REVIEW ESSAY

POWER AND THE RULE OF LAW IN THE GLOBAL CONTEXT

SUNDHYA PAHUJA*

Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law by Anne Orford (Cambridge: Cambridge University Press, 2003) pages i–ix, 1–256. Price A$150.00 (hardcover). ISBN 0 52180 464 7.

[Mainstream conceptions of the relationship between international law and power have significant limitations which lead to a consistent underestimation of the power of international law in constituting and maintaining the hierarchical relationship between North and South and render invisible what are arguably international law's own imperialising urges. This review essay situates Reading Humanitarian Intervention *within the broader body of critical approaches which challenge this blindness. It argues that Orford's work is a compelling addition to that corpus, particularly in its sophisticated reconceptualisation of power in the context of putatively humanitarian interventions and its pointed consideration of the congruence of the military and the economic. The essay concludes by embracing Orford's emphasis on critique as a political strategy, but wonders whether a necessary complement to the methodologies, both of this book, and of critical international law scholarship more generally, demands an increased attention to the nature of modern law. Such a focus would trouble the seemingly emancipatory possibility of a (re)turn to human rights and demand a relational, rather than refounded, understanding of international law.]*

CONTENTS

I INTRODUCTION

International law has a notoriously vexed relationship with power. If it is not constantly on the couch neurotically asking itself whether it is really law,[1] it is

* BA, LLB (Hons) (Melb), LLM (UBC); PhD Candidate, Birkbeck, University of London; Senior Lecturer, Faculty of Law, The University of Melbourne. I wish to thank Jennifer Beard, Upendra Baxi, Ruth Buchanan, Peter Fitzpatrick, Adrian Howe, Vidya Kumar, Fiona Macmillan, Chrysthia Papacleovolou and Patricia Tuitt for their generous and constructive involvement with this article and/or earlier manifestations of elements of the argument it contains.

pacing the room, wringing its hands and wondering whether, in any case, it has any effect on the conduct of the powerful. To make this existential crisis worse, the international lawyer's bête noire, the international relations scholar, has historically regarded international law with disdain, conceding that it is useful for, say, international postal relations, but certain it makes little difference to the way states behave when important interests are at stake, such as national security.[2] Now, in the 'war on terror' and in the intervention and ongoing United States military presence in Iraq, we are faced again with a contemporary crisis which would seem precisely to remind us that such questions are necessarily paramount to the authority of international law.[3] Once again, the key question at hand would seem to be whether or not the use of force can ever be subjected to the rule of law.[4]

Nevertheless, the centrality of this question reveals the informing preoccupation of international law as being whether or not it is capable of constraining the behaviour of those who are most powerful. Although the dual orientations of this concern, which we could shorthand as 'normativity' and 'enforceability', are in some senses oppositional, they in fact map the terrain over which dominant understandings of the relationship between international law and power navigate. Arguably, it is the constraining nature of this terrain which is both symptomatic and causal of the limited theoretical purchase of mainstream international legal scholarship — specifically in relation to the question of how the hierarchical relationship between North and South is constructed and maintained, how the 'international community' is constituted at any given moment, and the practical implications of each. Indeed, such is the import of these implications that far from being impotent, one might argue that the problem with international law is that it is *too* powerful, but in ways which work against its ostensibly emancipatory promise.

As an intellectual project, however, it would seem rather pointless simply to construct a straw man called 'mainstream international law', and then proceed to

[1] This question has been posed frequently. It hinges on international law's putative lack of a sovereign authority, related to the Austinian definition of law, and the ostensible lack of enforcement measures: see, eg, Anne Orford, 'Positivism and the Power of International Law' (2000) 24 *Melbourne University Law Review* 502; Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

[2] Martii Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law* (2002) esp ch 6.

[3] As will become clear, it is not specifically my concern to address the centrality of the crisis in the constitution of international law itself. A growing body of useful literature engages directly with this question. See, eg, Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377; Anne Orford, 'Review Essay: The Gift of Formalism' (2004) 15 *European Journal of International Law* (forthcoming); Jennifer Beard, *The Art of Development: Law and Ordering in the First World* (D Phil Thesis, The University of Melbourne, 2002); David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2002) 32 *New York University Journal of International Law and Politics* 335. The question of the intellectual implications of adopting a scholarly stance which is highly responsive to contemporary crises generally, and not just in the context of international law, is engaged with in Peter Fitzpatrick, 'Opening Address' (Speech delivered at the Professing to Educate and Educating to Profess Symposium, McGill University, Montreal, Canada, 3 July 2003) (copy on file with author).

[4] For a paradigmatic expression of the centrality of this question, see, eg, Michael Glennon, 'Why the Security Council Failed' (2003) 82(3) *Foreign Affairs* 16.

touch an analytical torch to it. There is already a substantial and growing body of critical international law scholarship which challenges many of its limitations. Anne Orford's compelling book, *Reading Humanitarian Intervention*,[5] is part of that incendiary corpus. In this book, Orford undertakes a detailed analysis of several recent humanitarian interventions in order to comprehend their human, cultural and economic effects. She draws on many strands of critical thought to illuminate her trenchant analysis, including psychoanalytic, feminist and post-colonial theories. Such approaches have been strangely slow to come to international law scholarship, but as Orford's work illustrates, they are crucial trajectories of enquiry if we are ever to get past the frustrating circularities produced by canonical modes of scholarship.

It is noteworthy, however, that even after the critical blaze sparked by the body of work in which we could include *Reading Humanitarian Intervention*, the siren call of the rule of law can still be heard.[6] That is, even after critiques which powerfully reveal the law's contingency and indeterminacy, the myth of the rule of law still persists. Indeed, this tenacity is particularly apparent when teaching international law. Even in the face of those critiques which reveal many of its limitations, the fantasies and frustrations of the mainstream retain a strong imaginative hold over many students and professors.[7] Nowhere is this more evident than in the case of human rights law,[8] which seems not only to capture eager hearts and minds in the classroom, but also to be an increasingly powerful legitimating banner for all kinds of political action in this putatively global era.[9] Indeed, in the observable trend toward the spatial displacement of emancipatory political and social movements from the national to the international or 'global' arena, such movements frequently employ the language of international law and human rights.[10] Yet for me, this persistent return to the rule of (international) law

[5] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003).

[6] This may not be problematic per se: see, eg, Peter Fitzpatrick '"Gods Would Be Needed…": American Empire and the Rule of (International) Law' (2003) 16 *Leiden Journal of International Law* 429.

