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Up the Down Escalator: #TheorizingWhileBlack and the Politics of International Legality

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In his classic 1989 book, *Up the Down Escalator: Development and the International Economy, A Jamaican Case Study*, former Prime Minister of Jamaica Michael Manley writes about the predicament of states in the global South. Using the metaphor of an elevator that is marked 'up' but is in reality 'part of a larger escalator which is unmarked [and is] actually going down',[1] he indicts an international economic/political/legal system controlled by former imperial powers which persist in containing the global South in structural conditions of subjugation. Though 'decolonized' and thus able to perform a politics of self-governance, neocolonized states were in fact never meant to thrive.

More than thirty years after this commentary was published, the escalator continues to operate this dual reality – the privilege nations in the global North and their subjects casting a gaslit hue over the continual striving against structural descent of economies, institutions, and ordinary lives in the global South. The legacy of colonial legal institutions, now re-imagined through a complex interplay of

[1] Michael Manley, *Up the Down Escalator: Development and the International Economy—A Jamaican Case Study* (Howard University Press, 1987) 332.

international, regional, and national legal frameworks, is one key – and still under-theorized – mechanism for the continued functioning of this machine. The rise of international laws and legal institutions, from the International Criminal Court to the Inter-American Court --has been seen by the 'international (Western) community' as hopeful and emancipatory. States in the global South have been more ambivalent, alternately perceiving these avenues for seeking justice as new vehicles of deliverance or new forms of colonization. The true possibilities and limitations of international law to engender 'justice' cannot be fully known in the absence of a complex, contextual analysis, one which traces the geographies and histories of power that have produced and continue to shape all sides of these evolving encounters.

As one contribution towards such a project, this reflection examines complexities inherent in three case studies of *stances* of protest related to the American Convention on Human Rights (ACHR) and the Optional Protocol to the International Covenant on Civil and Political Rights. These cases, in which states in the global South threaten to withdraw from international treaties that place them in unresolvable situations, reveal particular instances where a hegemony of legality is challenged by the political urgency to overcome structural inequality and racial injustice. even alongside a context of various forms of postcolonial state violence in which resisting states are themselves actively undermining the legal rights of citizens. For my purposes in this commentary, I begin by sketching the complexity of these protest stances both in terms of what they illuminate and in relation to what they obscure. What we will see is that the failure to sustain a withdrawal as legitimate is not a failure, but an operational effect. Denunciations, like speech acts, are non-performatives that can allow state actors to signal protest while also maintaining the status quo. Much work remains to be done to fully theorize why, how, and to what ends these statist forms of rebellion enmesh with both the international order and with the human populations who continue to find themselves ferried up and down the 'unmarked escalator'.

A Note on #TheorizingWhileBlack

Today, at a time when the calls of #BlackLivesMatter are finally forcing a reckoning across our institutions, there is a renewed urgency to illuminate and reckon with the duplicity of unmarked privilege. For BIPOC (Black, Indigenous, and other People of Colour) scholars working within academic institutions that were also shaped by logics of colonization and white supremacy, we often find ourselves (re)routed onto the very unmarked, descending escalator we are working to illuminate. BIPOC scholars have been at the forefront of theorizing the paradoxical ways in which unjust state practices are joined in sometimes awkward ways with anti-state protests. My colleagues and I have worked to highlight and make sense of the duality of both the disturbing breaches of state responsibility against citizens in the global South *and* the enduring structures of subordination that established and continue to shape the conditions under which social inequality and state violence fester.

In recognizing the intertwined complexities that constitute state breaches, we are often expected to focus on those individuals deemed 'victims', especially BIPOC victims. In these contexts, questions are sometimes posed about whether theoretical engagements by BIPOC academics who seek to explain inequality in the international system are appropriately centering the victims of state violence. These were some of the issues raised by Richard Wilson in his May 2020 Opinio Juris commentary on my monograph *Affective Justice* (2019), which drew a response by Wumi Asubiaro Dada amongst hundreds others who launched the #*TheorizingWhileBlack* hashtag. As Asubiaro Dada emphasized, Wilson fell short of taking seriously the complexities of scale (meso, macro, micro) and of agency (state and non-state actors) theorized in *Affective Justice*. Rather, his critique further reified a kind of doctrinal, prescriptive clinging to the 'international legal right' that was in fact at the center of my critique. As seen by the tone of his critique, Wilson seemed in reality to struggle with taking seriously the possibility of a Black scholar theorizing outside of the micropolitics of the victim category, so much so that he implied the book lacked a basic understanding of key elements of international. Digging in, Wilson pushed for a positivist argument about the legal rights of victims. In so doing he dismissed the alternative theoretical framework offered by *Affective Justice* as a way of making sense of unresolved complexities inherent in Africa's ongoing postcolonial condition. Ironically, he also

