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‘Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law’

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**Diffuse Subjects and Dispersed Power:  
New Materialist Insights and Cautionary Lessons for International Law**

**Jessie Hohmann\***

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**Abstract**

This article sets out the major tenets of new materialism, and maps out its implications for international law. It considers what new materialism might offer for those of us working within international law in the way of new insights, resources, practices or politics. It first sets the contours of new materialism within the broader material turn. It then elaborates three main tenets of new materialism's methodology, theory and ontology: its attention to matter in its physicality; the embedded and entangled subject; and the vitality or agency of objects. The article focuses on how new materialist work might help us to understand, first, subjectivity and second, power and accountability in international law. It concludes that new materialist approaches offer important and compelling insights, working against entrenched categories and structures that continue to perpetuate or excuse violence and harm in international law's doctrines and practices. These insights provide resources for rethinking power and subjectivity, and the role these play in international law. However, those of us working to consider how we can respond to pressing crises of justice and co-existence within international law may find new materialism most powerful when brought into relation, and deep conversation, with more structural methodologies. Notably 'older' (Marxist or historical) materialisms grasp embedded power relations and deep-rooted

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\* Associate Professor, Faculty of Law, University of Technology Sydney. I acknowledge the Gadigal people of the Eora Nation, upon whose lands and waters this work was researched and written. I pay my respects to their Elders past, present and emerging. I acknowledge them as the Owners of Country and the Holders of Knowledge for this place, whose sovereignty was never ceded. I am grateful to the participants at the ILSRG Research Symposium at La Trobe University in December 2019 for their constructive discussions and ideas. Thanks are also due to Christine Schwöbel-Patel for careful reading and critical discussion throughout the writing process. Two anonymous reviewers engaged deeply with the piece, and their constructive reviews were greatly appreciated. Any errors remain my own.

systemic harms in more concrete ways. This is, the article concludes, a conversation that international law scholars are well placed to contribute to, deepening both 'old' and 'new' materialist insights for international law.

**Keywords:**

New materialism; material turn; international law; legal materiality; international legal methodology.

1. Introduction:

Recent events have brought starkly into view humans' entanglements in the natural world, and our inability to control and insulate ourselves from them. In the Australian summer of 2019/20, after months of severe drought, bushfires burned out of control. Ash and smoke filled the sky and fell on the water, and apocalyptic images of Australia's major landmarks – the Sydney Harbour Bridge, the white sails of the Opera House – were broadcast worldwide.<sup>1</sup> The fires burnt for 79 days destroying homes, wildlife and ecosystems across an area the size of South Korea,<sup>2</sup> and effectively doubled Australia's annual carbon emissions.<sup>3</sup> In early January 2020, a highly contagious virus, the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) began its rapid spread across the world. Declared a pandemic by the World Health Organization in March 2020, the resulting disease, Covid-19, had, by December of that year, infected 72,225,203 and killed 1,612,021.<sup>4</sup> In response to the virus, borders were closed, supply chains suspended, and lockdowns imposed, foregrounding our reliance on global flows of goods and people. As the Northern

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<sup>1</sup> A. Beatty, 'L'est de l'Australie asphyxié par la fumée des incendies' *La Presse*, 9 December 2019 [www.lapresse.ca/international/asie-et-oceanie/2019-12-09/l-est-de-l-australie-asphyxie-par-la-fumee-des-incendies](http://www.lapresse.ca/international/asie-et-oceanie/2019-12-09/l-est-de-l-australie-asphyxie-par-la-fumee-des-incendies).

<sup>2</sup> C. Chang, 'The devastating toll of Australia's bushfires revealed' *News.Com.Au*, 11 March 2020 [www.news.com.au/technology/environment/climate-change/the-devastating-toll-of-australias-bushfires-revealed/news-story/24e21e16fe0cd016dff86b3bed24a339](http://www.news.com.au/technology/environment/climate-change/the-devastating-toll-of-australias-bushfires-revealed/news-story/24e21e16fe0cd016dff86b3bed24a339).

<sup>3</sup> A. Freedman, 'Australia's greenhouse gas emissions effectively double as a result of unprecedented bush fires' *Washington Post*, 25 January 2020 [www.washingtonpost.com/weather/2020/01/24/australia-bush-fires-have-nearly-doubled-countrys-annual-greenhouse-gas-emissions/](http://www.washingtonpost.com/weather/2020/01/24/australia-bush-fires-have-nearly-doubled-countrys-annual-greenhouse-gas-emissions/).

<sup>4</sup> Data as at 14 December 2020. See Johns Hopkins University, Coronavirus Resource Centre, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins, <https://coronavirus.jhu.edu/map.html>.

Hemisphere moved into summer, wildfires engulfed the West Coast of the United States.<sup>5</sup> The residents of Beirut are still living amid ruins, after a toxic combination of ammonium nitrate, fire, neglect and corruption sparked a massive explosion that shattered the city.<sup>6</sup>

These events bring into the foreground the ways in which we are interlaced with the world beyond our own skin. The smoke, ash, and carbon released by the fires; the physical, chemical and political explosion in Lebanon's vibrant capital; and the virus' invisible pathways have demonstrated the ability of the material things of the world to penetrate and infect, to move and spread. They do so in ways that show little respect for our conception of ourselves as bounded entities, set apart from and able to control the world around us. At the same time, these unfolding events reveal patterned and predictable harms. Migrant and indentured workers, the homeless, and those in precarious or subsistence work are especially vulnerable not only to environmental harms, but to viral infection and to the exploitations built into the global economy.

Current crises thus foreground *material* conditions. These range from our very tangible impacts on the planet, such as human encroachment on remote spaces and animal habitats (with their impacts for biodiversity, ecosystems and disease vectors<sup>7</sup>) to the material living conditions of millions of human beings who go without adequate food, work and shelter.<sup>8</sup> The impacts are global, though unevenly experienced. These events call into question ideas that have been dominant since the Enlightenment and which are repeatedly reinforced in liberal, western explanations of the world: ideas of humans as sole agents, acting over a passive nature. Instead, these phenomena show other aspects of the world as vibrant, uncontrollable, and deeply present in our homes, bodies and social structures.

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<sup>5</sup> H. Kelly, A. Freedman and J. Samenow, 'California wildfires burn 771,000 acres in one week, killing 5 and degrading air' *Washington Post* 22 August 2020 [www.washingtonpost.com/weather/2020/08/20/california-wildfires-evacuations/](http://www.washingtonpost.com/weather/2020/08/20/california-wildfires-evacuations/).

<sup>6</sup> Arianne Shahvisi, 'An explosion didn't burn Beirut to the ground – decades of political greed and neglect did' *The Independent*, 26 August 2020 [www.independent.co.uk/independentpremium/long-reads/beirut-explosion-news-blast-lebanon-government-corruption-poverty-a9679546.html](http://www.independent.co.uk/independentpremium/long-reads/beirut-explosion-news-blast-lebanon-government-corruption-poverty-a9679546.html).

<sup>7</sup> See J. Vidal, 'Human impact on wildlife to blame for spread of viruses, says study' *The Guardian* 8 April 2020 [www.theguardian.com/environment/2020/apr/08/human-impact-on-wildlife-to-blame-for-spread-of-viruses-says-study-aoe](http://www.theguardian.com/environment/2020/apr/08/human-impact-on-wildlife-to-blame-for-spread-of-viruses-says-study-aoe).

<sup>8</sup> J. Linarelli, M. E. Salomon and M. Sornarajah (eds.), *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018); A. Orford, 'International Law and the Populist Moment: A Comment on Martti Koskeniemi's Enchanted by the Tools? International Law and Enlightenment' (2019) 113 *ASIL Proceedings of the Annual Meeting* 3 at 26.

They prompt anxiety and suffering,<sup>9</sup> but also an opportunity for reconsidering the assumptions that we use to explain the world.

Might considering wider views of agency that stress the relation of all entities, the entanglements between and among human and non-human, and the vibrancy of matter and the stuff of the world offer new avenues and creative paths forward? These are questions that new materialist thinkers are already contemplating. What might their work contribute to those of us working in international law to contest global harms, exploitation and injustice? This article seeks to open up these questions and prompt a deeper reflection on new materialist thought for international law. Accordingly, in the following sections this article sets out the main tenets of new materialism, and maps out its implications for international law. It considers what new materialism might offer in the way of new insights, resources, practices or politics.

Harnessing new materialist insights can help to undermine the grip of Eurocentric, idealist doctrines and rules. These doctrines, which separate mind from matter, 'man' from nature, subject from object continue to structure who and what is accorded rights and subjectivity, power and agency versus who or what counts as a passive object, ripe for exploitation in international law. They can also help us to see the way that authority operates in international law, when expected centres of power suddenly seem hollow. These tools and methods, as discussed in the sections below, offer fresh ways of seeing. The insights of new materialist thinking can help illuminate in new ways the role that international legal doctrines continue to play in perpetrating injustice, violence and harm, as well as how we might use international law to contest such harm. However, critiques of new materialism caution that we might need to bring these insights into conversation with other critical tools, notably, other and 'older' materialisms (such as Marxist or historical materialism) that focus squarely on structures and systemic patterns of inequality and abuse, in order to adequately contest such abuses.

In the next section (2), I set the contours of new materialism within the broader material turn. I then, in section 3, elaborate three main tenets of new materialism: its

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<sup>9</sup> I acknowledge that these anxieties reflect the scholarship, conversations, and media discourse in the context in which I am situated, and that they may not speak to the anxieties of other constituencies and communities contesting or working with or within international law. On situated knowledge, from an early new materialist perspective on objectivity, see D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', (1988) 14 *Feminist Studies* 575.

attention to matter in its physicality; the embedded and entangled subject; and the vitality or agency of objects. I also position my argument in relation to materialist thinking in law. In the following section (4), I consider what these insights offer for those seeking to understand, or contest, the workings of international law, and also address the limits of these insights, attending to critiques of new materialist theories. I focus on how new materialist work might help us to understand first, subjectivity and second, authority or power, in international law. I conclude in section 5 that new materialist approaches offer important new ways of seeing the world. However, we might need to look elsewhere – harnessing also more structural critiques and methodologies, for tools to hold power meaningfully to account. These tools are readily to hand in international legal scholarship and critique: Marxist and critical international law scholars have built a scaffolding of ideas that pay careful attention to power and structure, and bringing these perspectives and insights to bear on new materialism is a productive project, and one, I conclude, that prompts an important research agenda going forward.

