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The Representation Gap: Critical International Law and the Populism Problem.

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Introduction

The proposition that international law is in crisis commands broad assent. What it does not command — and what this piece argues it urgently needs — is a criterion for distinguishing legitimate counter-hegemonic authority from its authoritarian doubles. Before asking whose law international law should be, we must answer who is even cognisable as a subject of it. That prior question has a structural answer: those collective actors who bear an authentic, accountable relationship to the communities they claim to represent. The absence of this representation criterion is not a marginal oversight. It is the foundational gap that has allowed the "international law from below" tradition to persist for over two decades without producing the transformation it promises — and which has rendered that tradition structurally vulnerable to appropriation by the very forces it was designed to contest.

Balakrishnan Rajagopal's International Law from Below (2003) made the foundational case: transnational and local social movements must be taken seriously as sources of international legal transformation, against a discipline organised around states and individuals.[1] That work is now over two decades old. Its central framework — counter-hegemonic practices, social movements, indigenous resistance, grassroots transformation — remains generative as diagnosis. What it has not furnished, and what the subsequent literature has not supplied, is a principled criterion for adjudicating among the multitude of actors who profess to speak from that register. Populist nationalist movements, too, claim to speak "from below"; so do authoritarian mobilisations professing to resist cosmopolitan elites. Absent a discriminating standard, "from below" ceases to be a framework and becomes a direction of travel without a map. The absence of a representation criterion leaves "from below" projects vulnerable not only to progressive self-misrepresentation — movements claiming authority they cannot demonstrate — but to right-populist appropriation, which deploys structurally identical rhetoric in the service of diametrically opposed ends. This is the populism problem the piece examines.

What follows traces this representation gap across four dimensions: the periodisation of international law's difficulties — and in particular whether the current moment is best understood as a tipping point rather than a rupture — the distinct layers of its alleged failures, the structural dynamics of institutional performance, and the theoretical architecture of the "from below" claim itself. The argument is not that critical international law is wrong in its diagnosis. It is that diagnosis without a theory of representation generates prescriptions that cannot distinguish the left from the right.

[1] Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance (Cambridge University Press, 2003).

I. Tipping Point or Structural Rupture? The Problem of Periodisation

A recurring claim in critical international legal scholarship holds that international law has become “unmistakably” in crisis over the past few years. Gaza, Ukraine, Venezuela, Greenland — these are the empirical anchors of a claim about structural breakdown. But the claim rests on an internal tension that the literature has not resolved.

On one hand, the crisis thesis insists that its roots run deep, embedded in the discipline’s colonial origins and hegemonic logic. On the other hand, it presents the present moment as distinctively catastrophic — a rupture, a revelation, the point at which “the mask has slipped.” These two claims do not sit easily together. If the pathology is constitutive and longstanding, what we are witnessing now is not a breakdown but a continuation — intensified, more visible, but not structurally novel. The better characterisation is that of a tipping point: a moment at which cumulative pressures breach the threshold of institutional tolerance, making suddenly legible what was always structural but latent.

The distinction matters beyond semantics. A rupture in the legal order calls for reconstruction — new norms, new institutions, a new foundation. A tipping point calls for something more targeted: identifying the specific mechanisms that have buckled under political strain, reinforcing those that remain functional, and mobilising the considerable legal resources that exist but are going uninvoked. Conflating the two forecloses repair prematurely, and it forecloses it in a politically specific way. By insisting simultaneously that the pathology is ancient and the present moment unprecedented, the critical tradition renders itself unable to specify what actually needs fixing.

Crucially, the representation gap is sharpened at tipping points precisely because institutional pressure produces exactly the kind of selective engagement that excludes the actors most affected. It is in moments of heightened political strain that the absence of formal representation for Indigenous Peoples, social movements, and non-state collectives becomes most consequential: those who bear the costs of legal dysfunction are precisely those with the least structural standing to demand remedy.

Jean d’Aspremont has demonstrated both theoretically and empirically that international law is constitutively organised around crisis as its native condition rather than its exception — the legal order continues to generate substantial normative activity, and the crisis narrative is not politically innocent.[2] Gerry Simpson's Great Powers and Outlaw States (2004) further established that the coexistence of sovereign equality and legalised hegemony is not a recent corruption of the international legal order but one of its constitutive and enduring features.[3] The selective enforcement that critical scholarship treats as revelation is, on Simpson’s account, the system working as designed.