proved many of the thesis' points. Asubiora Dada's *#TheorizingWhileBlack* intervention succinctly challenged the ways in which Wilson's critique – and the forms of theory-making it represents – seeks to place BIPOC scholars back on the escalator even as we try to point out how it works.

In the remainder of this essay, I turn to three case studies that allows us to theorize beyond positivist arguments that reify victim identities at the cost of ignoring macro-historical and geo-political forces that continue to benefit the global North at the expense of the South. As I seek to emphasize, issues concerning state culpability, the legal rights of citizens, and contestations of customary international legal practice are complex and require multi-scalar analyses while also tracking the complexities of power and its potential violence.

States and Stances of Resistance

Every state and region are products of local and trans-local histories. Mapping their relationships to contemporary expectations of international membership allows us to see how states in the global South that perpetrate violence against their citizens are simultaneously claiming victimhood within an unequal international system. By zooming from the micro to the macro of geopolitics at both local and global scales, we can begin to reveal how the persistent structural experience of 'going up the down escalator' involves making sense of deep histories of state violence, resistance, and legacies of poverty and victimization that are fundamentally inter-related with structural injustices still largely shaped by the interests of metropoles. One key mechanism for sustaining the economic and political presence of former colonial powers is the signing of bilateral and multi-lateral treaties, military missions and economic loans and international aid that adumbrate the contours of contemporary politics.

I turn now to a set of vexed issues related to international treaties and a range of Caribbean state-led treaty denunciations as examples of geopolitical complexities that require equally complex theorizations. The cases below point to state responses

to rising homicide rates in the Commonwealth Caribbean region: Trinidad and Tobago, Jamaica, and Guyana. Collectively, the pressure from these cases led to the ending of an unofficial moratorium on the death penalty that had been held since the 1970s. A rise in the number of murders in the Caribbean in the 1980s led to a corollary rise in the number of death-row inmates. This in turn led to an increasing number of complaints on behalf of these inmates forwarded to the Judicial Committee of the Privy Council.[2] The lawyers for those convicted and on death row argued that protracted delays to appealing a conviction and sentence constituted degrading and inhuman treatment or punishment.[3] This led to a range of mixed retractions by states. In some cases, state responses took the form of denunciations from related international treaties. These denunciations were complex because they were not performed according to acceptable international legal norms. As I will show through theorizing the notion of a *stance* as a form of protest, these performances served to signal a protest of larger structural challenges borne by postcolonial states even as they failed to actually shift the condition of enmeshment within the treaty assemblage.

Using stance-taking as an analytic can offer a lens into the complexities of paradoxical positions that are internally contradictory.[4] This concept allows us to understand how, through denunciations of treaties, states not only *perform* the will to refuse compliance, but also – through speech acts – they reinforce (through *non-performance)* an understanding of the treaty as being so universal that any refusal would be impossible (thus reinforcing its power). This inherent contradiction – and how it manifests – is important to understand. Through the analysis of denunciations by states in the global South we can move beyond attributing rational actor presumptions to states and instead apply the politics of semiotic performativity to legal actions or behaviors attributable to them.

In using the term 'performative' in this context, scholars connote the idea that speech produces effects with the ability to transform the social reality it describes.

[2] The Privy Council is the region's highest appellate court, based in the United Kingdom; Judicial Committee Act 1833, 1833, c. 41, s. 3.
[3] Ibid, 1868-1869.
[4] Lisa Feldman Barrett, *How Emotions are made: The Secret Life of the Brain* (Houghton Mifflin Harcourt, 2017).

'Non-performativity', coined by Sarah Ahmed does the opposite: rather than the speech equating the doing, it is the *not saying* of something obscured within the moment of saying that leads to either transformative action or perpetuation of the status quo. This understanding of the interplay of performance and non-performance helps to make sense of how actions of resistance may have the effect of maintaining and reinforcing state violence even as they purport to liberate.

