we don't have to organize ourselves according to this economic vision, that there are all sorts of other worlds out there that look nothing like this fantasy of perfect control and endless profit, docile bodies and redeemed souls. So what was my role in (re)producing this fantasy in my classroom? How might I approach this differently?⁵⁴

54 Anne Orford, 'Trade, Human Rights and the Economy of Sacrifice' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2006) 156, 164.

Orford then considers the hidden sacrifice that trade involves, noting that in a World Trade Organisation (WTO) decision, the impact of levels of hormone in beef was 'nonchalantly'⁵⁵ noted in a footnote as having possibly contributed to the death of 371 women⁵⁶ from breast cancer. The WTO decision itself was concerned with risks to human health which could be legally protected, and with the nature and meaning of risk to human health.⁵⁷ In her work, Orford wrestles the women from the footnote; they had been placed there as a reasonable loss. She reclaims their ordered and embedded sacrifice, which had been contained in a logical and highly produced legal judgment. Orford then gives life to their judicially ordained, otherwise silent sacrifice. In doing so, Orford creates a space, and the women are moved from being a footnote in a WTO decision; their reversal is from irrelevance, from a utilitarian trade-off, from obscurity. The outcome of her work is to consider the sacrifice that is often closed and hidden in trade,⁵⁸ thereby reversing the silence of the '... something [which] escapes the closed circle of this sacrifice economy'.⁵⁹

Writing in a way that 'reverses' a space can be translated to any area of international law. For international trade, this could well be done by examining one development zone created under a trade agreement and looking at one life affected by that agreement. How has that trade architecture affected the people within that development zone, their lives, their opportunities?⁶⁰ For international humanitarian law, the reversal could be effected by taking one proportionality decision, following it to its real-life location, writing of and about one lawful civilian death, for one alchemic moment, turning the scales of proportionality from a leaden scale necessary for our law to a scale where the loss of *one* is written. Such a technique reverses for that moment the understanding of war itself.⁶¹

55 Ibid 176.

56 Ibid 168: commenting in the context of the WTO, Orford stated that it is an agreement that 'mandates a particular approach to decision-making about issues that include food security, consumer safety, regulation of genetically modified food, sustainable farming practices, animal welfare or the effects of the agribusiness on small farmers'.

57 Ibid 169, discussing the WTO decision.

58 Ibid 176, 189-90.

59 Ibid 176.

60 On this point, see Rubin, above n 8, 1425, 1431.

61 Although Kennedy does not write of such an individual, his text contains a call for such a narrative: David Kennedy, *The Dark Sides of Virtue* (Princeton University Press, 2005). As noted by Judith Resnik, 'Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover' (2005) 17 *Yale Journal of Law and the Humanities* 17, 28-9, referring to violence occasioned by the judicial order itself, 'Yet violence occasioned by judicial order is a peculiar and constrained form. Although judges make rulings that reallocate personal property, limit individual freedoms, and even contribute to ending lives, judges do not themselves carry out the orders that they issue'.

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The device of Gardam's alien gives a visual and physical expression to our writing, letting us see our own landings at different levels. This chapter's purpose was to examine what the international scholar *should* examine, given that all levels of analysis are on offer. The suggested answer is anything — but, on entering the chosen space, the international scholar should know that to include the 'well-placed word' is to affect the space itself. Those that do this have created purposeful and transformative international legal scholarship through their reversals.