[7] See, eg, David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101; Anne Orford, 'Embodying Internationalism: The Making of International Lawyers' (1998) 19 *Australian Year Book of International Law* 1; Hilary Charlesworth, 'Feminist Critiques of International Law and Their Critics' [1994–5] *Third World Legal Studies* 1.

[8] A good example of such a faith in human rights law is implicitly enacted in Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (2001). See also Sundhya Pahuja, 'This Is the World: Have Faith' (2004) 15 *European Journal of International Law* (forthcoming), a review essay engaging with Wright's book.

[9] Indeed, even Michael Hardt and Antonio Negri in their recent tour de force diagnosing the modern empire could arguably be falling back on some fairly traditional notions of human rights as being the proper space of political contestation for the multitude: Michael Hardt and Antonio Negri, *Empire* (2000). On this question, see Ruth Buchanan and Sundhya Pahuja, 'Legal Imperialism: *Empire's* Invisible Hand' in Jodi Dean and Paul Passavant (eds), *Empire's New Clothes* (2003) 73. There is also a growing body of literature on the juridification of political action through the adoption of human rights language: see, eg, Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000).

[10] Part of the 'politically active' embrace of international law and human rights is entirely strategic — law has, after all, always been a potent site of struggle. However, the power of the emancipatory promise of international law could be such that even (or perhaps especially) strategic uses can become unwittingly complicit with that which would be challenged. Again, this is not a new

needs not only to be scrutinised, but also to be accompanied by an enquiry into the specific nature of modern law and whether or not it is itself implicated in international law's imperialising tendencies.

Thus, in this essay, I will go back and dwell briefly on the problematic conceptions of the relationship between international law and power in the mainstream.[11] I will also consider the way in which *Reading Humanitarian Intervention* provides us with a deceptively gentle, yet ultimately quite devastating critique of the limitations of those conceptions. Indeed, one of the many compelling aspects of Orford's book is her ability to generalise the central insistence of how a question, or set of choices, becomes framed in the international context. In this instance, the question considered is why, in situations of humanitarian crisis, the choice for the 'international community' is framed as being one between 'inaction' and 'action', such that certain forms of international intervention are understood as 'inaction' via the imaginative capture of the idea of 'action' as involving militarised activity. However the pertinence to the discipline as a whole of understanding how a question comes to be asked is one of the reasons why Orford's book will deservedly have a committed readership well beyond scholars of international humanitarian law. Combined with Orford's lucid account of the methodologies she uses, this is partly why the book is so valuable heuristically. Indeed, it presents scholars (teachers and students alike) with a formidable array of critical tools with which to think through international law.

Importantly, these tools include what might be called 'reflexive methodologies'. These demand of international law scholars a commitment to examine our own fantasies and desires about how to constitute ourselves as scholars, practitioners or activists, and the effect of that self-constitution on the unfolding of international events. Thus, Orford is addressing herself in part to those whose self-described project is combating global inequalities in some form or other, and urges us to examine whether we are unwittingly complicit with the causes of injustice against which we might wish to fight.[12] The way she approaches this, by and large, is to subject her own experiences and understandings to critical scrutiny. Orford uses her own daily life as an example of the contradictions which she embodies in being a Northern scholar examining interventions of various kinds of the North into the South. This refusal to absent her 'self' from the explicit concerns of her scholarship is an important challenge to the ways in which the putative objectivity of Western science contributes to the ostensible universality of 'our' ways of knowing. Furthermore, her approach exposes the unwitting imperialism of much well-intentioned work in international law. I

idea. Many have already realised that the promise of law as a subversive instrument is peculiarly perilous. However, perhaps one of the reasons that faith in international law remains so strong is that the powerful critiques unpack many of its key assumptions without asking whether the rule of law is itself implicated in international law's imperial effects. See also Ruth Buchanan and Sundhya Pahuja, 'Collaboration, Cosmopolitanism and Complicity' (2002) 71 *Nordic Journal of International Law* 297.

11 On the relationship between international law and power, see also Fitzpatrick, '"Gods Would Be Needed…"', above n 6.

12 See generally Buchanan and Pahuja, 'Collaboration, Cosmopolitanism and Complicity', above n 10. See also Anne Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275.

wonder though, whether Orford does have a residual faith in the rule of law and whether a useful complement to her methodologies might be one which considers the specificity of the dynamic of modern law itself and the basis of law's claim to authority, particularly as it plays out in the international sphere.

This review essay will briefly sketch the three dominant conceptions of the relationship between international law and power which we find in mainstream consciousness, and outline the three key axes along which I would contend they most need critique — axes I will shorthand as 'law', 'power' and 'context'. I will then argue that *Reading Humanitarian Intervention* usefully teases out the relationship between law and power along each of these axes, thus situating Orford's work within a broader body of critical international law scholarship. I will conclude by asking whether these varying strands of enquiry go far enough though, given what is arguably a shared inattention to the specificity of modern law, and whether a useful follow-on project from such critiques might be to attempt to deconstruct the movement of modern (international) law itself.

II Mainstream Conceptions of the Relationship between International Law and Power

In mainstream international law scholarship, there are arguably three dominant conceptions of the relationship between law and power. Each is implicitly informed by the disciplinary obsession adverted to in Part I: does international law have any constraining effect on the behaviour of powerful states? Thus, the first such conception is precisely that international law and power are in direct conflict with one another. This can be encapsulated by the idea that 'there is power and there are rules and when the two conflict, there is the rule of power'.[13] In this world view, international law is of little relevance to the way in which power is exercised.

A second reading might describe a raw, non-legal power (such as military or economic power) as existing side by side with international law, but consider international law to have a constraining, persuasive or 'legal' effect which can empirically be shown to constrain the behaviour of powerful nations.[14] An example of this type of analysis is the body of work which attempts to show that powerful states operate within a consciousness of international law even as they breach it, so that conduct which is in conflict with international law is accompanied by justifications for that breach.[15]

Nuances of this analysis have provided a third view, namely that we need to understand international law itself as both a source *and* effect of power. The latter is exemplified, for instance, in the formulation of customary international law, where state practice and opinio juris are said to be more weightily affected by the conduct of powerful states.[16] The former is evidenced by the fact that

[13] Gerry Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' (2000) 11 *European Journal of International Law* 439, 440.

[14] See, eg, Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, 1979).

[15] Ibid.