The treaty denunciations related to the Inter-American Commission on Human Rights (IACHR) and the United Nations Human Rights Committee (UNHRC) are examples of non-performatives in which state stances produce indexical practices[5] which tell us something about the contexts of engagement and the referential meaning of the forms of protest. Ultimately, these legal non-performatives continue to form the basis on which international agreements are established.

Rights of Accused and Withdrawals of Caribbean States as Legal Non-Performatives

Earl Pratt and Ivan Morgan, both death-row inmates, had submitted complaints on 28 January 1986 and 12 March 1987 to the IACHR and the UNHRC.[6] They alleged that Jamaica had violated a number of their rights by, inter alia, unduly hampering the process of appealing their convictions.[7] The UNHRC concluded that the 'delays in the judicial proceedings … constitute[d] a violation of their rights to be heard within a reasonable time',[8] and the IACHR held that the long waits were 'tantamount to cruel, inhuman and degrading treatment' under the ACHR.[9] The

[5] Mary Bucholtz & Kira Hall, 'Identity and Interaction: A Sociocultural Linguistic Approach' (2005) 7:4-5 *Discourse Studies* 585.

[6] *The Commonwealth: Privy Council Judgment In Pratt And Morgan V. The Attorney General For Jamaica And The Superintendent Of Prisons, Saint Catherine's Jamaica (Capital Punishment; Unacceptable Delay in Execution; Inter-American Commission on Human Rights; United Nations Human Rights Committee)* (1994) 33:2 International Legal Materials (I.L.M), Cambridge Core, 364–387.

[7] *Pratt v. Jamaica,* Case 9054, Inter-Am CHR, OEA/ser.L/V/II.66, doc 10 rev. 1 (1985); *Pratt v. Jamaica*, Communication Nos. 210/1986 & 225/1987, *Report of the Human Rights Committee*, 29 September 1989, 222, https://undocs.org/en/A/44/40 (accessed 15 October 2021).

[8] Ibid, § 13.3.

[9] As cited in Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102:7 *Columbia Law Review* 1832-1911 at 1870.

complaints culminated in the Privy Council's judgment in *Pratt and Morgan v Attorney General for Jamaica* (*Pratt*)[10]. The Privy Council found that fault for delays in the appellate system should not be attributed to the fact that the prisoners take advantage of them.[11] It held that the delays were unacceptable, and asserted that '[t]o execute these men … after holding them in custody in an agony of suspense for so many years would be inhuman punishment'.[12] As a remedy, the Privy Council determined that any delay over five years – during which all appeal mechanisms, including international ones like the UNHRC, should be exhausted – must result in a commutation of the death sentence to life imprisonment.[13] Unable to comply with the procedural requirements set out in *Pratt*, in part because the UNHRC failed to give assurances that it would deal with complaints within the prescribed timelines, Jamaica denounced the Optional Protocol to the ICCPR on 23 October 1997.[14]

The move to withdraw was decried by civil society and the UN, which has, on several occasions, called on Jamaica to re-accede to the Optional Protocol.[15] Despite the withdrawal, however, the UNHRC affirmed that Jamaica continued 'to be bound by the provisions of the Covenant' to which it remained party.[16] Taking seriously Jamaica's stance in relation to the Optional Protocol of the ICCPR, its actions in relation to *Pratt* could be understood as a form of stance-taking whose symbol is a form of refusal that produces a power whose effects may not be operationalized in relation to the law. Rather, the symbolic power of a stance such as this is actually in

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[10] *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1 (PC 1993) (appeal taken from Jamaica) http://www.bailii.org/uk/cases/UKPC/1993/1993_37.pdf (accessed 15 October 2021).
[11] Ibid, 9.
[12] Ibid, 10.
[13] Ibid, 11.
[14] Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP, 2011) at 170-171.
[15] See for example *Concluding observations of the Human Rights Committee: Jamaica*, UN Doc CCPR/C/79/Add.83 (19 November 1997) § 10: where the Committee notes with the utmost regret Jamaica's notification of denunciation of the Optional Protocol' (HRC *Jamaica Concluding Observations*, 1997). Also see Amnesty International, *Amnesty International Report 1998 – Jamaica*, expressing concern 'that the government's denunciation of the Optional Protocol to the ICCPR could cut off an avenue of international scrutiny for redress of human rights violations in Jamaica and that this unprecedented step could undermine the system of international human rights promotion and protection' Amnesty International, Amnesty International Report 1998 – Jamaica, http://www.refworld.org/docid/3ae6a9f63c.html (accessed 15 October 2021); Committee on the Rights of the Child, *Report on the Thirty-Third Session*, UN Doc. CRC/C/132 (23 October 2003), §§ 405-406: 'the Committee reiterates its concern about the lack of an independent body for the implementation of the Convention. The Committee is furthermore concerned at the State party's withdrawal from the First Optional Protocol to the [ICCPR], which eliminated the right to submit individual communications for individuals under the State party's jurisdiction and which also directly affects persons under 18 years … The Committee recommends that the State Party … Consider re-acceding to the first Optional Protocol to the [ICCPR]'.
[16] HRC *Jamaica Concluding* Observation (1997) note 15.