## 2. Mapping the material turn

A distinct material turn is currently animating work across the humanities and social sciences. Not only capturing the scholarly moment, things and objects have seized the public imagination. High profile object-focused museum exhibitions from the Victoria and Albert Museum's 'Disobedient Objects' and the British Museum/BBC Radio 4 'History of the world in 100 Objects'<sup>10</sup> to a range of object-centred biographies<sup>11</sup> have proliferated. These

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<sup>10</sup> Victoria and Albert Museum, *Disobedient Objects: About the Exhibition*, available at [www.vam.ac.uk/content/exhibitions/disobedient-objects/disobedient-objects-about-the-exhibition/](http://www.vam.ac.uk/content/exhibitions/disobedient-objects/disobedient-objects-about-the-exhibition/). See also C. Flood and G. Grindon, *Disobedient Objects* (2014). The British Museum and BBC Radio 4 collaboration began as a 100-part radio series presented by the Museum's then Director Neil MacGregor, with short expositions of the Museum's objects. See, [www.bbc.co.uk/programmes/b00nrtd2/episodes/downloads](http://www.bbc.co.uk/programmes/b00nrtd2/episodes/downloads). The project spawned a book, N. MacGregor, *A History of the World in 100 Objects*, (2010) and an internationally travelling exhibition, and MacGregor has followed this object focussed format in further projects see, e.g., N. MacGregor, *Germany: Memories of a Nation* (2016) and *Living with the Gods: On Beliefs and Peoples* (2018).

<sup>11</sup> See, e.g., L. Zuckerman, *The Potato* (1999); R. Hewitt, *Map of a Nation: A Biography of the Ordnance Survey* (2010); E. de Waal, *The Hare with Amber Eyes: A Hidden Inheritance* (2011).

sit alongside popular science writing focussing on matter and materials,<sup>12</sup> and a vogue for curation, which now encompasses our wardrobes, bookshelves, even diets.<sup>13</sup> Things have grasped the popular imagination in striking ways. At the academic end of the spectrum, this ‘turn’<sup>14</sup> involves new theories, methodologies, and ontologies, which seek to consider the material world from new angles, and in new relationships and configurations, with both human subjects and with existing organizations of power or of nature. It is concerned with recovering a number of existing approaches which have given attention to objects or things; using cross- or inter-disciplinary insights from areas where objects have long been given serious attention, such as archaeology, anthropology and museum studies.<sup>15</sup> It also feeds off closer engagement between the humanities and social sciences, on the one hand, and physics and mathematics,<sup>16</sup> biological<sup>17</sup> and information sciences,<sup>18</sup> on the other. It is particularly inspired by work in the sciences which itself moves beyond a Cartesian or Newtonian understanding of matter as something stable, tangible and inert.<sup>19</sup> At least some of this work is also prompted by the need to give space to marginalized and denied worldviews, including those of Indigenous Peoples.<sup>20</sup> Much of it has a strong feminist

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<sup>12</sup> See, e.g., M. Miodownik, *Stuff Matters: The Strange Stories of the Marvellous Materials that Shape our Man-Made World* (2013).

<sup>13</sup> See, e.g., D. Balzer, *Curationism* (2014); I. Mida et al., ‘Scholars’ Roundtable Presentation: Everyone Their Own Curator: Professionalism and Authority in the Digital Age’, (2017) 43(1) *Dress: The Journal of the Costume Society of America* 45, at 56, and the best-selling M. Kondo, *The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing* (trans. C. Hirano) (2014).

<sup>14</sup> On the ‘turn’ specifically see, T. Bennett and P. Joyce, ‘Material Powers: Introduction’, in T. Bennett and P. Joyce, (eds.), *Material Powers: Cultural Studies, History and the Material Turn* (2010), 1-21.

<sup>15</sup> See, e.g., the discussion in D. Hicks and M. C. Beaudry, ‘Introduction: Material Culture Studies: A Reactionary View’, in D. Hicks and M. C. Beaudry (eds.), *The Oxford Handbook of Material Culture Studies* (2010), 1-21.

<sup>16</sup> See, for e.g., D. Coole and S. Frost, ‘Introducing the New Materialisms’, in D. Coole and S. Frost (eds.), *New Materialisms: Ontology, Agency, and Politics* (2010), 10-14 for a synopsis of relevant developments in physics and in Complexity and Chaos Theory; Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (2007); Q. Meillassoux, *After Finitude: An Essay on the Necessity of Contingency* (trans. R. Brassier) (2008).

<sup>17</sup> Coole and Frost *ibid.* at 15; S. Jasanoff (ed.), *Reframing Rights: Bioconstitutionalism in the Genetic Age* (2011).

<sup>18</sup> J-H. Passoth, ‘From Hardware to Software to Runtime: The Politics of (at Least) Three Digital Materialities’, in U. T. Kissmann and J. van Loon (eds.), *Discussing New Materialism* (2019), 173-89.

<sup>19</sup> Barad, *supra* note 16; See also ‘Interview with Karen Barad’ in R. Dolphijn and I. van der Tuin, *New Materialism: Interviews and Cartographies*, (2012) at 62-8.

<sup>20</sup> See, e.g., A. Ravenscroft, ‘Strange Weather: Indigenous Materialisms, New Materialism, and Colonialism’, (2018) 5(3) *Cambridge Journal of Postcolonial Literary Inquiry* 353-70; P. Hinton, T. Mehrabi, and J. Barla, ‘New Materialisms\_ New Colonialisms’ COST Action IS1307 ‘New Materialism. Networking European Scholarship on ‘How Matter Comes to Matter’’, subgroup two: New Materialisms on the Crossroads of the Natural and Human Sciences position paper, available at [newmaterialism.eu/content/5-working-groups/2-working-group-2/position-papers/subgroup-position-paper-new-materialisms-new-colonialisms.pdf](http://newmaterialism.eu/content/5-working-groups/2-working-group-2/position-papers/subgroup-position-paper-new-materialisms-new-colonialisms.pdf); but see J. Rosiek and S. L. Pratt, ‘The New Materialisms and Indigenous Theories of Non-Human Agency: Making the Case for Respectful Anti-Colonial Engagement’, (2020) 26 *Qualitative Inquiry* 331-46, demonstrating relatively little

stance, and new materialist thinkers have also contributed significantly to broader feminist thought.<sup>21</sup> Finally, the material turn is a response to, or a reaction against, the limits of the linguistic or discursive turn, which dominated work in the humanities and social sciences until at least the 1990s.<sup>22</sup>

The novelty of this turn to things has been disputed, and is in fact often acknowledged as a 'return',<sup>23</sup> but it is undeniable that the reinvigoration of interest in objects, things and materiality is given fresh energy when coupled with new methodologies, theories and ontologies emerging, particularly under the banner of 'new materialism' itself.

For legal scholars, this 'turn' has given rise to a growing body of scholarship exploring various paths forward for law, materiality and their interrelationships. These paths of enquiry have led in three main directions, though they intersect and share terrain. The first focuses on law's material culture, beginning with objects, from the mundane to the museum piece. These objects are engaged in creative ways – for example in the work of Perry-Kessarlis,<sup>24</sup> and Hohmann and Joyce,<sup>25</sup> - to think through how material things and laws are co-constituted, and to decentre text as the main arena for legal interpretation and relevance.

A second approach seeks to move beyond anthropocentrism toward more generous understandings of agency, as well as more plural forms of law. For instance, Davies' work employs a broad range of materially inflected methodologies and theories, to 'unlimit' law, through an engagement with its 'diverse spaces, systems, forms of subjectivity, relations, discourses, narratives, imaginings, and things from which norms emerge and are

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articulation between Indigenous agential ontologies and 'agential realism' in new materialism, and calling for greater engagement.

<sup>21</sup> See, e.g., D. Haraway, 'A Cyborg Manifesto' (1985) *Socialist Review* 80; Barad, *supra* note 16; R. Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (2<sup>nd</sup> ed) (2011); E. Grosz, 'Feminism, Materialism and Freedom' in Coole and Frost, *supra* note 16.

<sup>22</sup> See, e.g., K. Barad, 'Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter', (2003) 28(3) *Journal of Women in Culture and Society* 801 at 801-2; M. DeLanda, 'A New Philosophy of Society: Assemblage Theory and Social Complexity', (2006) at 16; B. Washick and E. Wingrove, 'Politics that Matter: Thinking about Power and Justice with the New Materialists', (2015) 14 *Contemporary Political Theory* 63 at 64; Coole and Frost *supra* note 16, at 2-3, 6; 'Interview with Rosi Braidotti' in R. Dolphijn and I. van der Tuin, *supra* note 19 at 21.

<sup>23</sup> See, e.g., the discussion of this point in Coole and Frost, *supra* note 16 at 4; J. Bennett, *Vibrant Matter: A Political Ecology of Things* (2010), xiii-xix; B. Brown, 'Thing Theory', in B. Brown (ed.), *Things* (2004) at 13-14.

<sup>24</sup> A. Perry-Kessarlis' 'Legal Treasures' and 'Pop Up Museum of Legal Objects' Projects, 'Legal Treasures' available at [amandaperrykessarlis.org/legaltreasure/](http://amandaperrykessarlis.org/legaltreasure/) and 'Pop Up Museum of Legal Objects' available at [amandaperrykessarlis.org/collections/pop-up-museum-of-legal-objects-2017/](http://amandaperrykessarlis.org/collections/pop-up-museum-of-legal-objects-2017/)

<sup>25</sup> J. Hohmann and D. Joyce (eds) *International Law's Objects* (2018).



formalised'.<sup>26</sup> In doing so, Davies finds a 'material-plural' law that is enmeshed in, emerging from, and constituted in the material and the social.<sup>27</sup> Philippopoulos-Mihalopoulos has used legal material metaphors to help perceive the fleshly materiality of the law, and to consider locations and relations of agency and responsibility, informed by among other theoretical work, new materialism.<sup>28</sup>

Finally, a third important strand seeks to confront squarely what might be particular to *law's* materiality and its matters. This has led to a body of scholarship on 'legal materiality.' These scholars have sought more explicitly to open up law as a category. Prompted by the failure of a number of material theories or methodologies to look beyond the given of 'the law' as a bounded or reified entity, Kang writes of new materialism's 'missing perspective',<sup>29</sup> the lack of 'regard and feeling for the specificities of legal materiality itself.'<sup>30</sup> There is, she argues 'neither an openness towards defining and sensing the matters of law nor an attempt to understand legal materiality as a distinct phenomenon.'<sup>31</sup> In this vein, Pottage interrogates the ways in which Latour's application of Actor-Network-Theory to law failed to reach the critical potential it brought when applied to science.<sup>32</sup> He foregrounds the need to fully interrogate what law *is* in any material theory. Rather than 'strain so hard to materialize law' Pottage asks, 'why not begin with the extensive potentialities of "materiality" and ask what becomes of "law" if we try to hold those potentialities open?'<sup>33</sup> The first approach, he argues, has the effect of reifying law, while beginning with materiality might help to dissolve 'law' as a stable body of knowledge, practice or regulation in favour of more powerful explanations.<sup>34</sup> Building upon this critique, scholars such as Kang and Kendall have turned to consider the distinctions among

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<sup>26</sup> M. Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (2017), 154.

