

## BOOK REVIEW

*INTERNATIONAL LAW AND ITS OTHERS*, EDITED BY ANNE ORFORD  
(CAMBRIDGE, UK: CAMBRIDGE UNIVERSITY PRESS, 2006) 434 PAGES.  
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*International Law and its Others* is a pleasure to read, and a struggle to review.<sup>1</sup> In 're-viewing', one claims to be looking again at something earlier surveyed. And the authority to which a review essay lays claim seems to depend in part upon this unreported pre-reading — a pre-reading from which the reader of the review is always barred. A review essay also purports to recommend. In that sense, it looks forward: anticipating the reader's subsequent encounter with the reviewed text, or asking the reader to relive their prior reading of the same. Occasionally, a review will ask readers to swallow a book whole, but usually it will attempt to dismember and reassemble a book for the reader's ready consumption. Any allure of the offer of 'guidance' a review lays on this cutting board depends in part upon that clandestine pre-reading of which it boasts. Looking back while looking forward, a review essay whispers: 'I know something you may not know'.

What a review essay often claims to know is the wholeness of the book reviewed: its (partially secreted) 'meaning' and its 'proper' placement in a discipline. This is a hard claim to make at the best of times. It is a particularly difficult claim to make in this instance, when the book in question is comprised of 15 rich and challenging essays. Many of these, moreover, seem to be probing quite distinct accounts of 'international law', and quite divergent senses of its 'others'.<sup>2</sup> The 'reciprocal stating of the law' that Costas Douzinas identifies with the institution of the *demoi* in classical democracy, often seems to break down here.<sup>3</sup> This book enacts no community. Readers looking for a definitive statement of a 'school of thought' should look elsewhere. Readers seeking experiences of international legal reading charged with 'a stimulating sense of danger',<sup>4</sup> and open to the risk of being baffled, disturbed and/or captivated, would do well to open this book.

### I THE ORDER AND THE ADDRESS

Anne Orford's introductory essay announces *International Law and its Others* as 'part of a broader movement seeking to regenerate the exchange between international law and the humanities'.<sup>5</sup> This 'movement', she writes, seeks 'to

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<sup>1</sup> Anne Orford (ed), *International Law and its Others* (2006).

<sup>2</sup> This is a point made in the book's final essay: Hilary Charlesworth and David Kennedy, 'Afterword: And Forward — There Remains So Much We Do Not Know' in Anne Orford (ed), *International Law and its Others* (2006) 401, 404.

<sup>3</sup> Costas Douzinas, 'Speaking Law: On Bare Theological and Cosmopolitan Sovereignty' in Anne Orford (ed), *International Law and its Others* (2006) 35, 39.

<sup>4</sup> Charlesworth and Kennedy, above n 2, 405. On 'dangerous writing', see Fleur Johns, 'On Writing Dangerously' (2004) 26 *Sydney Law Review* 473.

<sup>5</sup> Anne Orford, 'A Jurisprudence of the Limit' in Anne Orford (ed), *International Law and its Others* (2006) 1, 2.

restore the ability of international law to address' precisely 'what is at stake' when people turn to international law 'in today's political environment'.<sup>6</sup> Orford's is a compelling manifesto for an unruly bunch of writers, for whom the term 'movement' seems somewhat misplaced. And yet the contributors do share a concern to probe the many ways in which an 'other' to international law is 'figured, performed, inscribed and imagined in the discipline'.<sup>7</sup> Of far lesser sharing have movements been made.

Orford loses no time in heading off any expectation that the book will unleash a heart-rending tale of exclusion, ending in a redemptive embrace. International law's 'others' will not, she relates, 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 perform the role of 'an other of a law which imagines itself as international, even at time universal'.<sup>8</sup> The book's contributors 'take seriously' questions posed by the history of imperialism, Orford observes, and owe much to the scholarly tradition of its critical engagement. Yet, they also 'depart from, and at times challenge' that tradition.<sup>9</sup> One discerns this challenge in the persistence of the contributors' efforts to disavow or surpass the final term of a 'unique addressee'.<sup>10</sup>

For some contributors to this book, the task of 'interpreting the texts of law' absent such a unique addressee is the task of recording 'the presence of another's law' in international law's work of subject-making.<sup>11</sup> For that work, Douzinas' essay lays some fresh metaphysical ground. Taking up the 'dirty word' of sovereignty, Douzinas disputes the idea that sovereignty 'has lost its power' in the face of 'universalizing exigency'.<sup>12</sup> Rather, according to Douzinas, sovereignty has 'lost ... its ability to make sense'<sup>13</sup> in metaphysical terms or to 'set the ends of community'.<sup>14</sup> This loss impels Douzinas back into the metaphysical register to 'examine the kind of person and social bond' being instantiated by a 'virulently post-metaphysical' age.<sup>15</sup>

Working in that metaphysical register (a key out of favour in 'acoustic econom[ies]' of recent decades),<sup>16</sup> Douzinas' essay is committed to reopening a gap between the constative and performative dimensions of sovereignty: that is, between the said and the saying of sovereignty.<sup>17</sup> He works at this by developing

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid 3.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 3–4.

<sup>10</sup> Ibid 31, with reference to Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (Alan Bass trans, 1987) 81 [trans of: *La carte postale: de Socrate à Freud et au-delà*].

<sup>11</sup> Orford, 'A Jurisprudence of the Limit', above n 5, 26.