the way it referentially indexes signs. Drawing on Peircean semiotics to explore philosophically, representations, interpretations and assertions through signs that embody particular social relations. In this case it is key acts that disavow state responsibility on the one hand and that referentially index forms of protests against subordination on the other, that provide a window for thinking about how forms of stance-taking capture the multiple alignments, positions, and evaluations that states engage in to draw on indexical signs to communicate their political and legal positions (Du Bois 2007). As we have seen through twentieth and twenty-first century scholarship of work of sociolinguists such as William Hanks and Michael Silverstein, through this process a stance produces indirect meanings that point to associative relations and evoke a constellation of ideas around it. The ideas that surround such protests are not necessarily and always progressive. They also operate in contexts of extreme violence, including cases of state genocide against minority communities, as we have seen in places like Sri Lanka, the United States, Canada, Rwanda and so forth.

In the context of such protests, the Vienna Convention on the Law of Treaties (VCLT) outlines the rules and procedures of treaty law and the terms by which states that object to them can opt to withdraw. Specifically, VCLT provides that state withdrawal should occur in accordance with *pacta sunt servanda*[17] – Article 127 of the Convention. This rule is governed by the overarching norm and importance of the notion of state consent. It is seen as one of the foundational principles of treaty law – and in particular the law of withdrawal[18] – and is enshrined in Article 26 of the VCLT, which states, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.[19] If there is no withdrawal clause in a treaty in question, according to the Vienna Convention, states can denounce a treaty only through 'consent of all parties after consultation with the other contracting States',[20] or in accordance with Article 56 of the VCLT, which governs the withdrawal of states

[17] *Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur*, UN Doc A/CN.4/107 (15 March 1957) § 6 https://legal.un.org/ilc/documentation/english/a_cn4_107.pdf (accessed 16 October 2021); International Law Commission, 'Draft Articles on the Law of Treaties with commentaries' (1966) 2 *Yearbook of the International Law Commission,* 211: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (accessed 16 October 2021); Laurence R. Helfer, 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579 at 1580.
[18] Tyagi (2011) at 153.
[19] *Vienna Convention on the Law of Treaties*, 23 May 1969 ('VCLT').
[20] Art. 55, Ibid.

from treaties that do not contain an explicit denunciation clause.[21] This scheme is considered customary international law,[22] and it is consolidated in paragraph 332 of the US Restatement (Third) of the Foreign Relations Law.[23]

In international law, however, a denunciation is seen as being a unilateral act in which a state party to a treaty seeks to terminate its participation in given said treaty relationship. Yet, an overarching principle governing the design and operation of all treaty exit clauses is the principle of state consent.[24] Because the creation of a treaty involves painstaking negotiation and reflects a compromise among states regarding mutual obligations, the ratification of these instruments represents their acceptance to be bound by 'any conditions or restrictions on termination, withdrawal, or denunciation that the treaty contains'.[25] This is reflected in Article 54(a) of the VCLT, [26] which provides that the withdrawal of a party to a treaty should in the first place occur 'in conformity with the provisions of the treaty'.[27]

Absent an express withdrawal clause in the treaty in question, states can denounce a treaty only through "consent of all parties after consultation with the other contracting States'[28] or in accordance with Article 56 of the VCLT, which governs the withdrawal