The Third World Approaches to International Law (TWAIL) tradition has the more pointed reading. Antony Anghie showed that sovereignty itself was constituted through the “dynamic of difference” between European powers and colonial subjects — the crisis is not in the system’s failure to live up to its own norms, but in the prior question of whose norms those

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[2] Jean d’Aspremont, ‘International Law as a Crisis Discourse: The Peril of Wordlessness’, in Makane Mbengue and Jean d’Aspremont (eds), Crisis Narratives in International Law (Brill, 2022); Jean d’Aspremont, ‘Le droit international ne se porte pas si mal’, La Libre Belgique, 13 January 2026; Jean d’Aspremont, ‘International Law and its Critical Misrepresentations’, 1 Journal du Droit Transnational (2025) 22.

[3] Gerry Simpson, Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order (Cambridge University Press, 2004).

were.[4] Bhupinder Chimni's composite class theory similarly insists that the global elite — a transnational class cutting across the Global North/South divide — is the structural beneficiary of the current order in ways that the state-centric crisis narrative systematically obscures.[5] Both accounts challenge the periodisation question from a more radical direction: they do not ask when the crisis began but who the order was always designed to serve. The representation question is inescapable on either account.

II. What Kind of Failure? Lex Lata, Lex Ferenda, and the Problem of Efficacy

Perhaps the most consequential ambiguity in the critical tradition is its conflation of three analytically distinct diagnoses of international law's predicament. There is, first, the claim that international law as it stands — lex lata — is structurally inadequate: its norms, doctrines, and institutional architecture reproduce hegemony. There is, second, the claim that international law as it ought to be — lex ferenda — is not yet in existence and must be constructed. And there is, third, a problem of efficacy (Wirksamkeit in Kelsen's terms): that international law, whatever its content, systematically fails at the level of application and enforcement, not because its rules are bad but because the mechanisms for giving them effect are captured by power. Each diagnosis has a different representational implication — and conflating them obscures which dimension of the representation problem is actually at stake.

The lex lata critique points toward doctrinal deconstruction and normative reconstruction — and its representational implication is that the existing architecture of international legal personality, built around statehood and state conferral, systematically excludes the collective actors whose authority the "from below" tradition seeks to vindicate. The lex ferenda critique points toward norm creation and institutional design — and its representational implication is that any new normative framework must incorporate authentic collective actors as subjects, not merely as beneficiaries. The efficacy critique — and this is what much of the empirical evidence actually supports — points toward enforcement mechanisms and structural conditions of compliance, and its representational implication is the most immediate: those most harmed by enforcement failure have no structural standing to demand remedy.

Recent empirical work makes the enforcement picture precise. A comprehensive study of 81 inter-state conflicts between 1945 and 2020 found that the prohibition on the use of force was invoked — either as justification or as the framework within which justification was offered — in ninety per cent of cases.[6] The prohibition has not been abandoned; it has been selectively applied and contested. The Security Council classified only thirty-seven per cent of those conflicts as lawful or unlawful, and never once condemned the use of force by a permanent member, despite ample occasion.[7] The same pattern holds in the most recent cases: the US justified its strikes against Iran in a letter to the Security Council invoking anticipatory self-defence under Article 51; Israel advanced comparable arguments. Both justifications are, at minimum, highly contestable: the existence of a nuclear programme in development cannot, on any mainstream reading of the imminence requirement, ground anticipatory self-defence under Article 51. Gaza does not primarily illustrate a failure of international law's norms; the

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[4] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, 2004).

[5] B.S. Chimni, International Law and World Order: A Critique of Contemporary Approaches (Cambridge University Press, 2017).

[6] Christian Marxsen and Florian Kriener, 'The Prohibition of the Use of Force in Practice (1945–2020): Justifications, Contestations, and International Reactions', British Yearbook of International Law (2026).

[7] Ibid.

prohibition on targeting civilians and the law of occupation are well established. What it illustrates is catastrophic failure in the mechanisms that give existing norms teeth.