[16] See, eg, Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999).

once customary international law is formed, it then has an independent operative effect on state behaviour — that in a sense, it takes on a life of its own.[17]

While this sketch is undoubtedly a simplification, it does provide us with a starting point from which to consider the limitations of dominant conceptions of the relationship between international law and power. Thus, let us turn to each of the trinity of axes, along which Orford's critique plays out — which we can extravagantly shorthand as 'context', 'power' and 'law'.

III CONTEXT

The first problematic aspect of the understandings which we encounter most frequently of the relationship between international law and power is that these understandings tend to ignore the way in which the boundaries seem increasingly to be collapsing between what might be called the political (or 'public') aspects of international law, and its economic and military aspects.

One instance of this fusion is the way in which the World Bank and the International Monetary Fund ('IMF') (which once were each concerned only with what we would consider 'economics' as strictly defined), are increasingly subjecting borrower states not only to conditionality relating to the way those states are structured economically, but also to their structures and institutions relating to democracy, political rights and governance.[18] Another example of this coming together is, of course, Orford's own — those putatively 'humanitarian' interventions (such as is now occurring in Iraq), which combine military, monetary and now explicitly 'nation-building' elements overtly directed at implementing something called 'democracy and the rule of law'.

However most theorising about public international law does not take account of this fusion. Indeed, mainstream international law operates within a framework in which there is an important conceptual separation, between public international and human rights law on one hand, and international economic law on the other.[19] Arguably, this can partly be traced to the way in which the discipline itself has historically drawn quite strict boundaries around these spheres, for within the canon, what is considered to be the political, or 'public', side of international law has long been quarantined from the economic side.[20] For

17 Ibid.

18 Many recent World Bank and IMF publications bear this out. See, eg, James Wolfenson, *Comprehensive Development Framework* (1999) The World Bank <http://www.worldbank.org/cdf/cdf-text.htm>. See also Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243; Buchanan and Pahuja, 'Legal Imperialism', above n 9.

19 There is a growing body of work challenging this divide (particularly in relation to the putative axiom of globalisation). See, eg, Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435; Dianne Otto, 'Handmaidens, Hierarchies and Crossing the Public–Private Divide in the Teaching of International Law' (2000) 1 *Melbourne Journal of International Law* 35; Fiona Macmillan, *The WTO and the Environment* (2001); Sundhya Pahuja, 'Trading Spaces: Locating Sites for Challenge within International Trade Law' (2000) 14 *Australian Feminist Law Journal* 38.

20 See, eg, Joel Paul, 'The New Movements in International Economic Law' (1995) 10 *American University International Law Review* 607, 613; Shelley Wright, 'Women and the Global Economic Order: A Feminist Perspective' (1995) 10 *American University International Law Review* 861, 874.

instance, when the institutional architecture of contemporary international law was being designed at the end of the Second World War, the two were separated even geographically: the United Nations ('UN') — thought to be the political 'pillar' of the international system — was drawn up at Dumbarton Oaks,[21] while miles away at Bretton Woods, the economic 'pillar', comprising the IMF, the World Bank and the abortive International Trade Organisation were being designed.[22] This conceptual separation was also reflected in the content of the charters of the various organisations themselves.[23]

However, as a growing body of critical work recognises, this conceptual and canonical separation of political (or public) international law and economic international law to which the mainstream subscribes is a key factor in its limited theoretical bite.[24] *Reading Humanitarian Intervention* is a timely and pointed exposition of the dangerous consequences of maintaining such an illusion. In particular, Orford is concerned with the way in which narratives about humanitarian intervention begin the story of the involvement of the 'international community' in the precipitation of humanitarian crises. They begin too late in the piece, disregarding the way in which

> the international community had already intervened on a large scale in each of the … cases [of the former Yugoslavia, East Timor and Rwanda] before the security crisis erupted, particularly through the activities of international economic institutions.[25]

Woven through the book is a series of detailed case studies. Through these, Orford illustrates the ways in which, contrary to the dominant narrative, the 'international community' was very much involved in places of large-scale human tragedies well before the eruption of 'humanitarian crises' which seemed to demand military intervention. In particular, she focuses on the role played by the IMF and the World Bank, and explores the ways in which radical economic restructuring in the former Yugoslavia may have contributed to the creation of the conditions of the genocide which subsequently occurred. Obviously Orford is well aware that '[s]tructural adjustment and shock therapy programmes have been implemented in many states without leading to genocide'.[26] However, she offers us a persuasive account of the ways in which the demands of the international economic institutions have far-reaching constitutional, political and social

[21] Balakrishnan Rajgopal, 'Crossing the Rubicon: Synthesising the Soft International Law of the IMF with Human Rights' (1993) 11 *Boston University International Law Journal* 81, 87.

[22] *Articles of Agreement of the International Monetary Fund*, opened for signature 27 December 1945, 1 UNTS 39 (entered into force 27 December 1945); *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 27 December 1945, 2 UNTS 134 (entered into force 27 December 1945). The International Trade Organisation failed from its conception, but what did survive from its design was the General Agreement on Tariffs and Trade ('GATT') which later evolved into the World Trade Organisation.

[23] *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 27 December 1945, 2 UNTS 134 (entered into force 27 December 1945).

[24] See above n 19.

[25] Orford, *Reading Humanitarian Intervention*, above n 5, 17.

[26] Ibid 96.

ramifications which are often devastating, if not genocidal, and with which those institutions are insufficiently concerned.

The other important aspect of this critique is that Orford implicitly addresses twin prevalent beliefs: firstly, that such economic restructuring in poor states is for 'their own good'; and secondly, that the crises which erupted were due to a pre-existing primordialism, the necessary eradication of which will be achieved through the (enforced) introduction of a strong market economy protective of 'the right to property, economic freedom and human dignity.'[27] The first aspect raises the question of whose interests are served by the kinds of economic restructuring being imposed upon 'failed', 'weak' and 'rogue' states. Orford presents an extensively researched array of evidence to suggest that it is the interests of foreign investors, rather than those of the bulk of the people who live in the state subject to intervention, which are best served by the prevailing orthodoxy.[28] However, even more significantly, Orford engages with the paradox of a situation in which coercively imposed, ideologically saturated notions of governance are legitimated by a narrative about introducing 'self-determination' and democratic governance into the state concerned.[29] She argues that such a thing is possible in large part due to the 'localisation' of the origins of the crisis and the primordial character attributed to the peoples subject to economic intervention.[30]

