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International law and its others

edited by Anne Orford.

INTERNATIONAL LAW AND ITS OTHERS

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ANNE ORFORD



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Institutional and political developments since the end of the Cold War have led to a revival of public interest in, and anxiety about, international law. Liberal international law is appealed to as offering a means of constraining power, representing universal values and governing relations between sovereign states. This book brings together scholars who draw on jurisprudence, philosophy, legal history and political theory to analyse the stakes of this turn to international law. These essays explore the history of relations between international law and those it defines as other – other traditions (theology, philosophy, morality, economics), other logics (sacrifice, war, despotism, calculation), other forces (God, desire, markets, imperialism) and other groups (indigenous peoples, corporations, barbarians, terrorists). The authors explore the archive of international law as a record of attempts by scholars, bureaucrats, decision-makers and legal professionals to think about what happens to law at the limits of modern political organization. The result is a rich array of responses to the question of what it means to speak and write about international law in our time.

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For Hamish and Felix

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A jurisprudence of the limit

ANNE ORFORD*

Institutional and political developments since the end of the Cold War have led to a revival of public interest in questions of international law and cosmopolitan legality. This has intensified with the violent attacks on the US of 11 September 2001, and the use of force against the territory and people of Afghanistan and Iraq carried out in response. Many scholars in law and the humanities have embraced a cosmopolitan vision of the future of international law in answer to the sense of crisis which these events have precipitated.¹ Liberal international law is increasingly appealed to as offering a bulwark both against the threats posed by terrorists, religious militants, failed states, environmental degradation and epidemics, and against the excesses of the measures taken by states in response to these perceived threats. Commentators look to international law as a source of constraints on the abuses of hegemonic power, as a means of responding to the threats posed to the state by terrorism and economic globalization, or as a field in which economic justice and global co-operation should be on the agenda. The international is imagined, for good or ill, as a space outside the order imposed by independent sovereign states – a space in which law, the state and the subject all reach their limits.² The revival of interest in and anxiety about those limits is expressed in the appeal to international law and by reference to imperialism, terrorism, human rights and the state of exception.³

* Thanks to Hilary Charlesworth for discussions about the writing of this introduction, to Andrew Robertson and Peter Rush for their helpful comments on earlier drafts and to Megan Donaldson for her invaluable editorial assistance.

¹ See for example Zygmunt Bauman, *Europe: An Unfinished Adventure* (Cambridge, 2004); Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, 2003); Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London, 2001).

² Mark F. N. Franke, *Global Limits: Immanuel Kant, International Relations, and Critique of World Politics* (Albany, NY, 2001).

³ R. B. J. Walker, 'International, Imperial, Exceptional' in ELISE Collective Volume, *Counter-Terrorism: Implications for the Liberal State in Europe* (Brussels, 2005), pp. 36–57.

At the same time, the discipline of international law is itself undergoing one of its periodic crises, in which it attempts to renew itself and reassert its relevance.⁴ Dramatic changes seem daily to be proposed to existing international institutions and to legal doctrines relating to sovereignty, territory, responsibility and the use of force. This renewed public interest in cosmopolitan legality, occurring at the same moment as a perceived crisis of relevance for existing international law and institutions, offers a valuable opportunity. The questions to which international law is expected to offer an answer are some of the most important, vital and intriguing questions of our time. Yet international law as a discipline has lost its capacity to provide a compelling understanding of what is at stake when these questions arise. This collection is part of a broader movement seeking to regenerate the exchange between international law and the humanities in order to restore the ability of international law to address such questions more fully. It brings together scholars working in a range of critical traditions to contribute to the generation of an understanding of the stakes of the turn to international law in today's political climate.

The chapters in this book complicate the tendency to see international law as offering an answer to the questions generated by the war on terror, globalization and related events. Rather than look to international law or institutions for answers or as the source of a pre-packaged programme of reforms which can solve the problems of domestic politics, these essays explore international law as a record of attempts to think about what happens at the limit of modern political organization. Responding to the questions posed of international law requires understanding the forms that global governance takes today, and 'how the world has come to take this form'.⁵ International law offers an archive of attempts to address the questions and solve the problems that arise under the conditions of a modern politics organized around territorial sovereignty. It provides a valuable history of the ways in which a politics imagined as involving encounters between independent, sovereign entities and a commitment to cosmopolitan ideals has materialized through specific practices, institutions and relations. Many of the issues currently on the agenda of international institutional reform – terrorism, human rights violations, civilian immunity, security, states of emergency, the responsibility to protect,

⁴ Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441.

⁵ Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London, 2004), p. 8.

peace-building – are about the point at which we reach the limits of modern political organization. By bringing together theorists working on these issues from the perspective of history, political theory, philosophy and international law, this book explores what the turn to international law might mean, and what the archive of international law offers as a way of understanding the stakes of this politics. These theorists remind us that the war on terror, attended as it is by a sense of ‘threats, challenges and change’, is not exceptional.⁶ International law guards the secret history of a modernity which is itself terrorized by the lack of any sovereign authority to guarantee the law or make sense of death.