The enforcement picture just described is not symmetrical in its effects. The states and non-state actors most harmed by the gap between norm and enforcement — those who cannot invoke the Security Council, who lack standing before the ICJ, and whose access to treaty body mechanisms is mediated through the very states responsible for the violation — are precisely those with the least structural voice in the legal order. The representation gap runs through each layer of this failure. At the lex lata level, Indigenous Peoples, stateless collectives, and non-state communities have no standing to challenge doctrinal frameworks that exclude them from legal personality — they can be affected by international law without being recognised by it. At the lex ferenda level, the actors most invested in transforming those norms are structurally marginalised within the treaty-making and institutional design processes that produce them — present, where they are present at all, on terms set by states rather than as co-authors of the frameworks that govern them. At the efficacy level, Sundhya Pahuja has traced how the framing of development and decolonisation in international law has historically domesticated Third World demands, translating them into technocratic problems amenable to institutional management rather than structural transformation.[8] Obiora Chinedu Okafor has argued that TWAIL's most important contribution is precisely to render visible the who of international law — to ask who bears the costs of its failures and who enjoys the benefits of its selective application.[9] Francisco Quintana and Sarah Nouwen have made the related point that representations of international law as fundamentally broken describe only one facet of a complex field.[10] Treating all three layers as equally compromised forecloses targeted reform at the level where failure is actually located — and where the actors most in need of effective legal protection might actually benefit.

III. Performance, Not Sentiment: The Structural Dynamics of Institutional Expression

The critique of what Gerry Simpson has called "international law of sentimentality" — a law of hashtags, Davos statements, solemn anniversaries — names something real. But the diagnosis misidentifies it. What the tradition describes is not sentimentality but performance: the systematic staging of legal commitment for audiences whose attention shapes institutional legitimacy.[11] International law institutions have always operated in a media environment; their expressive outputs are not naive expressions of feeling but calculated acts of audience management, designed to maintain the appearance of functional authority while deferring the costs of enforcement. The remedy is correspondingly structural — a rethinking of incentive architectures — not the seriousness of tone that curing sentimentality would require. Robert Knox has shown that what looks like hypocrisy in international law is not a moral failure but a structural feature — the predictable expression of the contradiction between formal equality and imperial hierarchy, one that the performance dynamic both sustains and occasionally exposes.[12]

[8] Sundhya Pahuja, Decolonising International Law: Development, Economic Growth and the Politics of Universality (Cambridge University Press, 2011).

[9] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', 10 International Community Law Review (2008) 371.

[10] Francisco Quintana and Sarah Nouwen, 'In Defense of International Law?', 36(2) Temple International and Comparative Law Journal (2022) 65.

[11] Ian Hurd, After Anarchy: Legitimacy and Power in the United Nations Security Council (Princeton University Press, 2007).

[12] Robert Knox, 'Imperialism, Hypocrisy and the Politics of International Law', (2022) 3 TWAIL Review 25.

Hilary Charlesworth's "discipline of crisis" — her feminist critique of international law's tendency to mobilise only in extremis, to accept the framing of crises as self-evident while neglecting the everyday work of legal construction — sharpens this point from a different direction. Her alternative was not a more radical international law but an international law of everyday life, attentive to the structural and mundane rather than the catastrophic and exceptional. The performance dynamic is, in part, a product of the crisis orientation Charlesworth diagnosed: institutions trained to respond to spectacle cannot easily represent the chronic, diffuse, and unglamorous harms that affect those with the least institutional voice. The representation gap and the performance gap are, in this respect, the same problem seen from different angles.[13]

The representation dimension is the heart of it. International institutions perform for the audiences they are structurally accountable to. Where those audiences are largely Global North states, donor governments, and international media, institutional outputs will track those audiences' preferences. A genuine redistribution of institutional voice — structural representation for the communities most affected by legal dysfunction — would not merely add new speakers to an existing conversation. It would change the incentive structure within which performance and compliance decisions are made. Madelaine Chiam's work confirms that popular legal engagement is not new; the institutional incentive structure determining whether such engagement translates into compliance is, however, a separate and more recent problem.[14] The question of who those institutions are accountable to is, at bottom, a question of representation. Luis Eslava's documentation of international law's everyday effects across the Global South makes the same point from the ground up: the invisibility of those effects within the formal legal order is not incidental — it is structural, and it is a representation problem.[15]