According to Orford, beginning the story of intervention at the 'moment of crisis' is much too late in the day. It becomes one of the key factors contributing to the apparent choice of evils with which we have been faced in each of the interventions that she studies. In each situation, it has seemed that the 'international community' must chose between 'action' and 'inaction'. Orford argues that it is, in part, the way in which the violence of intervention is posited against putative 'inaction' which serves to legitimise the former and, in many accounts, to render the intervention 'just'.[31] Thus Orford urges those who are concerned with humanitarian outcomes not to accept at face value the seemingly axiomatic story about the non-presence of the international community prior to crisis and military intervention, and to be attentive to the way the hand of the 'international community' is also at work in the project of economic restructuring. The implication is that this recognition might avoid an endless re-run of the program in which the choices seemingly on offer for those 'protected' by the international community are either life under an oppressive regime, or war; or for the East Timorese, for instance, to be faced with a choice between being governed by the Indonesian military or being placed under the tutelage of the IMF and the World Bank.[32]

27 Ibid 114.
28 Ibid 110–20. See also Joseph Stiglitz, *Globalization and its Discontents* (2002).
29 See, eg, Orford, *Reading Humanitarian Intervention*, above n 5, 110–20.
30 See also Sundhya Pahuja, 'Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide' (2000) 13 *Leiden Journal of International Law* 749.
31 Orford, *Reading Humanitarian Intervention*, above n 5, ch 3.
32 Ibid 29.

This wish — to reframe the question — is not simply the whine of the retroscope, but rather the vital recognition (when so much is at stake) of the power of the question to frame the issue. Orford is thus unendingly concerned with the way in which so many people, motivated by a genuine humanitarian concern, are willing to answer the question, and indeed to join the chorus of inquisition in asking, '[w]hat would you suggest we do if we are in that situation again?'[33] rather than to share her insistence that we step back and ask how 'we' got here in the first place.[34] Thus, in her focus on asking how it comes to pass that this is the question, Orford is illustrating the way in which proponents of human rights who either support humanitarian intervention or who argue for democracy and self-determination in the context of post-conflict nation-building must take into account the constraints imposed by the International Economic Organisations ('IEOs') on states subject to such intervention. Without this, such proponents might be complicit in providing a legitimating framework for such interventions, whilst simultaneously participating in the evisceration of any radical or emancipatory potential of terms such as 'democracy' and 'self determination'.

In this respect, Orford's book echoes other critical work engaged in considering the disciplinary and textual places where this convergence between the political, economic and military faces of international law can be seen to occur. Such studies include examinations of the ways in which the increasingly normative notion of 'democracy' is invariably linked to a market economy,[35] or the way in which theorisations of the so-called 'renewal' of international law after the Cold War are underwritten by a certain fantasy of capitalist development.[36]

However, such work is not only useful because it is corrective to the dichotomous framework in which mainstream international law scholarship operates. It also adds to the much theorising about 'globalisation'. Indeed, even though I argue that the conceptual separation between the economic and political branches of international law is unsustainable, I am wary of conceding this terrain to those who would attribute this conjunction to something called 'globalisation'.[37] This is partly due to the fact that accepting the invitation to read events as representing something entirely new would arguably expose us to the risk of overlooking the ways in which many of the oppressive practices which we would ascribe to the behemoth of globalisation can actually be located on a much longer continuum, including imperial history.[38]

[33] Ibid 18.

[34] See also Beard, above n 3.

[35] See, eg, Susan Marks, 'Guarding the Gates with Two Faces: International Law and Political Reconstruction' (1999) 6 *Indiana Journal of Global Legal Studies* 457.

[36] See, eg, David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) 32 *Harvard International Law Journal* 373.

[37] Such theorisations can sometimes assume too much, and we would do well to be sceptical of accounts which would grant some notion of the 'global' much quiddity. See, eg, Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (2003).

[38] Pahuja, 'Technologies of Empire', above n 30.

One notable assumption of many febrile invocations of the global is that we are currently seeing a deliquescence of the nation-state.[39] Although Orford does not engage with this assumption in exactly these terms, *Reading Humanitarian Intervention* is an implicit challenge to it, both empirically and conceptually. Empirically, Orford's careful study of the imposition on various states of structures of governance facilitative of foreign investment counters what one might call the 'myth of inevitability'. According to this 'myth', the inexorable flow of capital across borders encourages states (and the people in them) to open their borders to the 'natural' market. Her inclusion of studies which show the coercive extraversion of United States intellectual property laws through the regime of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the 'TRIPS' regime),[40] in combination with IEO conditionalities, belies the ways in which law and institutions are presented as neutrally facilitative of 'development' and 'progress'. They reiterate the centrality to the 'global' economy of the nation-state and its law-making capacity.[41] Further, Orford astutely observes that the link between the increased desire of states in the North to intervene in humanitarian crises, and their decreased willingness to accept refugees, is testament to the heightened intensity with which the rich police their borders in this so-called 'borderless world'.[42] However in addition to these empirical quarrels, one could certainly read Orford's book as evidence that statehood itself remains a key conceptual mechanism by which contemporary global hierarchies are maintained. That statehood is the axiomatic form of social, political and economic organisation would appear to be foundational to both 'military and monetary' interventions.[43] As Orford demonstrates, the 'international community' invests vast resources in maintaining that conceptual and geographic landscape.

IV POWER

The notion of mapping a conceptual cartography brings us to a consideration of power, the second axis along which mainstream conceptions of the relationship between international law and power merit complication. *Reading Humanitarian Intervention* is again an important member of the growing family of critical texts engaged in this task. As Orford has pointed out elsewhere, the vast majority of international law scholarship essentially adopts the kind of centralised, top-down understandings of power which could be described as juridical or

39 On this point, see Peter Fitzpatrick, 'Terminal Legality: Human Rights and Critical Being' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (2003) 119.

40 Orford, *Reading Humanitarian Intervention*, above n 5, 117–19.

41 See also Buchanan and Pahuja, 'Legal Imperialism', above n 9.

42 On the 'borderless world' thesis, see, eg, Kenichi Omae, *The Borderless World: Power and Strategy in the Interlocked Economy* (1990).