<sup>27</sup> *Ibid*, 155.

<sup>28</sup> A. Philippopoulos-Mihalopoulos, 'Flesh of the Law: Material Legal Metaphors' (2016) 43(1) *JOLS* 45-65.

<sup>29</sup> H. Y. Kang, 'Law's Materiality: Between Concrete Matters and Abstract Forms, or how Matter becomes Material' in A. Philippopoulos-Mihalopoulos (ed) *Routledge Handbook of Law and Theory* (2018), 456.

<sup>30</sup> *Ibid*, 457.

<sup>31</sup> *Ibid*.

<sup>32</sup> A. Pottage, 'The materiality of What' (2012) 39(1) *JOLS* 167. See also Pottage's object of critique, B. Latour 'The Making of Law – An Ethnography of the Conseil d'Etat' (2009) (trans M. Brillman, et al).

<sup>33</sup> Pottage, *ibid*, 180.

<sup>34</sup> *Ibid*.

matters, materiality and meanings.<sup>35</sup> Legal materialism, for them, involves a particular distinction between matters and materials:

whereas law's matters are not necessarily physical elements but rather issues or problematizations, materials are the substances, attributes or properties that are enlisted in acts of interpretation. Legal materiality is concerned with how materials *come to matter* to law by being engaged in the production of legal meaning through interpretive and representational practices.<sup>36</sup>

As Kang explains it, '[l]egal materiality can be understood as a mode by which the concrete matters come to be enlisted to define a matter of law; for example, how an invented scientific object comes to be signified as a patentable invention, or how recording formats and an expert's performance in court interweave to determine the legality of a copy.'<sup>37</sup> She argues therefore, 'materiality in the legal context is an argumentative, hermeneutic process involving several steps of representation and interpretation, rather than denoting an innate property or a physical thing.'<sup>38</sup>

At the same time, international law scholars, who have also contributed to the developing scholarship discussed in the previous paragraphs, have begun to turn their attention specifically to international law's materiality, asking how international legal regimes and rules structure subjectivity, sexuality, the home, food production, or movement within and across borders.<sup>39</sup> Their scholarship raises the point that international law is not just 'an ideological project that has material consequences'<sup>40</sup> but can be understood as 'a material project in itself.'<sup>41</sup> Scholars have focused on the role of everyday actors in the

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<sup>35</sup> H. Y. Kang and S. Kendall, 'Legal Materiality' in S. Stern, M. Del Mar and B. Meyler (eds) *The Oxford Handbook of Law and the Humanities* (2019). See also Kang, *supra* note 29.

<sup>36</sup> Kang and Kendall, *ibid*, 21. Original emphasis.

<sup>37</sup> Kang, *supra* note 29, 465.

<sup>38</sup> *Ibid*.

<sup>39</sup> See, e.g., the contributions in J. Hohmann and D. Joyce, *supra* note 25; R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018); N. Tzouvala 'Food for the Global Market: The Neoliberal Reconstruction of Agriculture in Occupied Iraq (2003-2004) and the Role of International Law' (2016) 17(1) *Global Jurist*; L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015); D. R. Quiroga-Villamarín 'Containing Globalization: A Material History of Transnational Regulation through Shipping Containers (1956 – 1968)' (2020) available at <https://repository.graduateinstitute.ch/record/298599>.

<sup>40</sup> L. Eslava and S. Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law', (2012) 45(2) *Journal of Law and Politics in Africa, Asia and Latin America-Verfassung und Recht in Übersee* 195 at 202.

<sup>41</sup> *Ibid*.

legitimation, contestation or practice of international law,<sup>42</sup> and have harnessed artefacts and the world as tangibly experienced to consider international law as a material practice.<sup>43</sup> International legal scholars are engaging with posthumanist feminisms, themselves inspired by and allied with new materialism, particularly in interrogating the fields of warfare and military technology.<sup>44</sup> A notable strand also engages new materialism to reframe international law's relationship with 'nature' and the environment.<sup>45</sup> There are also serious attempts to move beyond Eurocentric, Enlightenment understandings of international law, including through recovering fundamentally more relational and connected worldviews, to push toward re-creating international law as sustainable and inclusive.<sup>46</sup>

While the material turn is sometimes seen as synonymous with new materialism,<sup>47</sup> for me the material turn can be understood more broadly, and it is specifically new materialism that I engage with here. In the next section, I introduce the contours of new materialism, and then set out what I see as its three main tenets, before turning to consider what new materialism offers in the way of understanding issues of subjectivity, and power and accountability for international law.

### 3. The contours of new materialism

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<sup>42</sup> Eslava (2015), *supra* note 39. T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (2018); and F. Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law', (2017) 111(1) *AJIL* 1.

<sup>43</sup> See the contributions in (2017) 5(1) *LRIL*, special issue on History, Anthropology and the Archive of International Law; Hohmann and Joyce, *supra* note 25; R. Vos, 'Walking Along the Rue de la Loi: EU Façades as Front- and Backstage of Transnational Legal Practice' in L. J. M. Boer and S. Stalk (eds.) *Backstage Practices of Transnational Law* (2019); and A. Perry-Kessaris' 'Legal Treasures' and 'Pop Up Museum of Legal Objects' projects *supra* note 24, in which a number of international lawyers have participated.

<sup>44</sup> E. Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines', (2018) 44(1) *AFLJ* 93; M. Arvidsson, 'The Swarm that we Already are: Artificial Intelligent (AI) Swarming "Insect Drones", Targeting and International Humanitarian Law in a Posthuman Ecology', (2020) 11(1) *JHRE* 114; G. Heathcote, 'War's Perpetuity: Disabled Bodies of War and the Exoskeleton of Equality', (2018) 44(1) *AFLJ* 71.

<sup>45</sup> U. Natarajan and J. Dehm, 'Where is the Environment? Locating Nature in International Law', (2019) 3 *TWAILR: Reflections* available at [twailr.com/where-is-the-environment-locating-nature-in-international-law/](http://twailr.com/where-is-the-environment-locating-nature-in-international-law/); A. Grear, 'Introduction: "Staying with the Trouble"\* - Environmental Justice for the Anthropocene-Capitalocene', in A. Grear (ed.), *Environmental Justice* (2020).

<sup>46</sup> See K. Khoday et al., 'Locating Nature: Making and Unmaking International Law: Introduction', (2014) 23(3) *LJIL* 571, and the further papers in that Symposium issue, as well as Natarajan and Dehm, *ibid*; Grear, *ibid*.

<sup>47</sup> I. Clever and W. Ruberg, 'Beyond Cultural History? The Material Turn, Praxiology, and Body History', (2014) 3 *Humanities* 546 at 547.

New materialism can be seen as a methodology, a theory, and an ontology. In a series of interviews with leading new materialist figures, Dolphijn and van der Tuin noted in 2012 that while much has been made of the materialism of new materialism, ‘a clear perspective on how new materialism is *new* remains underdeveloped.’<sup>48</sup> Nevertheless, in my view new materialism remains distinct from previous materially astute approaches. It is certainly the case that new materialist thinking has been accused of failing to acknowledge its debt to a number of materially attuned approaches,<sup>49</sup> and of ignoring pre-existing engagement with some of its central claims.<sup>50</sup> Its leading scholars, however, are at pains to point out connections, as well as breaks.<sup>51</sup> In addition, while related to a number of material approaches, from ‘thing theory’<sup>52</sup> to Actor-Network-Theory (ANT),<sup>53</sup> science and technology studies (STS),<sup>54</sup> and Assemblage Theory,<sup>55</sup> new materialism has distinct features and aims. I also distinguish new materialism at what might be thought of as the ‘other end’ of the spectrum: from approaches that go beyond it, and insist that ‘the Real’ is an ultimate truth.<sup>56</sup> For that reason, I will exclude from my discussion here those further reaches of materialism that are grouped under the banner of object oriented ontology (OOO) and new speculative realism,<sup>57</sup> even though these are sometimes also considered ‘new materialism.’<sup>58</sup> New materialism is, for me,<sup>59</sup> distinguishable as a distinct approach for three

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<sup>48</sup> Dolphijn and van der Tuin, *supra* note 19, at 115. Original emphasis.

<sup>49</sup> See, e.g., S. Ahmed, ‘Some Preliminary Remarks on the Founding Gestures of “New Materialism”’, (2008) 15 *EJWS* 23; C. Devellennes and B. Dillet, ‘Questioning New Materialisms: An Introduction’, (2018) 35 *Theory, Culture and Society* 5, at 7.

<sup>50</sup> See, e.g., the discussion in Davies, *supra* note 26, 57.

<sup>51</sup> See, e.g., Coole and Frost, *supra* note 16 at 176; Bennett, *supra* note 23.

<sup>52</sup> See especially Brown, *supra* note 23.

<sup>53</sup> In particular, the work of Latour and of Callon, e.g., B. Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005); B. Latour, *We Have Never Been Modern* (trans. C. Porter) (1993); M. Callon, ‘Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fisherman of St. Brieu Bay’, (1984) 32(1) *The Sociological Review* 196.

<sup>54</sup> See, e.g., S. Jasanoff, (ed.) *States of Knowledge: The Co-production of Science and the Social Order* (2004).

<sup>55</sup> G. Deleuze and F. Guattari, *A Thousand Plateaus* (1980); M. DeLanda, *Assemblage Theory* (2016).

<sup>56</sup> See Coole and Frost, *supra* note 16, at 11 who insist that ‘acknowledging nondiscursive material efficacy’ is not ‘equivalent to espousing a metaphysical claim regarding the Real as ultimate truth’.

<sup>57</sup> See the work of Graham Harman and Timothy Morton, for e.g., G. Harman, *Object-Oriented-Ontology: A New Theory of Everything* (2018); G. Harman, *Speculative Realism: An Introduction* (2018); T. Morton, *Hyperobjects: Philosophy and Ecology after the End of the World*, (2013); T. Morton, *Realist Magic: Objects, Ontology, Causality*, (2013).

<sup>58</sup> See Dolphijn and van der Tuin, *supra* note 19.