IV. International Law from Below: The Populism Problem and the Representation Criterion

The most generative and the most underdeveloped claim in the critical international law tradition is its proposal that international law should emerge from social movements, Indigenous resistance, labour struggles, and environmental defence. The aspiration is compelling. Emmanuelle Tourme-Jouannet is right that international law has historically been mobilised by resistance movements as much as by dominant powers, and Vasuki Nesiah has shown that the progressive promise of self-determination has always been contested terrain, capable of both emancipatory and exclusionary instantiations.[16] But as a theoretical framework, the "from below" thesis faces a problem that its proponents acknowledge only obliquely, and which is more serious than they allow.

Populist nationalist movements — in Hungary, in India, in Brazil under Bolsonaro, across the Sahel's new military governments — also present themselves as speaking from below, against cosmopolitan elites, against abstract universality, against the hegemony of Geneva and New

[13] Hilary Charlesworth, 'International Law: A Discipline of Crisis', 65 Modern Law Review (2002) 377.

[14] Madelaine Chiam, International Law in Public Debate (Cambridge University Press, 2021).

[15] Luis Eslava, Local Space, Global Life: The Everyday Operation of International Law and Development (Cambridge University Press, 2015).

[16] Emmanuelle Tourme-Jouannet, Le droit international (PUF, Que sais-je?, 2022); Vasuki Nesiah, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice', 17 Harvard Human Rights Journal (2004) 75.

York. Their rhetoric is structurally identical to the progressive version, even as their substantive commitments are diametrically opposed. The “from below” framing is not self-sealing against this appropriation. If anything, it is unusually vulnerable to it, because it explicitly delegitimises the institutional filters — courts, treaty bodies, expert committees — that might otherwise distinguish between progressive and regressive counter-hegemonic claims. Karin Mickelson has noted that Third World approaches to international law have always had to navigate the tension between solidarity and heterogeneity — between the emancipatory claims of the Global South as a political project and the real divergences between those governments and the subaltern populations in whose name they speak.[17] The “from below” tradition replicates this tension at the level of social movements: who speaks for “below” within the movements that claim to represent it?

James Gathii’s work on African approaches to international law provides a further angle: counter-hegemonic resistance in African state practice frequently proceeds through institutional channels — AU mechanisms, treaty bodies, advisory opinions — that a more radical “from below” framing treats as compromised.[18] Makau Mutua’s sharp critique of NGO legitimacy — that human rights organisations frequently claim to speak for communities whose authority they have not sought — applies with equal force to the broader “from below” category.[19] The normative force of a claim does not automatically follow from its grassroots origin.

What is missing, and what the representation criterion supplies, is a procedural account of legitimacy that is neither statist nor merely assertoric. Three conditions give that account operative content. First, a demonstrable community of interest that precedes the act of representation and is not constituted by it — the collective exists as a social reality before the representative speaks. Second, internal accountability structures that allow the represented community to contest, revise, or withdraw the authority of those who claim to speak for it — representation without recall is mere assertion. Third, the capacity for deliberative closure: the ability to generate binding positions through a process that the community itself recognises as authoritative. These conditions do not require statehood, democratic elections, or international recognition; they require only that the representational relationship be real and verifiable by criteria external to the representative’s own claims.

These conditions admit of degrees, and their application will vary across the actors the “from below” tradition invokes. Social movements and labour organisations may satisfy the first condition — a pre-existing community of interest — while struggling with the second and third, where accountability structures are diffuse and deliberative closure is contested. Environmental coalitions often face the inverse problem: deliberative capacity without stable community membership. The point is not that non-state actors other than Indigenous Peoples are excluded in principle, but that the conditions provide a discriminating framework — one that can distinguish, within the category of “below,” between actors with genuine representational foundations and those whose claim rests primarily on normative solidarity rather than accountable authority.

The criterion discriminates across the three principal categories of actor the “from below” tradition invokes. An Indigenous People with continuous territorial presence, self-governing

[17] Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’, 16 Wisconsin International Law Journal (1998) 353.

[18] James Gathii, ‘TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography’, 3 Trade, Law and Development (2011) 26.