<sup>12</sup> Douzinas, 'Speaking Law', above n 3, 35, 37–8 on 'universal exigency', quoting Jacques Derrida, 'Globalization, Peace, and Cosmopolitanism' in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews, 1971–2000* (Elizabeth Rottenberg trans, 2002) 371, 375 [trans of: *La mondialisation, la paix et la cosmopolitique*].

<sup>13</sup> Douzinas, 'Speaking Law', above n 3, 38.

<sup>14</sup> Ibid 54.

<sup>15</sup> Ibid 37–8.

<sup>16</sup> Costas Douzinas, 'The Metaphysics of Jurisdiction' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (2007) 21, 29.

<sup>17</sup> Douzinas, 'Speaking Law', above n 3, 43–4.

a distinction between ‘bare sovereignty’ (or the infinite expressive process that is the self-constituting of a people) and ‘theologico-political’ sovereignty (or the ‘someone or something ... [that] substitutes for the temporal process of becoming’).<sup>18</sup> It is, according to Douzinas, the ‘rolling together’ of these that permits an experience of a particular decision as an articulation of the universal and ‘projects on community the figure of One’.<sup>19</sup> This, in turn, gives modern politics identity ‘as domination, resistance and conflict’ and ‘valorizes individual desire only in accordance with a domination or subjection to the sovereign’.<sup>20</sup>

By re-inscribing a ‘sense’ to sovereignty in these terms, Douzinas stands opposed to the replacement of sovereignty by humanity or cosmopolitan sovereignty — principles that he associates with the instantiation of ‘a bare and nihilistic justice’.<sup>21</sup> Instead, Douzinas would have us tend to the distance ‘between particular and universal or between performance and statement’, so as to cultivate the ‘memory and possibility’ that the claim of the sovereign (or the projection of the One) may fail.<sup>22</sup> It is in this separation that critique becomes possible, Douzinas writes, but also violence: no guarantee of benign openness is proffered here.<sup>23</sup> Far from evacuating foundations (as in the ‘groundlessness’ of humanity<sup>24</sup>), Douzinas works to reopen in them ‘the remembrance or promise of absent value [rather than] absence simple’:<sup>25</sup> recovering a sense of the ‘fragility of communal construction’ and its infinite remaking.<sup>26</sup>

For all its attentiveness to the performative, the constative bears down heavily in Douzinas’ essay. Douzinas writes of the ‘uncertainty’ of the claim made by a sovereign voice.<sup>27</sup> And yet the words in which this uncertainty is recorded are so definitive and sweeping that they often *sound* like a ‘closing down’.<sup>28</sup> Is there something about writing a succession of ‘the law is’ statements that often does this? Writing of the self-calling of community, for example, Douzinas observes, ‘[t]he speaking of the law gives community a voice (which is another word for decision or judgment)’.<sup>29</sup> This struck me as an odd equivalence. When decision is pronounced in the name of ‘law’, is that law necessarily (or even conceivably) thought as a unity (‘a’ voice)? If so, why does it seem so hard sometimes to settle the question of what a lawgiver’s decision is, or was, on any contested claim, or even when and where the pertinent decision took place? Can the elusiveness of decision in law be written off as one more level of ‘confus[ion]’ calculated to ‘conceal’ and ‘confound’ the performative dimension of sovereignty?<sup>30</sup> Conversely, might the memorialisation of decision as so attributable not entail

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<sup>18</sup> Ibid 46–7.

<sup>19</sup> Ibid 43, 46, 51.

<sup>20</sup> Ibid 52–3.

<sup>21</sup> Ibid 54–5.

<sup>22</sup> Ibid 52.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 55.

<sup>25</sup> Ibid 54.

<sup>26</sup> Ibid 53.

<sup>27</sup> Ibid 52.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 46.

<sup>30</sup> Ibid 51.

obfuscation of its unavoidability and its difficulty?<sup>31</sup> And how does this figuration of decision sit with Douzinas' further claim that processes of self-institution are 'infinite'?<sup>32</sup> Might not processes of decision be thought similarly: not only as a *response* to incalculability, but as an almost unavoidable *articulation* of the same?<sup>33</sup> That may be precisely Douzinas' point. Nonetheless, the performance of the essay seemed, at times, to work against its stated project. Or could it be that one needs to adopt the tone of a father if one would generate metaphysical grounds for relinquishing the 'desire for a Father or law-maker'?<sup>34</sup>

Ian Duncanson's essay speaks to the desire for a law-maker in a very different tone.<sup>35</sup> Alongside the concept(s) of sovereignty on which international law has long fixated, Duncanson excavates a half-written precedent for 'explor[ing] ... the possibility of negotiating difference peacefully without Leviathan'.<sup>36</sup> From within the social and political annals of post-Glorious Revolution England, he draws out 'a conception of law without much vertical hierarchy or a sovereign',<sup>37</sup> a 'normative order whose primacy does not depend on Benthamite principles'.<sup>38</sup> Recovering this sense of law's other incarnations from 18<sup>th</sup> century England could, Duncanson suggests, be 'fruitful' for an international law forever haunted by Benthamite derision.<sup>39</sup>

In Duncanson's sketch, we encounter a 'whole way of life' offering designs for 'social spaces, manners of address and the choreography of bodies'.<sup>40</sup> These designs were dedicated, Duncanson writes, to inculcation of a 'habit of a sociable disposition' emanating from a commitment to the 'ideal of a society of unforced civility'.<sup>41</sup> In Duncanson's reading, this was directed not towards the production of consensus, but rather towards 'allow[ing] differences to be negotiated without animosities permanently establishing themselves'.<sup>42</sup> The infinitely repeated 'decision ... to be in common'<sup>43</sup> of Douzinas' account is sketched in ethnographic terms here in the 'continual adjustment of agreements about how commonality is to be maintained'.<sup>44</sup> It is in this context that Duncanson is hopeful 'the affairs of others might achieve some recognition'.<sup>45</sup>

As though seeking to enact this 'way of life'<sup>46</sup> before our eyes, Duncanson's essay makes a number of 'sociable' concessions. He concedes that 'the depiction

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<sup>31</sup> 'International lawyers memorialize a certain set of knowledge and practices': Orford, 'A Jurisprudence of the Limit', above n 5, 12.