<sup>59</sup> Other delineations include Devellennes and Dillet, who identify three criteria of what makes new materialism: ‘First, there is an emphasis on the novelty of the theory. Second, there is an ontological claim that is made (either explicitly or implicitly) about the nature of matter and how it impacts our lives. And finally, there are methodical implications of taking material objects seriously in our academic practices.’ Devellennes and Dillet, *supra* note 49 at 37. Gamble, Hanan and Nail note three trajectories of new materialism, which

intertwined reasons. The first is its insistence on giving attention to matter in its very physicality; the second its position on the entanglement or intra-action of all matter; and the third is its openness to considering matter as vital or agentic.

### **3.1. *The physicality of matter***

New Materialism seeks to give serious attention to matter in its very physicality. As Coole and Frost write, introducing new materialism in an important early volume:

we inhabit an ineluctably material world ... surrounded by, immersed in, matter. We are ourselves composed of matter. We experience its restlessness and intransigence even as we reconfigure and consume it. ... Our existence depends from one moment to the next on myriad micro-organisms and diverse higher species, on our own hazily understood bodily and cellular reactions and on pitiless cosmic motions, on the material artifacts and natural stuff that populate our environment, as well as on socioeconomic structures that produce and reproduce the conditions of our everyday lives.<sup>60</sup>

In light of the 'massive materiality' of the world, Coole and Frost ask 'how could we be other than materialist? How could we ignore the power of matter and the ways it materializes in our ordinary experiences or fail to acknowledge the primacy of matter in our theories?'<sup>61</sup>

Thus, new materialism turns attention to things and objects, nature and the body, which western philosophy have so often ignored, or treated only as the binary foils for human action and subjectivity.<sup>62</sup> It is committed to 'raising the profile of the physical world

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they name 'negative new materialism' 'vital new materialism' and 'performative or 'pedetic' new materialism.' See C.N. Gamble, J.S. Hanan and T. Nail, 'What is New Materialism?', (2019) 24(6) *Angelaki: Journal of the Theoretical Humanities* 111.

<sup>60</sup> Coole and Frost, *supra* note 16 at 1.

<sup>61</sup> *Ibid.*

<sup>62</sup> See the synopsis in J. Hohmann, 'The Lives of Objects' in Hohmann and Joyce, *supra* note 25 at 30-32.

as an integral part of the social.’<sup>63</sup> As Barad puts it simply: in investigating ‘how matter comes to matter. How matter makes itself felt.’<sup>64</sup>

This entails, in common with other materially attuned approaches, approaching things with an open mind, and seeking to understand the work objects or things, matter and materials, do in the world. Moreover, it means letting objects speak without, so far as possible, an overlay of preconceptions built up through the received categories established from, at least, the Enlightenment onwards in western thought and the disciplines. On many planes, and in ever shifting and re-forming ways, we are tangled together as entities in the world. This process of entanglement or intra-action of entities is the next key point I will address.

### **3.2. *The embedded and entangled subject***

As already implicit above, new materialism stresses the embeddedness of all humans in the material world. In fact, new materialists understand entities to be mutually constituted through and in their relations with each other. Rejecting the idea of the human as a fully formed subject sitting apart from the natural world, new materialists argue that we are enmeshed in it. The meaning of the subject is intelligible only in relation to the object, not in the sense of a binary either/or, but through engagement or entanglement. A central undertaking for new materialisms is to question that there are discrete, fixed, and pre-existing units that can be understood to relate to each other. Instead, as Barad – feminist physicist and leading new materialist – puts it, in *intra-active* engagement, entities emerge from their relating.<sup>65</sup> She writes that the ‘primary ontological units are not “things” but phenomena – dynamic topological reconfigurings/entanglements/relationalities/(re)articulations of the world’.<sup>66</sup> Thus ‘[a]gency is not an attribute but the ongoing reconfigurings of the world. The universe is agential intra-activity in its becoming.’<sup>67</sup> New materialism brings everything into relation.<sup>68</sup>

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<sup>63</sup> Davies, *supra* note 26, at 57.

<sup>64</sup> Dolphijn and van der Tuin, *supra* note 19 at 59.

<sup>65</sup> Barad, *supra* note 16 at 137 – 141. Original emphasis.

<sup>66</sup> *Ibid.*, at 141.

<sup>67</sup> *Ibid.*

<sup>68</sup> Davies, *supra* note 26 at 58.

As theory, new materialism ‘emphasises the forms of relationality – resistance, mutual reliance, exclusion, mimicry, parasitism, autopoiesis, exchange, coupling, parallelism, dominance, subsumption, foreclosure and so forth – out of which in the human world subjects and objects are made as such.’<sup>69</sup> Davies summarizes these complex ideas lucidly:

There is flow between our bodily molecules and those outside us – in a physical sense we may feel as though we have edges, but we are also porous and unfinished. In association with matter, meanings constantly emerge to give shape to matter.<sup>70</sup>

Accordingly, this requires rejecting received binaries: of nature/culture, object/subject, female/male, matter/mind for instance. New materialists identify instead ‘fluxes,’ and seek ways of opening up perceived dualisms in productive, even revolutionary ways.<sup>71</sup>

This leads to the final aspect of new materialism I wish to draw out. If there are no hard edges between entities in the world, then where does agency lie? If we are entangled and intra-active, becoming and being only in relation with other entities, then, as Bennett argues, ‘an actant never really acts alone. Its efficacy or agency always depends on the collaboration, cooperation, or interactive interference of many bodies and forces.’<sup>72</sup> This leads us to the third point: that new materialism is open to matter as vital, actant, or even agent.

### **3.3. Vital and agentic objects**

Entailed in all new materialist thinking is the rejection of the human being as the only node of agency or subjectivity, given that, according to new materialism, there is no hard-bordered ‘human’. This raises the issue of what has agency in the world.

Some theorists have focussed specifically on the idea that things or objects have vitality and agency in and of themselves. Bennett’s ‘vibrant matter’ is perhaps one of the

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<sup>69</sup> Ibid., at 61.

<sup>70</sup> Ibid., at 60.

<sup>71</sup> Dolphijn and van der Tuin, *supra* note 19 at 85-6.

<sup>72</sup> Bennett, *supra* note 23, at 21.

most enticing, as well as influential, of the new materialist offerings in this respect. Matter, as Bennett writes, is *vibrant* and full of ‘energetic vitality’.<sup>73</sup> She suggests that considering material things to act and have agency is to notice and insist that they are also ‘quasi agents or forces with trajectories, propensities, or tendencies of their own.’<sup>74</sup> Things always have the capacity to exceed our understanding of them, to break free of their human-designated status,<sup>75</sup> and in doing so, they ‘manifest traces of independence or aliveness’.<sup>76</sup> For instance, Bennett ‘emphasize[s], even overemphasize[s], the agentic contributions of nonhuman forces (operating in nature, in the human body, and in human artifacts) in an attempt to counter the narcissistic reflex of human language and thought.’<sup>77</sup>

Other new materialist thinkers are more resistant to categorising matter as having agency or an ‘actant’ status. For example, though Barad’s work is often described as ‘agential realism’ she notes that she avoids using the terms agent or even actant, ‘because these terms work against the relational ontology I am proposing.’<sup>78</sup> Rather than agency as something held as a property of things or persons, she sees it as ‘an enactment, a matter of possibilities for reconfiguring entanglements.’<sup>79</sup> This, however, does not relocate agency firmly in the human, but insists that agency is a matter of relation, and a process that entails a potentially infinite spectrum of matter around and within us.

Together, these three insights of new materialist thinking operate to unseat the sovereign, rational human being as the location of agency and subjectivity, acting over a world of passive objects, and from which ‘he’ can separate himself conceptually and physically. They work to give us a picture of the world where agency is shared – moreover, where agency comes about as the result of ‘intra-actions’ and entanglements and is an unstable and potentially shifting process. Rather than established hierarchies across binaries of subject/object, mind/matter, culture/nature, new materialism locates diffuse constellations of agency, and dynamic fluxes of becoming, without a stable centre.

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<sup>73</sup> *Ibid.*, at 5.

<sup>74</sup> *Ibid.*, at viii.

<sup>75</sup> Brown, *supra* note 23, at 174-82.

<sup>76</sup> Bennet, *supra* note 23, at xvi.

<sup>77</sup> *Ibid.*

<sup>78</sup> Dolphijn and van der Tuin, *supra* note 19, at 54. See also Philippopoulos-Mihalopoulos, who writes of ‘lively agency’ as essentially relational. He defines it as ‘the ability of bodies (animate and inanimate) to withdraw in their singularity while connecting to other bodies.’ A Philippopoulos-Mihalopoulos ‘Lively Agency: Life and Law in the Anthropocene’ in I. Braverman (ed) *Animals, Biopolitics, Law: Lively Legalities* (2016) at 194.

<sup>79</sup> Dolphijn and van der Tuin, *Ibid.*



### 3.4 A Positioning

As Kang has noted, new materialist work has sometimes failed to grasp a legal sensibility.<sup>80</sup> The insights of new materialism do not map easily onto enquiries concerning law. On the one hand, some new materialist work that deals with law tends to treat law as a given, reifying law and excluding it from the searching critique and unpicking that it achieves for other entities or institutions. On the other hand, new materialism raises the question of what is left of law if the world is opened up into vibrant interactions among fluid, intra-acting molecules that operate across space and time and through the boundaries of organisms, let alone the boundaries of disciplines, social categories, or institutions. As Kang and Kendall write, '[a]s far as law exists in society as a distinct and distinguishable field, a legal materialist approach requires accounting for the distinctiveness of law as a category'.<sup>81</sup> From such a perspective, what can we say is distinct to law?

The thoughtful works of scholars writing on 'legal materialism' discussed above, have offered a careful and nuanced consideration of law, its matters, and its materiality. Some of this work, however, still sits uneasily with new materialism as I understand it. In legal materialist accounts, what often remains distinctive to law are language and interpretive and textual practices. Pottage, for example, finds legal materiality as made up out of discourse, such as 'regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic arguments' as well as human constructions taking in institutions and architectural formations.<sup>82</sup> Or, as Kang writes: 'If there is a specificity to legal materiality in comparison to other materialities, such as a scientific one or economic one, it is that law is already always mediated through the legal form and language games and that it is backed up by a normative claim.'<sup>83</sup>

Though certainly moving beyond the discursive or linguistic turn that had dominated theory and which new materialists react against,<sup>84</sup> language, text, and the materials on

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<sup>80</sup> Kang, *supra* note 29. See also Kang and Kendall, *supra* note 35, at 28.

<sup>81</sup> Kang and Kendall, *ibid.*, 28.