43 Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

'sovereign' models of power.[44] Even the most subtle of the three mainstream conceptions outlined in Part II operates within this paradigm. Thus, if we recall those conceptions, we saw sovereign power take three forms which are said to operate in competition with one another. The first, 'rule of power' type conception, is the 'raw' power exercised by sovereign states doing as they please. The second is power of the rules which sovereign states have collectively produced and which then take on a semi-autonomous, persuasive power over their conduct. The third is a melding of these two forms, in which the conduct of certain, more powerful states is understood disproportionately to influence the creation of those rules themselves. This third category of power begins to break apart the idea of international law as a self-contained system, but even this category, like the other two, operates within what might be called a sovereign or 'top-down' paradigm. Indeed, as Orford points out:

> The question as to whether international law is really law is never meant as a question about the utility of the sovereign model as a means of understanding the relationship between power and international law, but rather as a question about whether international law conforms to an otherwise self-evidently realistic model of power.[45]

Thus, such understandings are essentially concerned with a kind of 'guns, money and law' approach — all of these are, of course, important, but such an approach ignores valuable insights about how power might work in other ways.

Orford argues that 'much international legal scholarship continues to be "obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend."'[46] She wishes to disrupt this obsession through a consideration of the way in which 'law works through the creation of subjectivity and identity, rather than purely through the constitution of sovereign states and international institutions'[47] — that is, she is concerned with the power that operates to shape the way in which we understand the world, which relates to how truth and falsehood are constructed as categories, or how international actors (including states, diplomatic actors and even international lawyers) are themselves constructed as subjects who can do some things and not others.[48] As Orford recognises, all of these kinds of power are vitally important in shaping outcomes because, in a sense, they delimit the very terrain of possibility in which events take place.

Orford therefore eschews the international lawyer's habitual pursuit of 'analysing the ways in which international law can assist in constraining, disabling or negotiating with those who are imagined as holding power'[49] to follow an alternative approach to international law. This approach was developed through

[44] Orford, 'Positivism and the Power of International Law', above n 1, 507. See generally, Michel Foucault, *Power–Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon et al trans, 1980 ed) 78 [trans of: *Pouvoir–Savoir*].

[45] Orford, *Reading Humanitarian Intervention*, above n 5, 73.

[46] Ibid 39, citing David Kennedy, 'The International Style in Postwar Law and Policy' [1994] *Utah Law Review* 7, 14.

[47] Orford, *Reading Humanitarian Intervention*, above n 5, 39.

[48] See also Orford, 'Embodying Internationalism', above n 7.

[49] Orford, *Reading Humanitarian Intervention*, above n 5, 73.

the methodological shifts promoted by feminist, post-colonial and queer theorists.[50] According to these approaches, we need to recognise how far many authors of analyses of international politics 'are willing to go in underestimating the amounts and varieties of power it takes to form and sustain any given set of relationships between states.'[51] In order to understand those relationships better, we need to study the ways in which international law is, in fact, implicated in producing the relations and structures which it purportedly explains.

To this end, Orford is particularly concerned with the constitution of subjects. She draws on the work of Foucault to consider the ways in which international law is implicated in central, productive modes of power. These were famously termed 'disciplinary' modes by Foucault, through which 'subjects themselves are constituted through "a multiplicity of organisms, forces, energies, materials, desires [and] thoughts"'.[52] The subjects in which she is primarily interested include international lawyers, especially those who would consider themselves to be involved in the promotion of justice. However, Orford also considers the constitutive effects of the discourses around humanitarian intervention (including media imagery) on the way in which voters or political constituencies in the North endorse, and indeed urge, their governments to take action or to intervene militarily.[53]

Somewhat more problematic for any scholar in Orford's geographic and cultural position who shares her concern is the question of how to speak about the people subject to the interventions themselves. In this respect, Orford is careful not simply to assume that Foucault's analysis of the constitution of subjects through disciplinary power is itself universal. She takes heed of the insights of scholars such as Spivak, who point out that 'the new disciplinary mechanism of power in operation in 17th and 18th century Europe "is secured by means of territorial imperialism — the Earth and its products — 'elsewhere'".'[54] Orford goes on to help us to understand the ways in which sovereignty and subjectivity are interlinked — particularly in the way that the valencies between the sovereign and disciplinary modes of power work differently depending on whether one is in the North or the South. So, for example, part of what sustains a model of international order based on state sovereignty is the way in which, in the foundational texts and world views of international organisations, that very model of a rational order is juxtaposed with a disordered and lawless 'other'. This 'other' is represented both by failed or failing states, and by the 'unruly' people who inhabit them.[55]

50 Ibid 74.

51 Orford, 'Positivism and the Power of International Law', above n 1, 519, citing Cynthia Enloe, 'Margins, Silences and Bottom Rungs: How to Overcome the Underestimation of Power in the Study of International Relations' in Steve Smith, Ken Booth and Marysia Zalewski (eds), *International Theory: Positivism and Beyond* (1996) 186.

52 Orford, *Reading Humanitarian Intervention*, above n 5, 74, citing Foucault, above n 44, 79.

53 This theme recurs throughout the book: see, eg, Orford, *Reading Humanitarian Intervention*, above n 5, 79.

54 Ibid 76, citing Gayatri Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1999) 279.

55 See also Pahuja, 'Technologies of Empire', above n 30.

This kind of analysis of power is still relatively rare in international legal scholarship. It provides a much needed counter to the prevalent belief in international law scholarship that imperialism and its variants were aberrations in the international legal order, or that with decolonisation, a new era was heralded in which international law would provide the best remedy for past injustices.[56] However, as Orford points out, such beliefs rest on the assumption that international law is free from 'imperialist desire'.[57] They ignore the growing body of work which demonstrates, for example, the ways in which the 'international legal imagination' is itself a product of international law's colonial origins.[58] These origins define and delimit key concepts in international law (including sovereignty), circumscribing their implicit emancipatory promise from the outset.

Work in this vein could be said to take seriously the terms on both sides of the post-colonial hyphen, asking exactly what it is that we are putatively over, and from which we therefore depart, instead of simply accepting the 'post' as an historical descriptor. This post-colonial sensibility builds upon work carried out in other disciplines, largely because of which '[w]e now know that colonial conquest was not just the result of the power of superior arms, military organization, political power or economic wealth — as important as these things were.'[59] Rather, '[c]olonialism was made possible, and then sustained and strengthened, as much by cultural technologies of rule as it was by the more obvious and brutal modes of conquest that first established power on foreign shores.'[60] International lawyers in the main, have been particularly slow to recognise that

> the cultural effects of colonialism have until recently been too often ignored or displaced into the inevitable logics of modernization and world capitalism; and this only because it has not been sufficiently recognized that colonialism was itself a cultural project of control. Colonial knowledge both enabled conquest and was produced by it; in certain important ways, knowledge was what colonialism was all about. Cultural forms in societies newly classified as traditional were reconstructed and transformed by this knowledge, which created new categories and oppositions between colonizers and colonized, European and Asian, modern and traditional, West and East.[61]

International law as a discipline has been slow to examine whether these forms of knowledge, facilitative of, and in turn produced by, the colonial encounter, included international law, and indeed modern law itself.[62] However, *Reading Humanitarian Intervention* unravels in detail the ways in which those resilient

[56] See, eg, Nathaniel Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1515.