[21] Ibid, Art. 56 reads: '1. A treaty which contains no provision regarding its termination and which does not provide for denunciation and withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1'.
[22] *General Comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, § 1, https://undocs.org/en/CCPR/C/21/Rev.1/Add.8/Rev.1 (accessed 15 October 2021) ('General Comment 26').
[23] *Restatement (Third) of the Foreign Relations Law of the United States*, Vol. 1 (St. Paul: American Law Institute, 1987).
[24] Laurence R. Helfer, 'Terminating Treaties' in Duncan B. Hollis & Jutta. Brunnée. *The Oxford Guide to Treaties* (OUP, 2012) 634, at 636.
[25] Ibid.
[26] Art. 54, *VCLT*.
[27] As Lauterpacht puts it, "The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties – just as, in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to the matter regulated by a treaty, it is natural that the parties should invoke that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question … Within these limits – which may be substantial … a treaty overrides international customary law and even general principles of law." Elihu Lauterpacht, ed., *International Law: The Collected Papers of Hersch Lautperpacht* (CUP, 1970) 87.
[28] Art. 55, *VCLT*.

of states from treaties that do not contain an explicit denunciation clause.[29] This scheme is considered customary international law.[30]

However, withdrawal is seen as not releasing states from any *erga omnes* obligations to respect *jus cogens* norms that are codified in the denounced treaty. A *jus cogens* – or peremptory – norm is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[31] Moreover, Article 43 of the VCLT provides that withdrawing states will still be bound by international obligations which may have been codified in the treaty in question but also exist independently of the treaty (that is to say, in customary international law).[32] Thus, in the Jamaica case, when it denounced the Optional Protocol to the International Covenant on Civil and Political Rights in October 1997, a treaty that does not contain a withdrawal clause, what it was doing was signalling that Jamaica was willing to circumvent the rule through an oppositional stance of power that placed the state in breach of its treaty obligations.[33] This was despite the fact that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation because it is seen as codifying rights that are universally applicable and thus not temporary in nature.[34]

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[29] Ibid, Art. 56 reads: '1. A treaty which contains no provision regarding its termination and which does not provide for denunciation and withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.'

[30] *General Comment 26* (1997); Note - *Restatement (Third)* (1987).

[31] Consolidated in paragraph 332 of the *Restatement (Third*) (1987):

(1) The termination or denunciation of an international agreement, or the withdrawal of a party from an agreement, may take place only
   a. in conformity with the agreement or
   b. by consent of all the parties.

An agreement that does not provide for termination or denunciation or for the withdrawal of a party is not subject to such action unless the right to take such action is implied by the nature of the agreement or from other circumstances; *VCLT*.

[32] Art. 43, *VCLT*; E.g. Despite denouncing the European Convention on Human Rights (ECHR), the First Protocol to the Convention, and the Statute of the Council of Europe in 1970, the Council of Europe urged the Greek military government to continue fulfilling its human rights obligations under those instruments: See Tyagi (2011) at 159; See also, however, Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom' 120 *Yale Law Journal* (2010) 202. Bradley and Gulati challenge the notion that nations never have a legal right to unilaterally withdraw from rules of customary international law; Helfer (2005) at 80. Helfer agrees that a categorical ban on customary international law withdrawals should be rejected.

[33] Art. 54(a) VCLT; Helfer (2012) 636. For a detailed discussion of the difference between withdrawal and breach, see Helfer (2005) 1613-1629.

[34] This is also despite the widespread agreement that Jamaica's withdrawal did not comply with the conditions for denunciation set out in the treaty. *General Comment 26* (1997) 22, § 2.

The next example examines a similar oppositional stance in Trinidad and Tobago. In its attempts to comply with the *Pratt* judgment outlined in the Jamaica case, Trinidad and Tobago turned to the IACHR for assistance in meeting the timelines and strict guidelines set out in that judgment. The Commission responded that it 'was unable to give assurances that capital cases would be completed within the timeframe sought', precipitating Trinidad and Tobago's notification of withdrawal from the ACHR on 26 May 1998.[35] That same day, Trinidad and Tobago also notified the UN Secretary General of its intention to withdraw from the Optional Protocol to the ICCPR.[36] Three months later, when the withdrawal came into effect, Trinidad and Tobago re-acceded to the Optional Protocol with the following Reservation to article 1:

> [T]he Human Rights Committee shall not be competent to receive and consider communications relating to any inmate who is under sentence of death in respect to any matter relating to their prosecution, their detention, their trial, their conviction, their sentence, or the carrying out of the death sentence on them and any matter connected to this issue.[37]