<sup>32</sup> Douzinas, 'Speaking Law', above n 3, 47.

<sup>33</sup> Cf Orford, 'A Jurisprudence of the Limit', above n 5, 17.

<sup>34</sup> Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) 328.

<sup>35</sup> Ian Duncanson, 'Law as Conversation' in Anne Orford (ed), *International Law and its Others* (2006) 57.

<sup>36</sup> *Ibid* 57, 63–4.

<sup>37</sup> *Ibid* 58.

<sup>38</sup> *Ibid* 63.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* 57–8.

<sup>41</sup> *Ibid* 73.

<sup>42</sup> *Ibid* 58.

<sup>43</sup> Douzinas, 'Speaking Law', above n 3, 40.

<sup>44</sup> Duncanson, above n 35, 66.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 57.

of England ... as a population of “polite and commercial people”<sup>47</sup> risks ‘divert[ing] ... attention from production’<sup>48</sup> and from the many ‘*impolite* invasions of the customary rights of working people by their rulers, employers and landlords’.<sup>49</sup> He even feels bound (in a collection in which two Jacques loom large: Jacques Lacan and Jacques Derrida) to ventriloquise a ‘Lacanian’ view, albeit in the subjunctive tense.<sup>50</sup> Nonetheless, Duncanson remains hopeful that 18<sup>th</sup> century habits might yield ‘prudential rather than messianic’ ideas of justice by reference to which some of the central scripts of international law (as order among sovereign states) may be re-read and/or re-written.<sup>51</sup>

Rather than bewailing the failings of contemporary international law, Duncanson has put another version of that law (politely) on the table: an account of justice ‘first formed in “company and conversation” and ... embedded in convention’.<sup>52</sup> Yet, it still remains unclear from where Duncanson derives his confidence that Leviathan and violence have vacated this law-making scene. It is also unclear precisely what sense of ‘justice’ is implied in Duncanson’s reading. Does recalling the exchange of mannered missives among the literate classes of the 18<sup>th</sup> century entail the sending of unaddressed ‘open letter[s]’ of the sort that Orford appeals for in the introduction to this book?<sup>53</sup> Can we be so sure that Leviathan has left the building these 18<sup>th</sup> century conversationalists inhabit, when one takes seriously the point made by Douzinas about the mirroring of sovereignty in the ideal of the self-governing ‘civil’ individual,<sup>54</sup> or Connal Parsley’s reading of subjectivity as a taking place of a fantasy of the Leviathan’s return?<sup>55</sup> Reading all this talk of polite conversation, I kept seeing the work of the artist Kara Walker flash before my eyes: her parlaying of the genteel 18<sup>th</sup> century art of cut-paper silhouettes into scenes of incest, rape, mutilation and bestiality.<sup>56</sup> What, I wondered, might be the place of these images and interactions in Duncanson’s conversation?

Moving from Duncanson’s coffee house setting to another quotidian domain, Dan Danielsen’s essay sets about disassembling international law’s routine projection of the global economy as ‘not-law’ or ‘not-law-enough’.<sup>57</sup> His field of work is closer to international law’s presumptive ‘home’ than that of Duncanson, but equally remote in many ways: Danielsen turns our attention to daily

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<sup>47</sup> Ibid 64.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 65 (emphasis in original), quoting Paul Langford, *A Polite and Commercial People: England 1727–1783* (1989).

<sup>50</sup> Duncanson, above n 35, 80.

<sup>51</sup> Ibid 70.

<sup>52</sup> Ibid 79, quoting Nicholas Phillipson in his discussion on David Hume’s work: Nicholas Phillipson, *Hume* (1989) 49; David Hume, *Enquiries concerning Human Understanding and concerning the Principles and Morals* (2<sup>nd</sup> ed, 1901) 306.

<sup>53</sup> Orford, ‘A Jurisprudence of the Limit’, above n 5, 31, with reference to Derrida, *The Post Card*, above n 10.

<sup>54</sup> Douzinas, ‘Speaking Law’, above n 3, 37.

<sup>55</sup> Connal Parsley, ‘Seasons in the Abyss: Reading the Void in *Cubillo*’ in Anne Orford (ed), *International Law and its Others* (2006) 100, 120, drawing on Judith Butler, *Excitable Speech* (1997) 78.

<sup>56</sup> Annette Dixon (ed), *Kara Walker: Pictures from Another Time* (2002).