[57] Orford, *Reading Humanitarian Intervention*, above n 5, 21.

[58] See Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies: An International Journal* 321.

[59] Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (2001) 9.

[60] Ibid.

[61] Ibid.

[62] See generally Peter Fitzpatrick, '"The Desperate Vacuum": Imperialism and Law in the Experience of Enlightenment' in Anthony Carty (ed), *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (1990) 90.

colonial categorisations and ways of knowing the world are embedded in international law and continue to have powerful effects in this putatively 'post-colonial' era.

However, Orford brings these insights about power to bear on the study of international humanitarian intervention in a way which is more conscious of the dangers of complicity for a scholar in the North than can be found in much other post-colonial critical scholarship. One response to this danger has been for scholars, such as feminist international lawyers, to engage reflexively in examining the conditions of the author's own material and cultural position as well as the resultant situatedness and contingency of their own scholarship, in order to challenge the purported universality of the resultant 'knowledge' being produced.[63] Another response, sometimes combined with the first, has been to consider the ways in which the 'other' is constructed as a subject through various emanations of disciplinary power coextensive with occidental epistemologies. This is often accompanied by sociologies of resistance which account for the agency of the 'other'. However, whilst such projects do pose very significant challenges to the ways in which the production of knowledge in the North operates along an imperial continuum, they usually stop short of asking how the construction of the 'other' is necessarily constitutive of the 'self'. That is, they do not follow through with the necessary implications of developing a relational understanding of the subject.[64]

Thus, in recent law and development scholarship, many scholars have absorbed the lessons of various critical currents in legal thought to the extent that they try to unpack the myriad functions law might be serving in the context of 'development'. However, very few of them actually ever ask what is at stake for 'us' (the North) in this narrative of development. Or, in other words, why development?[65] Similarly, in the context of intervention, scholars seldom ask why the 'international community' might want to intervene for its own sense of self.

Orford, on the other hand, is concerned with exactly this question. This is complex, for it is not simply about the cynical stance which argues that the North intervenes whenever oil, or other important economic interests, are at stake. This question is not irrelevant but leaves open the space for others who are — probably quite justifiably — convinced of their own purity of motives to argue for a more 'just' conception of intervention. Furthermore, it creates the impression that if only international humanitarian intervention were conducted 'properly' (under the banner of the UN, for example), even-handedly and according to established rules and procedures (indeed, pursuant to the rule of law), it would

63 This is not an unimportant project in itself: see, eg, Brenda Cossman, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project' [1997] *Utah Law Review* 525.

64 See, eg, Peter Fitzpatrick, 'Missing Possibility: Socialization, Culture and Consciousness' in Austin Sarat et al (eds), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (1998) 185.

65 One notable exception to this is the remarkable work by Jennifer Beard tracing a genealogy of development and showing that development as a concept arguably serves its primary function in securing the self-constitution of the 'developed' world: Beard, above n 3.

require no further justification. Instead, Orford wants to trouble this idea of even the best version of intervention by asking what features of the 'international community' might require repeated acts of intervention to shore up its own identity. What desires and fantasies are playing out in the 'heroic narratives' of international law, which might precipitate both the act of intervention and a belief in its necessity?[66]

V LAW

I wish to explore one further aspect of Orford's decision to concentrate on the narratives which 'locate [law] and give it meaning' such that law can be understood as 'not merely a system of rules to be observed, but a world in which we live'.[67] That is, whether a necessary complement to Orford's project is one which considers the specificity of the movement of modern law itself. Before I do this though, and in order to explain why this project might add to rather than undercut work which, in a sense, dethrones law, it is necessary to consider how *Reading Humanitarian Intervention* and other similarly oriented projects usefully unpack the way in which law is embedded in an extensive network of regulatory practices to which the mainstream pays little heed.

Returning to the concern which I identified above as underlining the mainstream conceptions of the relationship between law and power — does international law have the capacity to constrain the behaviour of the most powerful states? — one important assumption underlying this type of question is that weak states want law. Indeed, it is axiomatic in the mainstream that international law is the natural choice for weak states.[68] Its putative hallmark, sovereign equality, promises that in international law, 'strength or weakness … counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful Kingdom.'[69] This assumption is also prevalent amongst South-friendly supporters of the international legal trading regime who would argue that trade rules are most helpful to the weak.[70]

It would be foolhardy to suggest that rules are never useful to the weak.[71] However, this assumption demonstrates a conception of law which overlooks the way in which international law *itself* might be mediating the relationship between the powerful and the weak, or be implicated in creating and maintaining those very hierarchies. This view sees law as set or 'constituted' by social relations, rather than as also being constitutive of them. Thus, if we recall the conception which I labelled above as the most nuanced of the mainstream positions — that is, the understanding which recognised that international law

66 Orford, *Reading Humanitarian Intervention*, above n 5. See esp at ch 5.

67 Orford, *Reading Humanitarian Intervention*, above n 5, 158, citing Robert Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4, 4–5.

68 See, eg, Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (2003).

69 Ibid 10.

70 See, eg, Macmillan, above n 19.

71 There is clearly a large and distinguished body of scholarship which argues that laws are devised by the weak to protect themselves from the strong: for a brief sketch, see, eg, Douzinas, above n 9, 27.

could be both a source and effect of power — I would argue that we need to supplement it by inverting that formulation and understanding that power is both a cause and effect of law.

Thus, *Reading Humanitarian Intervention* is useful in that it destabilises the central, positive (or posited) place of law, in order to consider the ways in which law itself is productive of the subjects which it purportedly regulates and builds those subjects into certain hierarchical relations. It is particularly useful, too, in unpacking the ways in which law does not achieve this alone, but rather is embedded in a much more extensive network of regulatory practices, including discursive practices (such as the instance of disciplinary power raised above). Together these elements form what we might call a 'normative web', productive of certain kinds of subjects and delimiting certain kinds of possibilities. However, it is here that another step arguably needs to be taken, and that we need once again to return to the specificity of modern law. In particular, I would suggest that after a project considering the narrative dimensions of law, we need to consider why the law's narratives are not just any kind of narratives, but have a particular power. That power is based upon law's claim to authority.