Despite the withdrawal from the ACHR and the Reservation to the Optional Protocol to the ICCPR, the denunciation did not, as Tyagi points out, release 'Trinidad and Tobago from its customary law obligation to respect the right to life and due process of law'.[38] In *Rawle Kennedy v Trinidad and Tobago* (*Kennedy*), the UNHRC held that the Reservation was invalid. It was 'incompatible with the object and purpose of the Optional Protocol' since it 'single[d] out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population', constituting 'discrimination which runs counter to some of the basic principles

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[35] Organization of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System* (July 2003) 73, http://www.corteidh.or.cr/docs/libros/Basingl01.pdf (accessed 15 October 2021).
[36] Tyagi (2011) 174.
[37] *Status of the Optional Protocol to the International Covenant on Civil and Political Rights,* available online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en#EndDec (accessed 15 October 2021).
[38] Tyagi (2011) 162.

embodied in the Covenant and its Protocols'.[39] This reading is consistent with the jurisprudence of the International Court of Justice (ICJ) that asserts that reservations cannot be incompatible with the object and purpose of the treaties they are associated with.[40] Following the *Kennedy* decision, Trinidad and Tobago denounced the Optional Protocol to the ICCPR once again on 27 March 2000.[41] As in the Jamaica case, what we see here is a set of practices that require that we go beyond doctrinal interpretations of state denunciations. The signalling devices serve as particular speech acts that invoke indexical signs (Duranti, 1994; Peters, 2016; Phillips, 1998). In this regard, state reservations can be seen as *legitimate* in relation to customary international law and also *illegitimate* in relation to the terms of international treaties, and gain yet different meanings through multilayered processes where state behavior may serve to both resist external domination while simultaneously asserting violent dominion over people's lives.

Like Trinidad and Tobago, the third case of Guyana denounced the Optional Protocol to the ICCPR on 5 January 1999, only to re-accede to it with a reservation that excluded individuals who were sentenced to the death penalty from the individual complaints procedures of the UNHRC. Finland, France, Germany, the Netherlands, Poland, Spain, and Sweden all objected to the reservation on the basis that it constituted an abuse of procedure, contravened the principle of *pacta sunt servanda*, and prejudiced the protection of human rights.[42] In its 2000 Concluding Observations on Guyana, the UNHRC urged the state to 'formally withdraw its Reservation made on re-accession to the Optional Protocol'.[43] Guyana refused.[44]

How are we to understand these articulations of withdrawals in relation to the denial of rights of citizens? These demands for all states to comply with international

[39] *Communication No. 845/1999*, UN Doc. CCPR/C/67/D/845/1999 (31 December 1999), § 6.7.
[40] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 28 May 1951, 24 https://www.icj-cij.org/public/files/case-related/12/4285.pdf (accessed 15 October 2021)
[41] Tyagi (2011) 175.
[42] Ibid, 173-174.
[43] *Concluding observations of the Human Rights Committee: Guyana*, UN Doc. CCPR/C/79/Add.121 (25 April 2000), § 9.
[44] Also, see *Optional Protocol to the International Covenant on Civil and Political Rights, Guyana*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en#2 (accessed 14 October 2021).

norms and standards cannot be understood without also making sense of the diminished capacities in which such states operate. Though the full development of this theory is beyond the scope of this essay, it is important to note that, unlike legal institutions in Finland, France, Germany, the Netherlands, Sweden, and so on, institutions based in the Caribbean region struggle to manage case loads not simply because of a lack of intention to comply but because of a range of other reasons, including the shortage of legal and politico-economic capacity and political will. Reckoning with this unevenness requires that we examine state action in the global South not just in terms of culpability but also in relation to broader conditions in which they are operating, as well as their deployment of various tools available to them to signal refusal. This is precisely why it is critical that scholars resist the allure of one-dimensional critiques that themselves flatten the complex ways in which international denunciations of treaties signal political stances that simultaneously refuse and sustain their status quo. In this regard, the study of stance-taking can be a useful index for making sense of such forms of treaty non-compliance as a window into macro, meso, and micro complexities of individual and state power.