<sup>57</sup> Dan Danielsen, ‘Corporate Power and Global Order’ in Anne Orford (ed), *International Law and its Others* (2006) 85.

governance practices undertaken by and within corporations, drawing upon '[m]any years' spent 'as a transnational corporate lawyer'.<sup>58</sup> Casting corporations in the role of producers in/of the global regulatory regime, Danielsen asks us to think of corporations 'as legal institutions performing public regulatory functions with public welfare effects not unlike nation-states'.<sup>59</sup> For Danielsen, this raises a range of questions, among them: '[h]ow do corporations govern globally?';<sup>60</sup> what transnational social welfare and policy consequences might flow from this or that change in (national) corporate rules;<sup>61</sup> and why has the 'neo-liberal regime of "best practice" corporate governance ... not met with more resistance in developing countries or transitional economies in recent years'?<sup>62</sup>

In part, Danielsen offers this question-begging redescription of the 'transnational economic sphere' in what one might take to be a pedagogical mode, drawing upon that old law school favourite: a hypothetical. The law school classroom is, thus, a second quotidian domain of political decision evoked here (in a gesture that will later be echoed in Anne Orford's essay).<sup>63</sup> Danielsen also effects a subtle yet significant tweaking of the 'standard' international law reform project or policy proposal. Here, he takes law reform ideas and questions that would seem routine were they levied at 'public' agencies and institutions (concerning, for instance, changes to the composition of representative and/or ruling bodies), and directs them towards unfamiliar targets in the 'private' domain.<sup>64</sup> At the same time, he repeatedly warns that decisional effects cannot be predicted reliably in advance: 'each legal mechanism might also produce more adverse consequences than it alleviates'.<sup>65</sup>

In these ways, Danielsen makes of the approachable and the familiar in international law something quite different. It is not Danielsen's style to say to his reader(s), 'what you desire most fervently does not exist'.<sup>66</sup> Rather, he seems to invite an excitation of the prevailing disciplinary fantasy — the aspiration to full knowledge or mastery of outcome — towards a policy proposal that veers almost imperceptibly in the direction of the absurd, and is at the same time serious and deserving of being taken seriously.<sup>67</sup> This presents another way of generating a 'sense' of which Douzinas wrote: awareness of the performative dimension of working in/on international law, the contingency of its constative codes, and the investments vital to their enactment.

One is dealing, however, in fine distinctions here. This piece could quite easily be flattened for skating over, registered as 'just' another policy proposal.

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<sup>58</sup> Ibid 99.

<sup>59</sup> Ibid 86.

<sup>60</sup> Ibid 86.

<sup>61</sup> Ibid 90–1.

<sup>62</sup> Ibid 96–7.

<sup>63</sup> Anne Orford, 'Trade, Human Rights and the Economy of Sacrifice' in Anne Orford (ed), *International Law and its Others* (2006) 156, 163 (fn 43).

<sup>64</sup> Danielsen, above n 57, 89–91.

<sup>65</sup> Ibid 91.

<sup>66</sup> Cf Duncanson, above n 35, 80.

<sup>67</sup> Gerald Frug is a particularly skilled craftsman of this chordal mode of critique. See, eg, Gerald Frug, 'Decentering Decentralization' (1993) 60 *University of Chicago Law Review* 253.

Likewise, the chessboard scenario of a law school hypothetical, with its quaint, stunted figures, might too readily indulge readers' fantasies of omnipotent vision. The questions Danielsen raises could be read as amenable to a single, enduring answer: 'you're right about the productive, governing work of corporations, so let's introduce some legislation about that'. Then again, as Danielsen says, that might or might not be a bad thing.<sup>68</sup> Keeping at close proximity a sense that 'success' might also amount to 'failure' allows Danielsen to leave this essay — and the iterative effects it might generate — unaddressed.<sup>69</sup>

The conundrum of 'failure' is also of interest to Connal Parsley — specifically, the 'failing enabling' that he remarks in the legal 'performance' of sovereign being.<sup>70</sup> Here, the performance with which he is concerned is the Federal Court of Australia's reading of Topsy Kundrilba's thumbprint in *Cubillo v Commonwealth*,<sup>71</sup> one of the 'stolen generation' cases. In that case, the question of state liability for forcible removal of a so-called 'half caste' Aboriginal child (the young 'Mr Gunner') turned in large part on a thumbprint 'signature' on a consent form being read as 'documentary evidence in support of the proposition that Mr Gunner's mother willingly parted with her son'.<sup>72</sup> So read, the 'signed' form prevailed over oral evidence concerning the circumstances of its 'signing', including evidence that Kundrilba 'had screamed hysterically while her son was forcibly removed'.<sup>73</sup> For Parsley, the construction and supply of Kundrilba's will in this context 'offers an exemplary instance of the manner in which the logics of sovereignty exert [sovereign] being as a being in force'.<sup>74</sup> He describes the consent form's institution of a 'possibility of saying ... structured to appear as laden with presence' as evoking 'an economy of signification and relation'.<sup>75</sup> This 'economy', in Parsley's account, establishes the conditions for a 'sovereign discourse refer[ring] to its own taking place'<sup>76</sup> in the 'Western metaphysics of language and of sovereignty'.<sup>77</sup>

In this generalisation of the significance of Kundrilba's 'signature' into a 'Western metaphysics of language and of sovereignty',<sup>78</sup> Parsley enacts an intriguing mimicry of the very performance he describes, intensifying its 'truth effect[s]' even as he highlights what is at stake in their generation.<sup>79</sup> The 'form itself' enjoys a curious 'perfect[ion]' and 'inheren[ce]' in Parsley's account, even as the sovereign being it calls forth is 'void[ed]'.<sup>80</sup> It is in the 'form itself' that sovereign being 'accrues' and is 'concentrated' in an intimate relation with

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<sup>68</sup> See, eg, Danielsen, above n 57, 90: 'mandating labour representation on corporate boards might not be good policy or necessarily lead to better social welfare outcomes'. See also Douzinas, 'Speaking Law', above n 3, 36: 'There is no easy way out'.