<sup>82</sup> Pottage, *supra* note 32 at 168.

<sup>83</sup> Kang, *supra* note 29 at 462-63.

<sup>84</sup> See above note 22.

which text is inscribed and through which it is circulated, promulgated, filed, and archived remain, for many of these scholars, privileged objects: they underpin the matters of the law.<sup>85</sup> These are thoughtful contributions, but they appear to stop short, in a number of accounts, of the granularity that new materialism brings into view. This is a granularity in which texts can become bits and nodes in networks of data circulation, merging in temporary intra-action with the atoms and DNA of finger-marked ink smears and the harried body of the court clerk, her microbiome and the airless cubicles of a court's backstage.

Importantly, however, this work on legal materiality points out that tensions remain in bringing new materialism to bear on law, including international law. These issues – the issue of how to avoid reifying law, yet recognising that it has some distinctness in the world – are not resolved, and prompt an important research agenda. Rather than attempting to resolve this tension within this paper, I acknowledge it. It is the case that efforts to provide conceptual contours and define new materialism, and to discuss (international) law can tend to construct both as 'things', though undeniably contested and unstable ones. As well as the problem already pointed out, this approach is in tension with the stated aims of new materialism: with its focus on entanglement and relationality, it seeks to call into question the bounded edges of entities, because, as Haraway puts it 'objects are boundary projects'.<sup>86</sup> It is not, therefore, a choice that escapes the tensions raised by legal materialism and is not unproblematic. However, from a new materialist perspective, an unproblematic choice is not available. Even defining terms such as 'international law' or 'the state' for the purpose of argument serves to work against the conceptual unravelling and open weave of the world that new materialist work hopes to bring into view. These tensions appear inescapable.<sup>87</sup>

However, bringing new materialist insights to bear on law (here international law) invoked as an identifiable entity, remains a worthwhile project. The work of those taking

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<sup>85</sup> See also on files and filing, C. Vismann, *Files: Law and Media Technology* (2008) whose work has been influential on these questions for legal materiality; eg Kang and Kendall, *supra* note 35; T. Johnson 'Legal History and the Material Turn' in M. D. Dubber and C. Tomlins (eds) *The Oxford Handbook of Legal History* Vol 1 (2018).

<sup>86</sup> Haraway, *supra* note 9 at 62. With thanks to Matilda Arvidsson for discussion on this point.

<sup>87</sup> Even the most generative and influential new materialist work has been critiqued for speaking as though from a vantage point beyond the assumptions it seeks to call into question. See, e.g. C. Calvert-Minor 'Epistemological Misgivings of Karen Barad's "Posthumanism"' (2014) 37 *Human Studies* 123.

this approach, such as Latour in his study of the *Conseil d'État*, though criticised in this respect, has been undeniably generative of new and important ways of thinking.<sup>88</sup> Indeed, even materialist work veering toward the personification of the law – such as that acknowledging law's desires and yearnings – still provides its own fruitful engagements and insights between law and materiality.<sup>89</sup> The emphasis here is not on what international law 'is' within a new materialist understanding, but on what new materialism shows about this 'thing' that is generally treated as international law. The project in this paper is to begin to think differently using new materialism's insights, as well as to bring into view its limitations. For the purposes of this paper, I concentrate on two specific issues: subjectivity, and power and accountability, which I now turn to discuss.

#### 4. Diffuse subjects and dispersed authority: new materialist insights and cautionary lessons for international law

How can we use new materialist insights in novel and helpful ways to understand international law, its structures, uses and processes, and how it works in the world? What are the limits of new materialism, and in what ways should we complement or further its insights using other (materialist) methodologies, theories or practices? Although new materialist insights have the potential to illuminate a number of issues in international law, and are already giving rise to a range of nuanced interrogations of international law and some of its effects and impacts in the world,<sup>90</sup> I want to concentrate here specifically on

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<sup>88</sup> See, *supra* note 32.

<sup>89</sup> See e.g. J. R. Martel, 'The Law is Not a Thing: Kafkan (Im)materialism and Imitation Jam' (2019) 23 *Law, Text, Culture* 240, at 242: 'By looking at what the law is not (at thing) [sic] we can begin to see what it is, a desire for power, for tangibility and determination, a want that cannot be satisfied on its own terms' he writes.

<sup>90</sup> On military technologies, targeting and the laws of war see, e.g., Jones, *supra* note 44; Arvidsson, *supra* note 44; M. Arvidsson, 'Targeting, Gender, and International Posthumanitarian Law and Practice: Framing The Question of the Human in International Humanitarian Law' (2018) 44(1) *AFLJ* 9; Heathcote, *supra* note 44; on human rights and environmental law see, e.g., A. Grear 'Human Rights and New Horizons? Thoughts toward a New Juridical Ontology' (2018) 43(1) *Science, Technology and Human Values* 129, Grear, *supra* note 45; and Nataranjan and Dehm *supra* note 45. On the regulation of infrastructure and big data see B. Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law "Wizards of Is"' (2019) 8(2) *CILJ* 171. For another mapping of new or 'renewed' materialisms and international law, see D. R. Quiroga-Villamarín, 'Domains of Objects, Rituals of Truth: Mapping Intersections between International Legal History and the New Materialisms' (2020) 8 *International Politics Review* 129.

what new materialism tells us about power (and accountability for its use) and subjectivity in international law. I then turn, in conclusion, to suggest that new materialism's insights are most productive when coupled with more structural critiques and methodologies, for example drawing from 'old' materialisms, for tools to hold power meaningfully to account. I also argue that the strength of international legal scholarship in these areas is poised to offer important insights in this respect.

#### **4.1. *Accidental subjects of international Law – legal and ontological categories for more than human rights?***

One of the main openings that new materialism offers is in rethinking what counts as a subject versus object. If, since the Enlightenment, the subject/object distinction has operated both as an organising principle and as a clear division, new materialism makes no such claims, seeing entities as entangled and intra-active.<sup>91</sup> There is, new materialists have argued, no subject *versus* object, but rather alliances which are shifting, merging and unstable, the agency of which is prone to continual change. What might such an approach to subjects offer for international protection or regulation of these entities? Where are the borders of the human being, and how might these edges play out in the context of new technologies; or existing power relations and politics? What are the implications of these shifts for international law and its politics and regulatory regimes?

New materialism begins with no stable, hard and fast subject. Instead, as Coole and Frost put it, we see 'objects forming and reemerging within relational fields, bodies composing their natural environment in ways that are corporeally meaningful for them, and subjectivities being constituted as open series of capacities or potencies that emerge hazardingly and ambiguously within a multitude of organic and social processes.'<sup>92</sup> Such a fluid picture of subjectivity may offer new ways to understand how subjects emerge into international law, and the ways in which the interplay between the object and subject, the emergence or submergence of status or personality, is managed through legal tools.

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<sup>91</sup> On the perpetual difficulty in maintaining this distinction in theory and practice, see J. Hohmann, 'Lives of Objects', in Hohmann and Joyce, *supra* note 25, at 30-33; M. Davies 'Material Subjects and Vital Objects: Prefiguring Property and Rights for an Entangled World' (2016) 22(2) *AJHR* 37.

<sup>92</sup> Coole and Frost, *supra* note 16, at 10.

New military technologies, artificial intelligence, and automation are all relevant fields in which to interrogate the ways that international legal regulation is already engaged with beings that are post- or extra-human. In these fields, post- or extra-human entities, evolving out of complex interactions of the technical and the corporal, are already present for the purposes of international law, as well as constructed by its regimes and rules. For instance, as Arvidsson has shown with respect to targeting and international humanitarian law, not only are who or what counts as a legitimate target for the laws of war identified by the conjunction of fleshly and digital bodies,<sup>93</sup> but those entities doing the targeting are also characterized by biological and digital amalgamations.<sup>94</sup> Contemporary high-tech warfare thus showcases our ‘posthuman condition of digital and material convergence where distinctions between nature and culture, genders, species, and technology are undone.’<sup>95</sup> Much debate, however, over the resulting questions of responsibility, accountability and legality, tends to centre back in on the human as a stable and accepted point of reference.<sup>96</sup> New materialist insights into entanglement and intra-action usefully show that this focus is sometimes misplaced, and that more productive responses to these technologies need to move beyond subject/object binaries, to consider the implications of these relations for international law and its doctrines, regimes and principles. For instance, as Gear writes, with reference to questions raised within the frame of human rights, if human beings ‘are repositioned as partners in world-making entanglements between multiple, contingently identified partners of all kinds – including – increasingly, the machinic’ then ‘the human of human rights becomes both contingent and productive: the human becomes a question of continuously emergent, evolutive subjectivity/ies for which the meaning of the human itself in any context is a collaborative materio-semiotic endeavor.’<sup>97</sup> These insights point to the need to understand and re-evaluate our categories and boundaries, and our commitments to other central principles of international law in the face of subjects which are ‘always-

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<sup>93</sup> Arvidsson, *supra* note 90, at 17-20.

<sup>94</sup> *Ibid.*, at 24.

<sup>95</sup> *Ibid.*, at 26.

<sup>96</sup> See for example, E. Libelich and E. Benvenisti, ‘The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapon Systems are Unlawful’ in N. Bhuta et al (eds.), *Autonomous Weapons Systems: Law, Ethics, Policy* (2016) 244, arguing that a human’s administrative-legal duty to exercise discretion is the key to legal targeting decisions.

<sup>97</sup> Gear, *supra* note 90, at 138.

already digital and material more-than-human: neither fully “machine” nor fully “human” and by necessity never autonomous nor free.’<sup>98</sup>

These examples show the potential for new materialist thinking to give us insights into the way that law – specifically international law – constructs and manages subjectivities, and to help us see more clearly the ways that humans and technologies of all kinds are already entangled or mutually contingent. However, for many, this picture of the human-machine hybrid entity is more dystopian than utopian. And for me, the most pressing question is whether, in these continuously emergent human/machine amalgamations, the losing subjectivity/ies are very likely to be those who have *always* suffered materially in an actually existing legal, political and economic landscape of unequal power, rights and status.<sup>99</sup> These structural power relations and their effects have been repeatedly pointed out by important critical international law scholars (including of a TWAILian and Marxist persuasion) who have tirelessly focussed attention on the implication of international law in sustaining unequal subjectivities in conjunction with ideas of empire, capital, race, gender and civilization.<sup>100</sup>

New materialist thinkers are generally highly attentive to issues of power and the political purchase of their work. One of new materialism’s key propositions is that moving beyond binaries (of subject/object, male/female, culture/nature, for example) will help us to move beyond the dominations often carried out across those pairings. Nevertheless, critics of new materialism have argued that new materialism does not do enough to explain the ‘continuities, durabilities and often monotonous predictabilities that characterize systems of power asymmetry’.<sup>101</sup> These critics worry that new materialist thinking might serve to

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<sup>98</sup> Arvidsson, *supra* note 90, at 14.