[19] Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, 42 Harvard International Law Journal (2001) 201.

institutions operating before and independently of the state, and deliberative practices through which the community generates and revises its collective positions satisfies all three conditions: the community pre-exists the representative, recall mechanisms exist within the community's own governance structures, and deliberative closure is institutionally embodied. A transnational human rights NGO, by contrast, typically satisfies neither the first nor the second: it constitutes itself through its advocacy mandate rather than through a pre-existing community of interest, and the populations it claims to represent have no structural mechanism to contest or revoke its authority. A populist nationalist movement presents the most instructive case: it may generate genuine deliberative closure — its followers genuinely authorise its positions — while failing the first condition decisively, because its community of interest is constituted by the movement itself through exclusionary mobilisation rather than pre-existing it. The criterion reveals this asymmetry; the "from below" framing, without it, cannot. On this view, an Indigenous People with continuous territorial presence, self-governing institutions, and deliberative practices of collective decision-making has a cognisable claim to international legal personality that the legal order is obliged to confront — not because states have conferred it, but because the representational relationship that grounds it already exists. A body with a formal mandate but no democratic legitimacy over the population it governs possesses formal personality with no representational foundation. This asymmetry is not a doctrinal anomaly. It is the international legal order functioning exactly as designed. Tourme-Jouannet's recent turn toward an ethics of consideration — grounded in the philosophy of Corine Pelluchon — points in a compatible direction: the normative foundation of a renewed international law must be built on something more robust than mere assertions of grassroots origin.[20]

The question of whose law international law should be cannot be answered until we have answered who is allowed to be law's subject. The critical tradition gestures at the first question. The second remains open.

Conclusion

Critical international legal scholarship performs a vital service: it rejects the comforting fiction that the discipline's present difficulties are mere anomalies or exogenous shocks to an otherwise robust system. That refusal is indispensable. But refusal is not a programme.

The transformation this tradition calls for requires three things it has not supplied. First, a precise account of which layer of international law has failed — a targeted diagnosis that distinguishes the norms that are valid from those that are inadequate, and both from the question of whether any of them are efficacious. The empirical record supports the efficacy diagnosis most strongly: states continue to invoke the prohibition on force even when violating it, the normative framework persists, and the failure is concentrated in the enforcement architecture rather than in the norms themselves. The tipping point framing, properly understood, keeps this possibility of targeted repair open in a way that the rupture narrative forecloses. Second, a procedural criterion that can distinguish genuine counter-hegemony from its authoritarian doubles — something that the "from below" framing, by delegitimising institutional filters, currently cannot provide. Third, and most foundationally, a theory of who counts as a subject of international law — a question the literature raises without answering.

The representation criterion answers that third question as follows. A collective actor has a cognisable claim to international legal subjectivity when three conditions are met: it constitutes a pre-existing community of interest not created by the act of representation itself; it is governed by internal accountability structures that allow the represented community to contest

[20] Emmanuelle Tourme-Jouannet, Un nouveau droit international écologique: habiter autrement la Terre (Bruylant, 2024).

or withdraw delegated authority; and it is capable of deliberative closure — of generating positions that the community recognises as genuinely its own. This is not a procedural technicality. It is the foundational condition that distinguishes authentic collective authority from its simulacra, whether those simulacra take the form of state-appointed proxies or self-appointed progressive spokespeople. Indigenous Peoples with continuous territorial presence and self-governing institutions satisfy it. Many of the actors currently celebrated by the “from below” literature do not, and the literature has no tools to tell the difference. The criterion is compatible with, and provides the normative foundation for, the graduated personality literature in international law: rather than treating legal personality as a binary conferred by states, it grounds personality in the prior social reality of the collective, with the degree of recognised personality tracking the robustness of the representational relationship.

The critical tradition identifies what is broken with admirable lucidity. The more arduous task — constructing criteria by which alternatives can be rendered intelligible, and distinguishing the emancipatory from the merely counter-hegemonic — remains conspicuously unfinished. The representation criterion is an attempt to begin that work. It is, deliberately, a conceptual precursor rather than a programme of institutional design: the questions of standing before treaty bodies, participation in norm-making processes, and access to enforcement mechanisms cannot be answered until the prior question of who qualifies as a genuine collective subject has been resolved. Once it is, the institutional implications follow with some force — and they are considerably more demanding than the “from below” tradition, in its current form, is equipped to supply.for notes