<sup>69</sup> Danielsen, above n 57, 90.

<sup>70</sup> Parsley, above n 55, 113.

<sup>71</sup> *Cubillo v Commonwealth* (2000) 103 FCR 1.

<sup>72</sup> Parsley, above n 55, 102.

<sup>73</sup> *Ibid* 104.

<sup>74</sup> *Ibid* 126.

<sup>75</sup> *Ibid* 117–18.

<sup>76</sup> *Ibid* 116.

<sup>77</sup> *Ibid* 107.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* 117, 126.

<sup>80</sup> *Ibid* 107, 113, 125.

violence, while the conditioning of that sovereignty's emergence upon conformity with a form negates its singularity.<sup>81</sup> In the very 'illusor[iness]' of sovereignty, made transparent in the 'pur[ity]' of the form, 'a unity of saying and meaning' is achieved that comes to stand in for the aspirations and afflictions of the 'West'.<sup>82</sup> It is left to the essay's short postscript for Parsley to contemplate the possibility of deciding 'at the expense of the form' — warning nothing less than 'the undoing of a sequence of enmeshed priorities of the Western metaphysics of presence' would be involved.<sup>83</sup> My intuition, drawing from Parsley's masterful account, is that any such decision could still be read back into the perfect unity of the form through a displacement of enabling failure elsewhere. And I suspect Parsley would be just the man for the job.

It is another mode of 'rulership' with which David Kennedy is concerned in his essay on international humanitarianism.<sup>84</sup> 'Humanitarians have come into rulership', Kennedy reports, pointing to the successful infiltration of the modern law of force by way of example.<sup>85</sup> And Kennedy has some words for them (or rather for 'us', as Kennedy writes in chummy 'our' and 'we' terms). Among 'rulers' who have transformed humanitarian sentiments into 'legal and institutional projects', Kennedy works to provoke a confrontation with 'difficulties', 'conflicts' and 'the damage we sometimes do'.<sup>86</sup> International lawyers, Kennedy observes, are already deciding on many of the questions that they regularly implore the international legal order to take up. The international trade law question of which is 'normal' between the 'subsidy' implicit in Mexico's non-enforcement of a minimum wage scheme or the 'non-tariff barrier' represented by an American demand for higher labour standards, for instance, entails an 'unavoidable political decision' that international lawyers are partly responsible for making.<sup>87</sup> Kennedy wants international lawyers to recognise the 'rulership' exerted through these kinds of decisions on 'background norms' and enact realistic assessments of their costs and benefits.<sup>88</sup>

This is not, however, a proposal for interdisciplinary import. According to Kennedy's reading, international law already possesses resources for responsible decision-making in this realistic mode:

As a vocabulary for debate and judgment, the law in war offers the possibility of embracing the unavoidability of making trade-offs, balancing harms, accepting costs to achieve benefit — a calculus common to both military strategists and humanitarians.<sup>89</sup>

To take up this calculus according to 'the best military practices of the rich' has, however, taken on a particular inflection.<sup>90</sup> It is this inflection, rather than the

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<sup>81</sup> Ibid 118.

<sup>82</sup> Ibid 125–6.

<sup>83</sup> Ibid 127.

<sup>84</sup> David Kennedy, 'Reassessing International Humanitarianism: The Dark Sides' in Anne Orford (ed), *International Law and its Others* (2006) 131.

<sup>85</sup> Ibid 137, 151.

<sup>86</sup> Ibid 131–2.

<sup>87</sup> Ibid 136.

<sup>88</sup> Ibid 132, 136.

<sup>89</sup> Ibid 139.

<sup>90</sup> Ibid 140.



calculus itself, with which Kennedy takes issue — namely, the preoccupation with affirming the interminability of one's own force.<sup>91</sup> To adopt 'best military practice' has become, Kennedy suggests, to 'place an imaginary CNN webcam on your helmet' and, with the assurance of that gaze, to feel emboldened to propagate a 'culture of violence' without having to question one's own 'civilized' credentials.<sup>92</sup>

Kennedy creeps up on this scene from a number of angles, always awry. Decision, not (moral) judgement, is what is called for, he suggests.<sup>93</sup> Denial and blame are to be abandoned in favour of an awareness of investments made. Humanitarians' 'renunciation of ... the vocabulary of power politics' merits rethinking, Kennedy argues.<sup>94</sup> Humanitarians, as much as state leaders, should relax their tendency to focus on 'fixed star[s]' and work on fleshing out their earthly political vision responsibly.<sup>95</sup> Why not consider, for instance, 'put[ting] Morocco, Jordan and Tunisia on the road to [European Union] membership', thereby collapsing the 'two architectures' of European pragmatic vision: the frame for Europe and the global frame?<sup>96</sup> European smugness and resentment are thus thrown back on themselves in the call 'to become responsible protagonists over the terms and future of global justice'.<sup>97</sup> This is not a call for 'rightful' governance of a particular type, as much as a call to accept the implications of acting in a governing role in pursuit of a cause, without recourse to an ethic of ultimate ends — a call to 'accept politics as a vocation' in a Weberian sense.<sup>98</sup>