<sup>99</sup> A. Cole ‘The Subject of Objects: Marx, New Materialism, and Queer forms of Life’ (2018) 22(2) *Journal for Cultural Research* 167, at 176-7.

<sup>100</sup> See, e.g., the foundational works of scholars such as B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993) (2<sup>nd</sup> ed., 2017) and ‘An Outline of a Marxist Course on Public International Law’ (2004) 17(1) LJIL 1; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); U. Baxi, *The Future of Human Rights* (2002); S. Marks (ed.) *International Law on the Left: Re-Examining Marxist Legacies* (2009); A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003) and more recent important contributions including R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019); L. Eslava, M. Fakhri and V. Nesiha, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017); N. Tzouvala, *Capitalism as Civilisation* (2020).

<sup>101</sup> Washick and Wingrove, *supra* note 22, at 66.

obscure or turn attention away from sustained injustices that remain static and entrenched.<sup>102</sup>

It is concerning, then, if new materialist thinking might be used to open up new arguments that support reasons for international law to make rights more contingent, more fluid, and therefore less stable, reliable and protective for the vulnerable entities of the world. For example, human beings' protection through international law remains tenuous and fragile and international law provides numerous legal doctrines, which disserve the interests of individuals or communities. These include the protection of international investors over the needs of local populations,<sup>103</sup> or technologies of governance at borders, which discipline flows of people in the interests of states.<sup>104</sup> International law plays a dubious role in a world 'characterized by complex plays of forces in which patterned and predictable injustices are constantly reiterated.'<sup>105</sup>

For this reason, embracing the 'extrahuman' is a rich opportunity to push for an international law that is more protective of aspects of the world which have not previously received protection. At the same time it cannot be at the expense of the marginalized and abused human beings – or other entities – of the world. For these reasons, posthuman international law is productive as an imaginative and critical project, but one to be embraced with caution and with an eye to accountability and power, to which I now turn.

#### **4.2 Opacity and diffusion – finding power and accountability for international law**

The amorphous picture of authority produced by the entanglements and intra-active becomings of new materialist thought provokes us to look for power in new places and unexpected configurations, crossing the assumed boundaries of international law's horizon. This should provide new opportunities to contest that power and hold it to account where necessary. However, new materialism has been critiqued for its tendency to hollow out

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<sup>102</sup> See Cole, *supra* note 99, at 176; A. R. van Wyk, 'What Matters Now?' (2012) 8(2) *Cosmos and History: The Journal of Natural and Social Philosophy* 130 at 135.

<sup>103</sup> See, e.g., K. Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) 31(3) *LJIL* 617; R. Parfitt, *supra* note 100; UNGA, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context, A/HRC/34/51 (18 January 2017) para 53-55.

<sup>104</sup> See, e.g., S. Dehm, 'Passport' in *International Law's Objects* Hohmann and Joyce (eds) (2018), *supra* note 25, at 342; Johns, *supra* note 42.

<sup>105</sup> Gear, *supra* note 90 at 141.

responsibility and accountability. In this section, I suggest that new materialist approaches help us to look for power in new spaces and configurations, but that we need to keep these insights firmly tethered to methodologies and theories that are avowedly structural.

New materialists do not discount the workings of power and authority. Rather, understanding ‘the nature of power in the fullness of its materiality’<sup>106</sup> as Barad writes, is central to the critical project of new materialism. Many new materialists seek to bring their work to bear on how power ‘works’ in the world. As Coole and Frost put it, a major trend of new materialism is ‘explicitly political’.<sup>107</sup> For them, ‘it means practical, politically engaged social theory, devoted to the critical analysis of actual conditions of existence and their inherent inequality.’<sup>108</sup> It entails a critical global political economy.<sup>109</sup> This is a *critical* new materialism.<sup>110</sup> For example, Bennett’s engagement with the infrastructure of electricity grids in the United States is shot through with concern for how power and accountability can be found and engaged in such a system. She writes that treating the grid as an assemblage of more than human agency ‘broadens the range of places to look for sources’ of harmful effects,<sup>111</sup> to include looking ‘to long-term strings of events: to selfish intentions, to energy policy offering lucrative opportunities for energy trading while generating a tragedy of the commons, and to a psychic resistance to acknowledging a link between American energy use, American imperialism, and anti-Americanism.’<sup>112</sup> These are deep and important structural questions of power and responsibility, which implicate international legal regulation: international energy law, environmental and financial laws, for example.

These sorts of critical investigations through new materialist ideas help us to explain certain trends in international law. For example, they help explain the fact that we seem to increasingly find international law *itself* abstracted into regimes, infrastructure and organizations that are typically unexamined by international lawyers and that seem to evade the structures of accountability built into international law.<sup>113</sup> We appear to be at moment where our normal channels of engagement and critique seem like blind alleys, or to lack

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<sup>106</sup> Barad, *supra* note 22, at 810.

<sup>107</sup> Coole and Frost, *supra* note 16, at 30.

<sup>108</sup> *Ibid.* See also Dolphijn and van der Tuin, *supra* note 19, at 21.

<sup>109</sup> Coole and Frost, *supra* note 16, at 32.

<sup>110</sup> *Ibid.*, at 27.

<sup>111</sup> Bennett, *supra* note 23, at 37.

<sup>112</sup> *Ibid.*

<sup>113</sup> See, e.g., F. Johns, ‘On Dead Circuits and Non-Events’, in K. J. Heller and I. Venzke (eds.), *Contingency in International Law: On the Possibilities of Different Legal Histories* (2021).



traction. If we once understood the United Nations General Assembly and Security Council, The WTO, the International Court of Justice, the EU or African Union, to be the places where the international rules and regulations governing us were made, consolidated, disseminated and importantly, contested, these arenas now seem to have been hollowed out. International law appears *itself* abstracted into regimes, infrastructure and organisations that are normally opaque to international lawyers.

New materialist insights prompt us to look elsewhere to understand international law and its impacts on the world. For instance, to look far beyond the state, and the public-facing international institutions such as the United Nations or the International Criminal Court, and shine a spotlight on organisations such as the ISO,<sup>114</sup> on infrastructure – often (at least partly) privately owned – such as water or gas pipelines, or Bennett’s example of electricity grids, or the fibre-optic cables that transmit flows of data under the sea.<sup>115</sup> The complex matrix of state and non-state (or extrastate<sup>116</sup>) spaces, regulations and regimes may make power harder to locate and more difficult to hold to account. Likewise, global markets and processes of financialization, data flows and nodes of storage, do not depend on what Johns calls ‘determined’ or ‘determinative’ power with which international lawyers have long been concerned.<sup>117</sup> Rather, she argues, they ‘depend in large part on a sense of human and nonhuman actions and interactions taking place under circumstances of contingency and having contingent effects.’<sup>118</sup> For these reasons, international lawyers might be ill-equipped to account for these shifts ‘in tempo, technique, technology, and terrain’.<sup>119</sup>

Roele, writing on the collective security regimes of the UN Security Council, similarly identifies the hollowing out and depoliticisation that accompanies techno-managerialism,

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<sup>114</sup> On the ISO see, K. Easterling, *Extrastatecraft: The Power of Infrastructure Space* (2014) at 107-8.

<sup>115</sup> On electricity grids, see Bennett, *supra* note 23 Ch. 2. See also, M. Donaldson and B. Kingsbury ‘Erzatz Normativity or Public Law in Global Governance: The Case of International Prescriptions for National Infrastructure Regulation’ (2013) 14(1) *Chicago Journal of International Law* 1. See also B. Honig *Public Things: Democracy in Disrepair* (2017) and Easterling, *ibid.*, on infrastructure more generally; on transoceanic cables see S. Humphreys ‘Data: The Given’ in Hohmann and Joyce, *supra* note 25, at 191.

<sup>116</sup> The term is Easterling’s, see *supra* note 114.

<sup>117</sup> Johns, *supra* note 113, at 16.

<sup>118</sup> Johns, *supra* note 113, at 16. Johns calls these ‘vectorial’ power.

<sup>119</sup> *Ibid.*, at 32. Johns argues that our ‘fixations on necessity could perhaps have something to do with it ... but fixations on contingency also seem to have played a role.’ *Ibid.* I explore this aspect of the argument further in section 5, below.

with its fetish for performance indicators and empty transparency initiatives.<sup>120</sup> She argues that this leads to the creation of infra-law, which cannot be challenged or held accountable in the ways international lawyers expect.<sup>121</sup>

Focusing on these disregarded spaces, and on the way that they are, in new materialist terms, entangled, can give us a better picture of how – and where – international law now works, where power lies with respect to it, and how that power might be made more accountable. The risk, on the other hand, is that new materialist thinking can be harnessed by quite different political projects, to excuse just such hollowing out, making power less accountable and playing into the hands of those entities able to entangle themselves in problematic power-preserving or creating ways, as I turn to discuss below.

First, it must be noted here that movements or dispersal of power in international law are not inherently bad. On the contrary, they may be necessary to overcome injustice and inequality. Critical international legal scholars have long argued that international law has served as an instrument (even a project) of empire and of (neo)liberal capitalist hegemony.<sup>122</sup> Important work has reminded us that international law's decision making forums, the content of its rules, and its power brokers, have long been dominated by a small club of mainly white, mainly male, Western Europeans and North Americans.<sup>123</sup> In addition, international law has operated in a way that concentrates and reproduces power in the hands of the few, foreclosing other ways of individual and collective being.<sup>124</sup> These uses of power through international law need to be contested, rather than protected. Nevertheless, what remains of crucial importance is the need to be able to see where power is operating, to understand how it is operating, and to be able to contest and resist its operation when needed. Thus, critical projects focusing on the role of hegemony, imperialism and exploitation remain very relevant.

But how do we know – in new materialist terms – when international law works as a tool to hold power to account, and when it masks the abuse of power, if agency is understood as an intra-acting, ever-shifting, relational process? A number of critics of new

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<sup>120</sup> I. Roele, *Articulating Security: The United Nations and its Infra-Law* (forthcoming 2021) Ch 6 (chapter on file with author).

<sup>121</sup> Ibid.

<sup>122</sup> See, e.g., Chimni, *supra* note 100; Kapur, *supra* note 39.