Reading Humanitarian Intervention is centrally concerned with the way in which narratives of humanitarian intervention come to elevate occidental values — why 'the international community' comes to be associated with what is good or why Western values become associated with that which is desirable.[72] However, I think it might be necessary to explore further the ways in which the originary connection between law and community authorises these narrative associations. Such authorisation works through the way in which claims about social organisation, the foundation of a certain kind of order and the delimitation of the subject are made through and by modern law.

Orford does engage with the notion of founding acts. However, she confines her analysis of such acts to the notion of community, here the 'international community'. Notably, she is concerned throughout the book with the way that '[t]he narratives of humanitarian intervention also attempt to achieve stability and security … through trying to fix the identity of those states that make up the "international community".'[73] However, a failure to unpack the mutually sustaining relationship between law and community — in these foundational moments in particular — makes me wary of Orford's apparent return to human rights as a possible way forward. The reason for this is that if the putative delimitation between self and other occurs in a defining way, through the 'foundation' of the 'international community', and that mythic foundation is secured through law, then human rights (which are similarly secured), may be insufficiently destabilising to that foundation. Furthermore, the ongoing certainty of that foundation may encourage the maintenance of the dynamic of exclusion against which Orford would wish to struggle. In order to examine this further, let us consider the way law makes a claim to origin, and the possible effects of that claim.

[72] Orford, *Reading Humanitarian Intervention*, above n 5. Again, this theme recurs throughout the book, but see esp at 169.

[73] Ibid 204.

In the origin, there is a beginning. By this, I mean that a story of origin would seem to describe a beginning: a beginning which marks a break from that which preceded it and which provides a foundation for that which follows. When a system of social organisation narrates its origin, it draws a limit by saying, 'this is our beginning', and 'it is from here that we exist and have meaning'. The effect is thus authoritative and authorising. By founding authority, the narrative of origin erases the possibility of being — of arriving — otherwise. Moreover, it prevents the subject of narration from being more than the origin allows. The subject is always that which is already born of its origin.[74]

This, of course, is not to say that the origins used to narrate a particular subject cannot be reauthored. Indeed, the story of origin must continually be rewritten to be the origin of what we are now. The Western legal subject of international law is a prime example of a topic that has retained its bodily integrity despite, or perhaps because of, the possibility of retelling the story of law's origin. Hence, the legal subject has existed (variously) under the authority of natural law, divine right and, according to social contract theory, by itself consenting to undertake the authorisation of its origin. In this way, too, secular authority takes the place of sacred authority[75] such that secularism must therefore be seen as part of the religious tradition.

Although these retellings replace the origin, or re-site/cite the legitimate source of authority, in each, the new authority begins against, and therefore from, that which it replaced. This mnemonic trace of authority, which haunts the legal subject, is also evident in the now familiar primal scene described by Freud (which, after Fitzpatrick, one could read as a telling instance in modernity's narration of its origin).[76] In this myth of origins, the community of sons kill their father but by eating him they internalise his authority and take his place. In this way, the authority of the Father is dispersed but nonetheless remains present. Each of the origins in this narrative palimpsest serves to limit and secure the body of the legal subject into an authorised text. This body is secured against the savage, who is alleged in its otherness, to be law's reason. In the savage, the narrative itself, with a backward glance, tells the story of a progressive movement from pre-text to text.

The origin must thus mark an exclusion. So when international community and international law are born together, they are brought into being by that which is excluded. This exclusion can be combined with the way in which each concept — law and community — coheres the other in its putative secularity. Together they reveal that when economic and/or military interventions are undertaken by reference to the rule of law, what might result in that law is limited by the nature of the community by which it is authorised. The originary congruence of law and community also facilitates a world in which many people are, because they are outside the authorised community, simply outside the law. That is, their actions

[74] The ideas in this and the following two paragraphs are drawn from Jennifer Beard and Sundhya Pahuja, 'Before the Beginning: Disclosing Law's Foundation' (2003) 19 *Australian Feminist Law Journal* 1.

[75] Jacques Derrida, 'A Discussion with Jacques Derrida' (2001) 5 *Theory and Event* 1, 14.

[76] Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001) 4.

are not judged even putatively according to a standard of legality or illegality, or governed by legal procedure and with recourse to review. Rather, they are simply cast as 'outlaws', congruent with 'evil' or 'terror', and therefore legitimately subject to unrestrained violence. Arguably, the war on terror is conducted in the shadow of this casting out, and the instance of Guantanamo Bay is a pointed example of the 'legal black hole'[77] into which such outsiders may be cast.

However even for those not cast out, law both facilitates ongoing interventions in the first place, and constrains what might result. That is, it forecloses the possibility of self-determination occurring outside of the limited shape of the economically rationally-governed, globally-articulated, nation-state. Indeed, *Reading Humanitarian Intervention* is centrally concerned with precisely this foreclosure in its persuasive illustration of the ways in which 'the international community' comes to elevate occidental values.[78] However, as mentioned above, the originary connection between law and community which supports these narrative associations begs consideration, and more pressing still when resistances to such interventions, or even attempts to temper their worst effects, are defined by reference to human rights.

Orford herself would appear to be somewhat ambivalent about the potential for human rights to address her central concerns, but does not seem to have lost faith in the possibility that they might. Implicit in her concern that '[t]he institutionalised commitment to a narrow range of civil and political rights as the end of military and monetary intervention has shut out other opportunities for dissenting from the established order or achieving emancipatory ends'[79] is the notion that a broader conception of human rights might be the way to that emancipation. Similarly, her portrayal of the 'human rights victim'[80] as a spectral figure which might haunt the international community into envisaging a more inclusive notion of justice would suggest that there is some fixity to such a creature, specifically by reference to their status as 'human rights victims'.