Kennedy's 'extravascular project' in this instance involves listening and cleaving very closely to a vernacular (post-World War II American internationalists' pragmatic sense of law within rather than against power), and then tweaking it — at once towards the practical and the surreal.<sup>99</sup> He finds absurdity, and '[w]ilful blindness',<sup>100</sup> but also 'spirit and grace' in the quotidian words and ways of the lawyers about whom he writes.<sup>101</sup> Orford reads Kennedy's chapter as 'focus[ed] ... on ... the subject who pre-exists the decision'.<sup>102</sup> I read Kennedy's appeal to 'a human freedom of the will' somewhat differently: 'the will' circulates in Kennedy's account, but it does not roost comfortably in a subject.<sup>103</sup> Indeed, it seems that the very thing that makes its free circulation 'pleasurable and terrifying'<sup>104</sup> is the threat that it poses to such 'fixed star[s]'.<sup>105</sup>

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid 140–1.

<sup>93</sup> Ibid 141.

<sup>94</sup> Ibid 131.

<sup>95</sup> Ibid 148.

<sup>96</sup> Ibid 149–50.

<sup>97</sup> Ibid 151.

<sup>98</sup> Ibid 152. See Max Weber, 'Politics as a Vocation' in W G Runciman (ed), *Weber: Selections in Translation* (E Matthews trans, 1978) 212, 212 [trans of: *Politik als Beruf*].

<sup>99</sup> Charlesworth and Kennedy, above n 2, 406.

<sup>100</sup> Kennedy, 'Reassessing International Humanitarianism', above n 84, 148.

<sup>101</sup> Ibid 155.

<sup>102</sup> Orford, 'A Jurisprudence of the Limit', above n 5, 16.

<sup>103</sup> Kennedy, 'Reassessing International Humanitarianism', above n 84, 155.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 148.

Does Kennedy, then, seem to be taking his own advice, namely ‘foster[ing his] ... will to power’ and ‘heat[ing] up [his] ... politics’?<sup>106</sup> For the most part, it hardly seemed as though Kennedy has stretched himself in this essay. It is perhaps unfair to ask the writer responsible for such significant shifts in ways of writing and thinking about international law to do so each and every time.<sup>107</sup> For those familiar with Kennedy’s prior work, this essay might, nonetheless, read like killing time. ‘People must build ... [justice] anew each time, struggle for it, imagine it in new ways’, Kennedy reminds his readers.<sup>108</sup> But one senses a quiet hope that these ‘[p]eople’ would just take their work elsewhere. Kennedy offers those around some very useful tips, and accommodates their enthusiasms graciously, but struggles, it seems, to retain interest.

Orford’s contributions, on the other hand, seemed alert, even mesmerised. Capturing her interest is the ‘intimate relationship between the forms of law embodied in the two international regimes’ of international trade law and international human rights law.<sup>109</sup> One needs to stay with Orford’s account of these ‘forms’ of law in order to appreciate the particular mode of complicity that she is positing between ‘liberal democratic politics and global capitalist economics’ and to celebrate with her when she locates what might slip their hold.<sup>110</sup> And Orford is patient in this respect. With care, she leads her readers through the World Trade Organization’s trade regime (glimpsed through the frame of the *SPS Agreement*<sup>111</sup>) and then through the Christian doctrine of sacrifice said to be enacted in that regime.<sup>112</sup> In Orford’s account, this ‘pre-democratic’ economy of sacrifice is augmented rather than supplanted by appeals to human rights and democratic participation.<sup>113</sup>

‘Sacrifice’ is the name that Orford gives to ‘that which is cherished’, which the subject must relinquish to become citizen of a liberal, democratic state constituted in the fashion required for ‘participat[ion] ... in a liberal capitalist polity’.<sup>114</sup> The World Bank’s stipulations for the reform of communist curricula are given as an apt example, recalling Orford’s earlier situation of her chapter in pedagogical relations.<sup>115</sup> Orford’s concern is, nonetheless, to recover ‘a set of relations that suggest another beginning’ before this ‘sacrifice’ was initiated.<sup>116</sup> This was, as Orford recognises, the concern of Marx in his 1844 essay, *On the*

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<sup>106</sup> Ibid 152–3.

<sup>107</sup> See, eg, David Kennedy, ‘Theses about International Law Discourse’ (1980) 23 *German Yearbook of International Law* 353; David Kennedy, ‘Spring Break’ (1985) 63 *Texas Law Review* 1377; David Kennedy, ‘The International Style in Postwar Law and Policy’ (1994) 1 *Utah Law Review* 7.

<sup>108</sup> Kennedy, ‘Reassessing International Humanitarianism’, above n 84, 134.

<sup>109</sup> Orford, ‘Trade, Human Rights and the Economy of Sacrifice’, above n 63, 163.

<sup>110</sup> Ibid 157.

<sup>111</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493 (*SPS Agreement*).

<sup>112</sup> Orford, ‘Trade, Human Rights and the Economy of Sacrifice’, above n 63, 166–80, taking leads from Jacques Derrida, *The Gift of Death* (David Wills trans, 1995) [trans. of *Donner la mort*].

<sup>113</sup> Orford, ‘Trade, Human Rights and the Economy of Sacrifice’, above n 63, 182–4.

<sup>114</sup> Ibid 190.

<sup>115</sup> Ibid 191.

<sup>116</sup> Ibid 177.