<sup>123</sup> See, e.g., S. Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (2011); Anghie, *supra* note 100; Chimni, *ibid.*, Parfitt *supra* note 100.

<sup>124</sup> See Parfitt, *supra* note 100; Anghie, *supra* note 100.

materialism argue that with its embrace of dynamism, fluidity and intra-active agency, new materialism can be unhelpful, providing tools that can undermine its critical and political promises. It can, they argue, be used to underpin an embrace of disorder, indeterminacy and risk by powerful entities, excusing violence and violation in the process. As the environmental sociologist Pellizzoni argues, in work examining the links between new materialist ideas and neo-liberal capitalist approaches to nature and the environment, new materialism and neoliberalism share ontological ground.<sup>125</sup> Both new materialism and neoliberalism are underpinned by an approach to the world that sees it as unstable and indeterminate, ‘such features representing the basis of dynamism and liveliness’.<sup>126</sup> This produces an unhappy link between the openness of new materialist approaches to the world, and neo-liberal ideology and its embrace of risk, randomness, and volatility.<sup>127</sup>

Pellizzoni writes that ‘[t]urbulence and contingency, as produced by global trade, innovation-based competition and floating exchange rates’ have come to be interpreted not as ‘threatening uncontrollability, but lack of limits, room for manoeuvre, opening up of possibilities.’<sup>128</sup> In Pellizzoni’s view, neoliberal, capitalist and anti-environmental agendas embrace these opportunities, through concepts such as resilience and system-adaptation, in ways that operate against the anti-capitalist and critical stance of new materialist thinkers.<sup>129</sup>

The implications of indeterminacy, Pellizzoni argues, have undergone a radical shift. While once threatening, it ‘no longer is a problem, but rather becomes a resource.’<sup>130</sup> It is unclear by whom, and for whom, this resource can be mobilised within the terms of new materialism. For Pellizzoni, this means that new materialist precepts are uncomfortably

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<sup>125</sup> L. Pellizzoni, ‘Governing through disorder: Neoliberal environmental governance and social theory’ (2011) 21 *Global Environmental Change* 795.

<sup>126</sup> L. Pellizzoni ‘Catching up with Things? Environmental Sociology and the Material Turn in Social Theory’ (2016) 2(4) *Environmental Sociology* 312 at 316. See also L. Pellizzoni, ‘Metaphors and Problematizations: Notes for a Research Programme on New Materialism’ (2014) 5(2) *Tecnoscienza* 73 at 82-84.

<sup>127</sup> Pellizzoni, *supra* note 125, at 316-17 makes the connection here cogently. For an influential work embracing the potential of disorder see N. Taleb, *Antifragile: Things that Gain from Disorder* (2012).

<sup>128</sup> Pellizzoni (2014) *supra* note 126 at 84. See also Johns, *supra* note 113, at 9-12, discussing financialisation, datafication, and development as operating in this vein.

<sup>129</sup> Pellizzoni, *ibid.* See also Pellizzoni, *supra* note 125.

<sup>130</sup> Pellizzoni (2014), *supra* note 126 at 81. See also Pellizzoni, *supra* note 125 at 797. For an analysis of a similar approach within the World Bank, see D. Van Den Meerssche & G. Gordon ‘“A New Normative Architecture” – Risk and Resilience as Routines of Un-Governance’ (2020) 11(3) *Transnational Legal Theory* 267.

open to projects, to which new materialism's founders are opposed, but which they cannot adequately contest without going beyond new materialism itself.<sup>131</sup>

Similarly, Bruce Braun (whose eco-political geography takes in its sweep colonialism, extractivism and empire) tracks the parallel rise of new materialism's non-deterministic, non-linear understandings of nature; and the neoliberalisation of environmental governance. He argues that there is a direct relationship between neoliberalisation of nature and new materialists' vibrant and indeterminate view of the same. However, he notes, the relationship is parasitic, with neoliberal approaches co-opting and attempting to contain the radical potential of new materialist insights for its own ends.<sup>132</sup>

Thus while recognising that the dynamism of agential intra-action gives new materialist approaches particular creative purchase, if this is taken as an espousal of disorder and instability it has darker implications. Taken to its extreme ends, indeterminacy, disorder and dynamism can be used to espouse violence and violation. Disorder, instability and contingency dovetail with an embrace of what one scholar has promoted as 'the ethos of rugged practitioners' which prefers 'simple' tools that are 'explicitly rough in character, practical in tone, and sub-optimal in their outlook.'<sup>133</sup> Or, to put it another way, the business model and now cultural anthem of 'move fast and break things.'<sup>134</sup>

Although there have been problematic attempts to use international law as an ordering tool, imposing a certain kind of (liberal, Christian) order on the 'uncivilised',<sup>135</sup> there are also problematic implications to welcoming disorder for international law, as law is at least in theory an institution for predictability and stability, for regulating power according to clear rules. And rules, as Chimni insists, can protect the weak and the oppressed from the powerful.<sup>136</sup>

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<sup>131</sup> Pellizzoni (2014) *ibid.*

<sup>132</sup> Bruce Braun, 'The 2013 Antipodes RGS-IBG Lecture: New Materialisms and Neoliberal Natures' (2015) 47(1) *Antipode* 1-14.

<sup>133</sup> D. Clausen 'Crude Thinking – 7 Ways of Dealing with the Complex in IR' (2016) *E-International Relations* 1 available at [www.e-ir.info/2016/01/29/crude-thinking-7-ways-of-dealing-with-the-complex-in-ir/](http://www.e-ir.info/2016/01/29/crude-thinking-7-ways-of-dealing-with-the-complex-in-ir/)

<sup>134</sup> J. Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (2017).

<sup>135</sup> For a classic approach to the civilising mission of international law, see, e.g. W. E. Hall, *A Treatise on International Law* (1890) (3<sup>rd</sup> edn) 1; J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883). For an important critique, see Anghie, *supra* note 100 at 3–6, 37–39.

<sup>136</sup> Chimni (2017), *supra* note 100, at 103.

New materialists would surely reject any attempt to excuse violence and violation through new materialist approaches to the world. Moreover, it must also be noted that new-materialism as an excuse for the embrace of neoliberal risk, techno-managerialism, or violent disorder rests on impoverished versions of new materialist thinking, as Bruce Braun has argued.<sup>137</sup> The link between neoliberal ideas and new materialism is not inherent, and represents neoliberal attempts of strategic containment of the critical and radical potential of new materialist insights.

Nevertheless, these critiques raise important questions about the nature, and purpose, of power in the world, and on what terms new materialist insights can evaluate 'good' and 'bad' power. It is with this issue, and the limits of a new materialist critique of power, to which I now turn. I argue that the insights of new materialist thinking needs to be complemented with methodologies and approaches that take a more explicit position on evaluating the social, political and economic structures through which enduring power imbalances and exploitations are perpetuated, using both existing and emerging critical tools and practices. It is to this point that I now turn in conclusion.

## 5. Conclusion – dialogues beyond the limits of a new materialism.

In order to resist the imposition of wrongs in situations of existing inequality we sometimes need something powerful: something with 'teeth'. But what separates 'good' power from 'bad' power; power to hold to account, versus abuse of power, in a new materialist calculation? Can new materialism answer this question within its own terms? This remains an important question when we look at new materialist insights for responding to actual material harms and the potential for international law to either overcome these harms, or to perpetuate them.

Both the politics, and the critical purchase, of new materialism, have been critiqued by a number of scholars and thinkers. For me, it is clear that the vast majority of scholars who fall under the banner of new materialism are politically, ethically, and intellectually committed to a world in which all entities, including and *especially* those who have been

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<sup>137</sup> Braun, *supra* note 132.

marginalized, exploited or silenced are recognized as vital and vibrant contributors. The insights of new materialists have the potential to open up a number of questions for international law, and to give us insights from different perspectives and from beyond our normal disciplinary boundaries.

These steps are significant because international law has served as a handmaiden to powerful desires to exploit and dominate the objects of the world, which have been posited as simply there for the taking. This is evidenced in international law's imperial history, which relied – and continues to rely – on doctrines that erased whole peoples so that dominant powers could exploit them and their lands.<sup>138</sup> It is shown in its foundations in the protection of private investors' property rights over subservient nature.<sup>139</sup> It is demonstrated in its efforts – notably in trade regimes such as the WTO - to purify itself of social, environmental, and political concerns.<sup>140</sup> The global challenges of climate change, our reliance on toxic products and processes of production, and our porosity to viruses and other microbes, brought starkly into view in the ongoing Covid-19 Pandemic, prompt a rethinking of these anthropocentric suppositions and *modus operandi* for international law.

Taking on board concern and care for other aspects of the world offers an ethics of 'mattering' which pays close attention to our entanglement in the world, and its vibrant and ongoing connection to and through us, even when we experience ourselves as bounded and separate from it. As Bennett argues, the 'ethical aim becomes to distribute value more generously, to bodies as such.'<sup>141</sup> If we recognize that the world is, in Haraway's words, a 'spatial and temporal web of interspecies dependencies'<sup>142</sup> then we can attempt to better acknowledge those aspects of the world that have been treated as merely ripe for exploitation, and also seek to protect them. It offers a reason for humility and deflates distended human pretensions that we are the only prism through which to see the world. This challenge is fundamental, if, as new materialists claim, 'foregrounding material factors

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<sup>138</sup> See, e.g., Anghie, *supra* note 100.

<sup>139</sup> M. Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) *61 University of Toronto Law Journal* 1; K. Miles 'Insulae Mollucae: Map of the Spice Islands, 1594' in Hohmann and Joyce (eds) *supra* note 25. See further on nature and the environment, A. Grear 'Anthropocene, Capitalocene, Chthulucene': Re-encountering Environmental Law and its "Subject" with Haraway and New Materialism' in Kotze (ed.), *Re-Imagining Environmental Law and Governance for the Anthropocene* (2017).

<sup>140</sup> See, e.g., A. Lang 'Purse Seine Net' in Hohmann and Joyce, *supra* note 25.

<sup>141</sup> J. Bennett 'Thing Power' in B. Braun and S. J. Whatmore (eds.) *Political Matter: Technoscience, Democracy, and Public Life* (2010) at 47-8.

<sup>142</sup> D. Haraway, *When Species Meet* (2008) 11.

and reconfiguring our very understanding of matter are prerequisites for any plausible account of coexistence and its conditions in the twenty-first century.’<sup>143</sup>

Yet for a discipline where accountability and power within enduring structures are central questions, new materialism remains only one tool, which must be complemented by others. This is because its central insights – into the entanglement of all entities in the world, the agency and vitality of the world beyond the human subject, and the physicality of matter – appear to have insufficient purchase when it comes to unsettling structural patterns and institutions. These are patterns and institutions that continue to assert themselves, and be treated as – stable, bounded, and powerful entities in the world. Moreover, new materialist ideas, much against the creed of its committed founders – might contribute to the embrace of risk, instability and disorder, by *already* powerful entities and groups, against those whose agency and subjectivity is denied, and serve to further inscribe or excuse problematic techniques of violence and harm in international law.