To the extent that Jamaica, Trinidad and Tobago, and Guyana's stance to withdraw from a treaty serves as communicative practice that impacts behaviors and produces effects (Hamlin and Jennings 2011), these effects do not only arise from their positive actions. They are also impactful through their production of new political and regional imaginaries in which positions of protest against international conventions align those engaged in derogation with one other. This is also seen with the non-compliance of African states as it relates to the ICC issuing an arrest warrant for former President al Bashir of Sudan and the refusal of African states to arrest him. These imaginaries are not quantifiable in relation to a state's Gross National Product or a violence index, nor in relation to analyses about what is being 'said' without it being communicated through speech. Rather, these imaginaries produce the terms (often invisible) on which Black and Brown lives are made to matter or not within (but often outside) of the Law – through denunciation and protest often resulting in other violations that can sever individual rights or modify state force in particular ways.

Reflecting on what Sarah Ahmed, in rethinking speech act theory, examines through the distinction between performatives and non-performatives, I turn now to the conceptualization of legal non-performatives as ways that postcolonial states deal with constraints through contradiction. In the three cases described here, we see that the treaty derogation functioned as a claim to power, as a way of taking a contrary stance through the performativity of protest against forms of international legalism that constrained state action. Yet, in taking that stance, the performative produced no real-world changes to state membership in the treaty system given that the acts were seen as illegitimate by global Northern states, which rendered the derogations null. To understand this dynamic in relation to the non-performative is to reckon with the reality that Jamaica, Trinidad and Tobago, and Guyana's derogations were ineffective because the speech act failed in its commitment to withdraw from the treaty. According to Ahmed, it is not the speech act that commits a person, organization, or state to do what is said, to act in accordance with its utterance. It is, rather, its operational effect of international inequality. Speech acts that are performatives are seen as generating their own effects. However, understanding the workings of a non-performative allows us to see how certain speech acts work precisely by not producing the effect they name. They work through their failure to perform. The stance that actors or states might take may signal their climate of protest. Yet, in following Ahmed's model of the non-performative, the reality needed for the performative to succeed goes unmet even as the 'failure of the speech act to do what it says is not a failure of intent or even circumstance'.[45] The failure is, paradoxically, what the speech act means to do.

Conclusion

In these examples, Jamaica, Trinidad and Tobago, and Guyana claim to not have the capacity to manage increasing homicide rates on their islands and are deploying various levels of common law jurisprudence that was adopted from former imperial powers to manage growing levels of insecurity. On the other hand, there is

[45] Sarah Ahmed, "The Non-performativity of Antiracism" (Duke University Press 2006) 7:1 *Meridians*, 104-126.

another dynamic at play related to the individual rights of the accused on death row that are being undermined by state incapacity. This incapacity has had consequences for both those families who were victimized by those convicted of murder as well as for those convicted of such crimes whose legal rights are being disregarded. As these examples demonstrate, threats of treaty denunciation or withdrawals not only provide opportunities for the expression of protest principles in the global South, but they also provide openings for state actors to push back against structural challenges in an attempt to register positions that do not necessarily transform the status quo. Attention to the dual complicity of states in an uneven world shows us why it is important to read the participation of particular states in the global South as always complexly intersecting within particular forms of hegemonic domination seen through the political force that law exercises.

All the issues indexed by these cases are interrelated in complex, paradoxical, and uneven ways. BIPOC scholars should not be expected to disregard these complexities in order to perform a perpetual focus on individual victimization as expected of us by hegemonic (White) frameworks of knowing. It is time to move beyond the either-or-analytic and seriously articulate the interrelated dynamics that continue to capture postcolonial states *up the down escalator* regardless of their efforts to resist.

I end by arguing that what might at first seem to be 'marginal' experiences in the global economic system in fact reflect increasingly widespread trends. The dynamics of mobility, growth, and inequality take shape in an inherent unevenness of capacity that can make it difficult to grasp many of the system's phenomenal corollaries. Political predicaments long identified, often exclusively, with postcolonial states – their diminished capacity to regulate their own economies, the constraining dictates of international institutions and legal rules – have now played out more visibly across the globe. State contraction, the erosion of social safety nets, the demands for flexibility in forms of work and sociability, the large-scale privatizations of social goods and services, the diminished capacity of states to discipline their citizens by means of consent … all of these attributes are increasingly evident to the broader publics of the

global North as well. Widespread and rapid economic, political, and social transformations are playing out across the globe yet in distinct social contexts and with distinct cultural and political consequences. Legal scholars, whether BIPOC or not, have an important opportunity to bring multi-scale empirical research and complex theory to bear on the macro and micro processes that may be placing a growing percentage of the global populace *up the down escalator*. We are increasingly in this together.

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