For me, this spectral 'human rights victim' is already marked by law, made victim by the lines of exclusion drawn in its authoritative hand. In arguing that '[h]uman rights has the potential to found an international law that is not limited to supporting the fantasy life of nations and the international community through recreating the violent exclusions of the alien or the foreign'[81] Orford would, in some senses, appear to be calling international law to make good on its promise. However, throughout the rest of the book, it is arguable that we have been shown that international law's promise might be part of the problem. 'Refounding' international law on human rights would therefore appear to be unable to escape the violent creation of self and other, and may even play into international law's imperialising urge, this time powerfully delineating what it means to be human. Orford, though, is trying to avoid, or at least minimise, this danger by accompa-

77 *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Abbasi* [2002] EWCA Civ 1598 (Unreported, Lord Phillips MR, Waller and Carnwath LJJ, 6 November 2002) [22].
78 Orford, *Reading Humanitarian Intervention*, above n 5, 169.
79 Ibid 202.
80 Ibid ch 6.
81 Ibid 214.

nying this call to human rights with a reconceived notion of the same in which we recognise the 'foreignness in ourselves'.[82] And she would point, for example, to the necessary move by which we must understand the refugee as the 'other' of the subject citizen. However, I wonder whether such a 'strategy' (though it is too strong to call it that) perhaps persists in the realm of the appropriation and reversal of rights, more than the displacement of the categorical distinctions which draw lines between self and other to begin with, and upon which those rights are founded.[83] Indeed, Orford herself is deeply concerned with the relationality of being, but would seem unwilling to take that relationality to a point to which it would seem necessarily to lead us, but which would require her to relinquish her faith in human rights (law).

For me, though, I wonder whether pushing this notion of relationality is precisely that which might begin to unravel the imperialising tendencies of modern law.[84] That is, I wonder whether it is not so much a 'recognition' of the foreignness in 'ourselves' for which we should strive, but rather to dwell in the impossibility of finite being such that the movement of differentiation between self and other is the space in which meaning is sought. Or, to put it another way, I wonder whether we should try to rethink an international law, based not on 'right', or a 'founding' of human rights, but on a more determinedly relational understanding. With such an understanding, we would be forced to take account of the impossibility of fixed and determinate being — both for our 'selves' and for 'others'. We would do this in ways which open up, rather than broaden, reorganise, or even revalorise the categorisations upon which colonialism and imperialism depended, and arguably upon which human rights still depends.[85]

Obviously, such a rethinking does not lead us easily to a place of prescription as to what the international 'order' should be. Yet, in my view, this absence of prescription is an important stance for scholars of international law, especially those situated in the North, to adopt. Indeed, Orford's own ambivalence about the notion of 'reform' is an important current in the book. Relatedly, one could read Orford's desire to break apart the choice between 'action' and 'inaction' which seems to confront the international community in at least two ways. The first is in the way discussed above, in which representations of 'inaction' erase the involvement of the international community in states subject to intervention prior to the outbreak of a humanitarian crises. Another reading, though, is suggested implicitly by Orford's poetic conclusion about the notion of 'action'

[82] Ibid.

[83] See generally Jacques Derrida 'The Laws of Reflection: Nelson Mandela, in Admiration' in Jacques Derrida and Mustapha Tlili (eds), *For Nelson Mandela* (1987) 13; Robert Bernasconi, 'Politics beyond Humanism: Mandela and the Struggle against Apartheid' in Gary Madison (ed), *Working through Derrida* (1993) 94.

[84] See also Pahuja, 'This Is the World: Have Faith', above n 8.

[85] This idea of thinking through relationality is inspired by my readings of Jean-Luc Nancy: see, eg, Jean-Luc Nancy, *The Inoperative Community* (Peter Connor et al trans, 1991 ed) [trans of: *La Communauté Désoeuvrée*]; Jean-Luc Nancy, *Sense of the World* (Jeffrey Librett trans, 1998 ed) [trans of: *Le Sens du Monde*]; Jean-Luc Nancy, *The Birth to Presence* (Brian Holmes et al trans, 1993 ed) 143. It would be absurd to suggest though that these provocations come in any way close to indicating his arguments, but they might hopefully be provocations to the reader to further explore them him or herself.

itself. It proposes the ways in which certain narratives, which Orford associates with masculinity, do not accept what one might call a certain 'stillness', as itself also *doing* something.[86]

In a scholarly lexicon, one might be able to draw an analogy between the loving stillness instantiated for Orford in 'the arc of the bodies of mothers sleeping against their sick children'[87] and the notion of critique without prescription. This kind of 'quiet action' is commonly eschewed by the 'defenders of traditional legal method' who would treat it as an exercise of 'illusory radicalism, rhetorically colourful but programmatically vacuous'.[88] However, if one pays heed, as Orford does, to the lessons drawn from the post-colonial critique sketched above, then it is clear that even the well-intentioned may be complicit in an imperialising project, made all the more insidious because of their capture of virtue or 'justice'. This is particularly so when international law is grounded so firmly in the metaphysical commitments of the enlightenment project of enacting transformative practices of emancipation based on a universal vision for the future.[89]

Thus, rather than produce reform proposals, I would advocate critical scrutiny of the ways, in which notions of development and intervention are related to the self-constitution of the North, or indeed to the 'international community'. Also to be scrutinised are the exclusionary effects of those founding acts as a major (and possibly even only) part of any thoughtful answer to the question of 'but what should we do?'.

VI CONCLUSION

Perpetually haunted by the twin spectres of international law's fragile normativity and seeming non-enforceability, it sometimes seems that international lawyers are so intent on defending international law against the charge that it is not powerful in a sovereign sense that they are blind to the ways in which it is extremely powerful in other ways. This is never more true than in the ongoing reinscription of the North/South divide, and the inequalities and exploitation which that implies. *Reading Humanitarian Intervention* is a timely and powerful counter to that blindness, unravelling the many ways in which international law is more implicated in who 'we' are than might at first appear.

Orford's delineation of the dangers of putatively humanitarian intervention suggests that international law's imperial desires may be playing out in such notions, even in their most well intentioned manifestations. And unfortunately for all of us, it seems that she has turned out to be depressingly prescient. In this contemporary moment of the 'war on terror', the lineaments of new interventions

[86] Arguably, the question of whether or not doing something can also be a form of action is a recurrent bugbear of the common law. An example is the difficulties the law has with the notion of liability, and the extent to which an omission is a positive action.

[87] Orford, *Reading Humanitarian Intervention*, above n 5, 217.

[88] Ibid 39, citing Brad Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii' (2000) 98 *Michigan Law Review* 2056, 2057.

[89] See generally Bradley Bryan, 'The Constitution and the Program: Haraway and the Politics of Cyborg Emancipation' (2003) 19 *Australian Feminist Law Journal* 93.

in Iraq and Afghanistan, and the 'nation-building' that has come in their wake, it seems that '9/11' has not so much precipitated a ruptural moment of insecurity in the world as made visible an imperium which would seem to be part of a much longer continuum. However, it is possibly the 'quiet action' of critical interventions, such as *Reading Humanitarian Intervention*, rather than the violence of war, which can ever begin to precipitate a break.