For these reasons, those of us working to consider how we can respond to pressing crises of justice and co-existence within the terms of international law as it now is, may find new materialism most powerful when harnessed in relation to, and in deep conversation with, other methodologies, theories and strategies that can grasp power or harm in more concrete ways. These structural power relations and their effects have been repeatedly pointed out by critical international legal scholars (including TWAILian and Marxist scholars), who have focussed attention on the implication of international law in sustaining unequal subjectivities in conjunction with ideas of empire, capital, race, gender and civilization.<sup>144</sup> What might these existing strengths in critical international law scholarship bring to a new materialism for international law?

The suggestion that new materialism is most productive when read alongside, and in dialogue with, older materialisms has already been raised by a number of scholars.<sup>145</sup> For example, both Pellizzoni and Braun argue that bringing new materialism into dialogue with Marxist materialism has the potential to overcome the problems they identify. Recently,

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<sup>143</sup> Coole and Frost, *supra* note 16, at 1.

<sup>144</sup> See, e.g., R. Knox, ‘Valuing Race? Stretched Marxism and the Logic of Imperialism’ (2016) 4 *LRIL* 81 and the works cited at *supra* note 100.

<sup>145</sup> See, e.g. Pellizzoni, *supra* notes 125 and 126, Braun, *supra* note 132, Cole, *supra* note 99; E. Cudworth and S. Hobden, ‘Liberation for Straw Dogs? Old Materialism, New Materialism, and the Challenge of an Emancipatory Posthumanism’ (2014) 12(1) *Globalizations* 134.

legal historian Christopher Tomlins has brought together Bachelard's literary and philosophical materialism with Benjamin's Marxist historical materialism, claiming that bringing these perspectives together offers a 'productively coupled point of entry to the current epoch's "new materialisms"' which is helpful for understanding so called 'old' and 'new' materialisms, as well as space, time, justice and law.<sup>146</sup>

Much new materialist work acknowledges and explicitly builds on other, older, materialisms,<sup>147</sup> but overall, remains ambivalent in its relation to or connection with Marxist or historical materialism.<sup>148</sup> However, recent work by critical, TWAIL and Marxist international legal scholars is well positioned to bring 'old' or Marxist materialism into dialogue with 'new' materialism. With Braun, Pelizzoni, Tomlins, and others, I suggest that this is a productive conversation that can strengthen international legal scholars' responses to injustice and harm, by bringing the explicitly structural critiques of these methodologies into stronger view, alongside new materialist insights.

This prompts an important research agenda beyond the scope of this paper, and there are multiple entry points for this conversation. Here, I point to two potential avenues for engagement.

The first is to bring into discussion new materialism's open, dynamic and, thus, contingent subjectivities and agencies, with international legal scholarship on contingency. As set out above, one of new materialism's central tenets is the fluid, intra-active, and emergent nature of subjectivity and agency. As Barad puts it, agency is not a property of things, but 'an enactment, a matter of possibilities for reconfiguring entanglements.'<sup>149</sup> When, where and in what patterns agency forms, and where it 'sticks' thus seems open, dynamic and contingent.

Marks' work on false contingency provides an important complement to this approach, showing what can be lost from view when contingency is assumed. Starting from

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<sup>146</sup> C. Tomlins, 'Materialism and Legal Historiography, from Bachelard to Benjamin' in S. Stern, M. Del Mar and B. Meyler (eds.) *The Oxford Handbook of Law and the Humanities* (2019), at 18;; see also C. Tomlins, 'A Poetics for Spatial Justice: Gaston Bachelard, Walter Benjamin, and the Return of Historical Materialism' (2020) 32 *L&Lit.* 1. On the potential complementarity of Marxist materialism and legal materialism see also Kang and Kendall, *supra* note 35 at 25.

<sup>147</sup> See, e.g., Bennett, *supra* note 23; Coole and Frost, *supra* note 16.

<sup>148</sup> See, e.g., the discussion of this point in Cole, *supra* note 99 at p 170. Thomas Nail, however, argues that Marx should be read as *himself* a new materialist thinker. See T. Nail, *Marx in Motion: A New Materialist Marxism* (2020).

<sup>149</sup> Dolphijn and van der Tuin, *supra* note 19 at 54.



Marx's famous statement that '[men] make their own history, but they do not make it just as they please in circumstances they choose for themselves; rather they make it in present circumstances, given and inherited.'<sup>150</sup> Marks suggests the term 'false contingency' can help us keep in view that 'things can be, and quite frequently are, contingent without being random, accidental, or arbitrary.'<sup>151</sup> There is, she writes, 'a kind of necessity that must be reckoned into, rather than contrasted with, our sense of what it is to be an artefact of history.'<sup>152</sup> Although arriving at this from different points, new materialist and critical international law scholars clearly reject false necessity – the idea that things must be as they are; that they are determined and fixed around us. As Marks notes, to show that the world can be otherwise has long been a central, and hopeful, project of critical scholars.<sup>153</sup> This work on the relationship between necessity and contingency can operate productively to bring the dynamism of new materialism into conversation with Marxist or historical materialism, illuminating the interplay between agency and structure. As Marks puts it, in what could clearly ground a shared project between critical international law scholars and new materialists, the issue is 'to investigate in particular circumstances what individual and collective action can achieve, what relation is established between structure and agency, how the world works as an organic totality.'<sup>154</sup>

The need to pay attention to the interplay of contingency and necessity also motivates Fleur Johns' recent thinking.<sup>155</sup> In asking why international law's locations of power seem currently so difficult for international lawyers to identify and grasp, she writes that our 'fixations on necessity could perhaps have something to do with it ... but fixations on contingency also seem to have played a role.'<sup>156</sup> Certain forms of power, she writes, thrive on contingency.<sup>157</sup> These 'vectorial' forms of power underpin datafication,

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<sup>150</sup> K Marx, 'The Eighteenth Brumaire of Louis Bonaparte' in T Carver (ed), *Marx: Later Political Writings* (1996) at 32. S. Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1, at 1.

<sup>151</sup> Marks, *ibid.* at 2.

<sup>152</sup> *Ibid.*, at 2.

<sup>153</sup> *Ibid.*, at 3-4. See also the important forthcoming volume by K. J. Heller and I. Venkze, *Contingency in International Law: On the Possibilities of Different Legal Histories* (OUP 2021), *supra* note 113, and Ingo Venkze's introduction to it, teasing out how the volume contributors have dealt with the interplay of contingency and necessity: I. Venkze, 'Introduction: Situating Contingency in the Path of International Law'.

<sup>154</sup> Marks, *ibid.*, at 9.

<sup>155</sup> Johns, *supra* note 113.

<sup>156</sup> *Ibid.*, at 33. See also A. Pottage, 'Power as an Art of Contingency: Luhmann, Deleuze, Foucault' (1998) 27 *Economy and Society* 1.

<sup>157</sup> Johns, *ibid.*, at 15-16.

financialisation, and development. They appear to require a fluid and dynamic system.<sup>158</sup> But at the same time, the *given* of the material infrastructure, such as undersea cables, on which they rely is relatively fixed, patterned and stable.<sup>159</sup> Johns' work, thus similarly prompts us to look for the patterned and predictable, the static and structured, that operates in complex relationship with flows and movement. Here, again, is an opportunity to bring international law's current critical tools into conversation with new materialism's approach to agency and power in intra-action and flow, to powerful effect.

The second point of productive engagement I want to point to here is work on the commodity. For me, a powerful avenue opens up in bringing into view Marx's writing on the processes of mystification that accompany commodification, alongside new materialist insights into the agency of things. Marx defined the commodity as 'an object outside us' and moreover a thing of use to the human.<sup>160</sup> This conception casts commodities as discrete things: things upon which people act. But a commodity is also an 'assemblage of many properties'<sup>161</sup> and 'the material depositaries of exchange value.'<sup>162</sup> At the same time, as workers become commodified – mere products of their labour – the products of that labour take on an agency: they become, in Marx's words 'autonomous figures endowed with a life of their own.'<sup>163</sup> This is 'commodity fetishism,' in which commodities can even be made to speak.<sup>164</sup> Marx focussed on the harm produced through commodity fetishism, alienating people from their labour, and from each other; while the commodity fetish structured social relations behind a veil of 'phantom-like objectivity.'<sup>165</sup> Giving due to the agency of things, as Marx's work makes clear, does not *necessarily* underpin a progressive or emancipatory project. Recent important international law scholarship on capitalism as the structuring force and principle in international law can be deepened through new materialist insights into flows and nodes of agency: for instance in regulating and facilitating

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<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, at 21.

<sup>160</sup> K. Marx, *Capital: Vol 1, A Critique of Political Economy*, Ch 1, (1887), at 27 at <https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf>

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> This phrase is from the translation in K. Marx, *Capital: Vol 1, A Critique of Political Economy* (1976) (trans. B. Fowkes), at 165.

<sup>164</sup> See Cole, *supra* note 99, at 173, commenting on the significance of Marx's 'speaking commodity' 173 and Nail, *supra* note 148, at 137 on the agency of matter and linen cloth as having the ability to 'recognise' a 'kindred soul'.

<sup>165</sup> K. Marx (1976) *supra* note 160 at 128.

datafication and financialisation as Johns points out.<sup>166</sup> Meanwhile, critical international law scholarship, with its focus on the legacies of colonial domination and extraction, and the role of international law in commodification, can bring into view enduring structures that underpin how agency appears and coalesces around assemblages in human-non-human entanglements. Bringing the explanatory power of new materialist *and* Marxist approaches to the agency of things can deepen our understanding of these process, and help craft more just responses. These are thus productive avenues for future research.

In conclusion, perhaps new materialism's greatest potential rests in helping us to see in different ways where power lies, and how it works in intra-action across entities. We may, however, need additional tools, which pay more attention to and have more concrete grasp on structures of power and their endurance in the world, to contest these harms and injustices. International law scholarship is poised to make a significant contribution in bringing materialisms into dialogue, with the aim of furthering a shared project between new materialists and critical international law scholars: to recognise and respond to harm, violence and violation, and to disable the conceptual and practical apparatuses that perpetuate it.

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<sup>166</sup> Johns, *supra* note 113.