*Jewish Question*.<sup>117</sup> However, Orford would have us conceive these in a rather different sense than Marx's 'species-being': the 'relations' of which she writes have a more intimate, psychoanalytic inflection.<sup>118</sup> While these relations are sketched in terms of a recollection of the contribution of 'the mother as passive gift-giver' without economic reward,<sup>119</sup> they remain rather pointedly obscured or, after Luce Irigaray, 'mysterious'.<sup>120</sup>

However, as much as one is drawn to Orford's alluring reading, there remains something troubling in the curious unwillingness of this chapter to admit deviations or failures *in* the 'forms' as described — a flawlessness that impels Orford towards her mystical exit. Among other effects, this ensures that the struggle to find 'something that escapes those forms' becomes more epic than it might otherwise have been: Orford is, after all, tackling nothing less than 'the foundation of a global economy'.<sup>121</sup> In brief, I found myself wondering (as in relation to Parsley's chapter) if this chapter had not become a little *too* invested in the perfection of the forms under critique.

Consider, for example, Orford's claim that '[t]he process of regulating' under the *SPS Agreement* is 'presented as mechanical', a presentation taken to evince trade law's insistence that unreason and its like must be outlawed.<sup>122</sup> In support of this claim, Orford points to the *SPS Agreement*'s reliance on 'risk assessment procedures and risk management strategies based on detailed scientific data'.<sup>123</sup> No indication is given, however, of why one should read these procedures as 'mechanical': indeed, Orford later remarks that quantitative measurements do *not* take us into a more rational world, external to politics.<sup>124</sup> Orford briefly discusses the 1998 *EC — Hormones* decision<sup>125</sup> of the WTO Appellate Body. Yet far from being mechanical and dispassionate, that decision has attracted criticism for *rejecting* the quantitative assessment of risk, and for 'befuddling the issue' by reference to such factors as 'anxiety'.<sup>126</sup> Does this text accord with a 'form of law that publicly champions rationality', when its irrationality is so publicly decried? Is science so readily opposable to 'mystery or secrecy'?<sup>127</sup>

Having seen what an attentive reader Orford is of non-legal texts, I would have liked to have seen her spend more time with the trade law texts with which she is supposedly concerned, asking (as she proposes) 'where we find *in the text* that which exceeds'.<sup>128</sup> Yes, one can not know in advance where the 'exorbitant'

<sup>117</sup> Ibid 184, referring to Karl Marx, 'On the Jewish Question' in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Right of Man* (1987) 137.

<sup>118</sup> Orford, 'Trade, Human Rights and the Economy of Sacrifice', above n 63, 185.

<sup>119</sup> Ibid 194–5 (fn 192).

<sup>120</sup> Luce Irigaray, *Marine Lover of Friedrich Nietzsche* (Gillian Gill trans, 1991) 171 [trans of: *Amante marine*].

<sup>121</sup> Orford, 'Trade, Human Rights and the Economy of Sacrifice', above n 63, 166.

<sup>122</sup> Ibid 167, 169, 170.

<sup>123</sup> Ibid 169.

<sup>124</sup> Ibid 195.

<sup>125</sup> *European Communities — Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998) (Report of the Appellate Body) ('*EC — Hormones*').

<sup>126</sup> See, eg, Ryan Thomas, 'Where's the Beef? — Mad Cows and the Blight of the *SPS Agreement*' (1999) 32 *Vanderbilt Journal of Transnational Law* 487, 503.

<sup>127</sup> Orford, 'Trade, Human Rights and the Economy of Sacrifice', above n 63, 172.

<sup>128</sup> Ibid 195 (emphasis added).

might be experienced, but for that very reason, might it not have been sought a little closer to orbit — in closer proximity, that is, to the language and sensibility of the legal materials in question?<sup>129</sup> Might this have been a way around the problem of consecrating the forms under critique, as well as the heroism of the critic able to ‘see through’ them (not to mention that of the ‘passive, gift-giv[ing]’ mother)?<sup>130</sup>

Like Orford, Judith Grbich posits a ‘close fit’ between ‘the politics of finance capitalism and globalization of currencies and markets’ and certain philosophical and theological narratives.<sup>131</sup> Specifically, Grbich sees in the global market confirmation of Giorgio Agamben’s ‘theorization of abandonment as the “nomos of the modern” — a politics of risking human life against the health of financial beings’.<sup>132</sup> This she associates with ‘a capture by the modern state of a Christian messianic logic’ — that is, ‘the logic of the doomed and glorious heir’.<sup>133</sup> At the same time, Grbich remarks upon a certain embrace of this ‘messianic logic’ in international legal scholarship.<sup>134</sup> And she is circumspect about the latter — too often these ‘messianic’ themes seem to focus upon the positioning of the discipline as the Christian messiah, the saviour’.<sup>135</sup>

It is, nonetheless, precisely in these secularised theologies of international law that Grbich locates potential. By finding that ‘monetary exchanges or financial property can be said to be grounded in theologies of Christ’s atonement’, Grbich is able to point to resources that might ground or enclose these relations otherwise.<sup>136</sup> Jacob Taubes’ work on the biblical writings of Saint Paul,<sup>137</sup> for instance, highlights for Grbich the specificity and limited reach of Christian messianism, as well as its vulnerability to ‘an antinomistic scheme of interpretation’.<sup>138</sup> This re-grounding of international financial law, Grbich suggests, is less a matter of replacement or reform than a question of revealing ‘a force interred in the form and exhumed by it’.<sup>139</sup> This interred ‘force’ Grbich tracks by reference to the structure of a fetish: both in a historiographical sense (citing anthropological studies of the role of *fetissios* in Portuguese and Spanish encounters with African Guinea Coast peoples) and in the sense of Marx’s commodity fetishism.<sup>140</sup> Reading the figurative placement of Christ’s body within monetary narratives in terms of fetishism leads Grbich to read financial

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<sup>129</sup> Ibid 193, referring to Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, 1997) 7–8 [trans: *De la grammatologie*].