More specifically, this book is about the many forms of the relation to the other, as it is figured, performed, inscribed and imagined in the discipline of international law. To give this book the name *International Law and its Others* is immediately to invoke a critical project which has an established trajectory within international law. The well-versed reader of international legal texts, glancing at the title, might anticipate that this is a book which will describe and denounce the ways in which international law was complicit in, and founded upon, European imperialism. Such a book, being published as it is during an era of wars on terror, of development rounds at the World Trade Organization, of an institutional language of threats and challenges at the United Nations, might be relied upon to demonstrate the continuities between imperialism in its classical form and imperialism lite (or not so lite) in Iraq and elsewhere in the twenty-first century. Ideally, it might be expected that some of international law’s ‘others’ will be invited to speak within these pages, to give the perspective of the ‘native informant’ on how the progress of international law should properly be measured, or to offer a description of what it is like to be an other of a law which imagines itself as international, even at times universal. There is a generous and liberal impulse within the mainstream of international law which wants the voice of the other to be heard, and which believes, in true cosmopolitan fashion, that we have now arrived at the moment when the truth of our history will finally be available to us. This book owes a great deal to this tradition of thinking critically about the need to reform international law to make it more inclusive and humane, and its authors take seriously the questions of responsibility that are posed by the history of imperialism.

⁶ *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change* (2004).

Yet many of these chapters also depart from, and at times challenge, this mode of critical engagement. In particular, the authors writing here hesitate to name once and for all the inside and outside, the self and other of law, as if fearing that the other can only ever be represented by accommodating or assimilating it to existing economies, languages or practices. They attempt in a variety of ways to come to terms with the complicated and infinite process of constituting the self in relation to the other through the institutions of law and language. In these pages, sovereigns proliferate and take different forms, those addressed by the speech of law are figured and encountered in many ways, and the contingent and unstable meanings of legal texts are stabilized and take effect over the bodies and territories of those who are included in the community of international law only through their exclusion.⁷ This sense of the fragmentary nature of critique is a product of the challenge that imperialism poses to history. As Gayatri Spivak writes, 'the epistemic story of imperialism is the story of a series of interruptions, a repeated tearing out of time that cannot be sutured'.⁸ Writing about 'the other' after such a history can be one way of attempting to regain that which has been lost in the process. Yet, as Spivak adds, if 'we are driven by a nostalgia for lost origins, we too run the risk of effacing the "native" and stepping forth as "the real Caliban", of forgetting that he is a name in a play, an inaccessible blankness circumscribed by an interpretable text'.⁹ It is the task of interpreting the texts of law, rather than attempting to access the blankness which they circumscribe, with which these chapters are engaged.

The themes which emerge from this book in terms of the relation between self and other include responsibility, desire and violence. Each of these themes addresses the conflict at the very interior of the subject, whether that subject be the liberal individual, the sovereign state or the discipline of international law. For one group of authors, the challenge posed by imperialism is to provide histories of the ways in which the other has been represented. They ask what has been done to the other who is figured in relation to sovereignty and imperialism. For a second group of authors, the 'other' of international law is that from which we set off or which we push away in order to constitute a subject, an institution or a tradition.¹⁰ These chapters are concerned with how one might respond

⁷ On the form of law which includes through exclusion, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998).

⁸ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA, 1999), p. 208.

⁹ *Ibid.*, p. 118. ¹⁰ *Ibid.*

to the call of the wholly other understood in this sense. There is a quality to international law as a discipline that brings some of the anxiety or the excitement involved in this question of responsibility into sharp relief. For some of the authors, there is something about this relation to the other from which they take pleasure, or which drives their work. They bring together fragments from disparate traditions or engage across idioms, writing about texts and ideas taken from worlds that would name themselves as theory on the one hand and practice on the other, and seeing how these texts open out when read together. Marjorie Garber describes the quality of this pleasure in terms of disciplinary libido. Garber says that this libido is that which keeps 'scholarly disciplines from becoming inert and settled'.¹¹ Each field differentiates itself but also desires to become its nearest neighbour, whether at the edges of the academy, among the disciplines, or within the disciplines. To quote David Kennedy, this is 'the disruptive edge of each discipline vibrating excitedly with the other'.¹² For others, this engagement with the other of law is also disturbing. Many of the chapters use the language of responsibility and ethics to develop the sense of the other as posing a question which the subject cannot answer. For scholars faced with the horrors of the war on terror, of detention of asylum-seekers, of suspension of law in the name of security or national interest, this sense of responsibility gives rise to an anxiety about the irrelevance of scholarship and the academic role. The terms in which we might once have thought about this academic responsibility are in flux. As Antony Anghie writes in his concluding chapter:

The question of what role should be played by the scholar, or, more particularly, the international law scholar and adviser, is a very old and complex one. But, clearly, profound changes have occurred. The traditional divisions and debates, between 'realists' and 'pragmatists' and the 'crits', seem in retrospect to have been based on a curiously secure intellectual order, one in which, whatever the divisions, certain shared assumptions were maintained. The older verities that bound together the members of the 'invisible college of international lawyers', in Oscar Schachter's memorable phrase, no longer obtain.¹³

This sense of the relationship between 'older verities' and the grounds of critique can be seen in an earlier exchange between a sovereign and

¹¹ Marjorie Garber, *Academic Instincts* (Princeton, 2001), p. ix.

¹² David Kennedy, 'Law's Literature' in Marjorie Garber, Rebecca L. Walkowitz and Paul B. Franklin (eds.), *Field Work* (New York, 1996), pp. 207–13 at p. 212.

¹³ Antony Anghie, 'On critique and the other', pp. 389–400 at p. 397 (reference omitted).