<sup>130</sup> Orford, ‘Trade, Human Rights and the Economy of Sacrifice’, above n 63, 195 (fn 192).

<sup>131</sup> Judith Grbich, ‘Secrets of the Fetish in International Law’s Messianism’ in Anne Orford (ed), *International Law and its Others* (2006) 201, 201.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid 197, 201.

<sup>134</sup> Ibid 197.

<sup>135</sup> Ibid 202.

<sup>136</sup> Ibid 209.

<sup>137</sup> Jacob Taubes, *The Political Theology of Paul* (Dana Hollander trans, 2004) [trans of: *Die Politische Theologie des Paulus*].

<sup>138</sup> Ibid 211–15.

<sup>139</sup> Ibid 219, quoting Jean-Luc Nancy, ‘The Two Secrets of the Fetish’ (2001) 31(2) *Diacritics* 3, 6 (Thomas C Platt trans, 2001) [trans of: *Les deux secrets du fétiche*].

<sup>140</sup> Ibid 207, 219.

beings' privileged existence in international economic law as 'closed upon' an abandonment of 'bare human life' to a 'precarious existence'.<sup>141</sup>

It is to the 'final' presentation of an image of human life to itself — without mediation through the fetish — that Grbich seems to aspire: such is her incendiary rewiring of the messianism of international law. Once this 'secret writing' of international financial law becomes legible, Grbich seems to suggest, 'we can reach a point of theorizing law and being as a joy of existence, and a desire for the presence of community'.<sup>142</sup> For this reader, Grbich's gradual tightening upon this secret 'presence' — revealed for Grbich through Jean-Luc Nancy's work — was at once promising and somewhat disappointing. Doris Sommer, for one, has taught us the strategic importance of *resisting* the liberal impulse towards transparency, revelation, decoding.<sup>143</sup> In light of her work, I wondered: should *all* international law collapse into Jean-Luc Nancy's penetrative embrace with quite the relief that Grbich seems to? Is it really 'new ways of *naming* the politics and practices of abandonment' that international law should covet at this political juncture?<sup>144</sup>

Florian Hoffmann's approach to the 'forms' that international law has generated is perhaps more admiring than those of Orford and Grbich, yet also, ultimately, less humanistic. In these forms, he sees 'a beautiful, if ultimately unpredictable, "chaotic" image' — an image he likens to a 'recursive algorithm'.<sup>145</sup> His primary focus rests, however, elsewhere. Hoffmann's essay proceeds from a compassionate and explicitly political concern for the predicament of the human rights activist. He sets out to address the question '[w]hat can, and, indeed, what ought that activist ... do if she or he wishes to take [recent] critical insights seriously?'<sup>146</sup> Hoffmann's response to this question is not, however, one of 'pure' compassion: his project is simultaneously one of 'complexify[ing]' or 're-exoticiz[ing]' the "we" of human rights activism and 'de-exoticiz[ing]' the "other" of different socio-cultural spheres.<sup>147</sup> In this respect, his work links up in divergent ways with the essays of Duncanson, Kennedy, Danielsen and Obregón in this book.

Hoffmann's Rortian pragmatism is resolute, and yet he grapples seriously with the difficulty of expounding a meta-language about the lack of 'any meta-language in which incommensurable beliefs could be compared and evaluated' without bracketing the question of what *is*.<sup>148</sup> He engages further with a series of critiques to which Richard Rorty's 'pragmatic perspective' has been subjected. By way of holding ground against those critiques, he insists upon maintaining distance between 'human rights consciousness' and 'human rights discourse': refusing the collapse of the former into the latter and hence

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<sup>141</sup> Ibid 211.

<sup>142</sup> Ibid 219.

<sup>143</sup> See Doris Sommer, *Proceed with Caution, When Engaged by Minority Writing in the Americas* (1999).

<sup>144</sup> Grbich, above n 131, 220 (emphasis added).

<sup>145</sup> Florian Hoffmann, 'Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights' in Anne Orford (ed), *International Law and its Others* (2006) 221, 244.

<sup>146</sup> Ibid 223.

<sup>147</sup> Ibid 241–2.

<sup>148</sup> Ibid 233.

preserving a domain inaccessible to formalisation or theorisation.<sup>149</sup> Through all this, Hoffmann keeps clear sight of his goal: to foster a ‘contingency-accepting, self-revising and self-responsible political activism based on personal beliefs and felt solidarity’, in order that continued work on ‘micro-political processes’ engaging ‘concrete “others”’ might be justified and supported.<sup>150</sup>

Even so, when the ‘space for mutual perturbations between language games emerges’ at the end of his essay, it is unclear in what language those ‘perturbations’ might be articulated, since Hoffman’s language seems to have inoculated itself at some earlier time against perturbation.<sup>151</sup> In this regard, I was struck by the curious proliferation of hat-doffing phrases throughout the essay. Hoffmann’s readings of texts were frequently chaperoned by adjectival phrases such as now ‘well-known’, or by the self-effacing ‘of course’.<sup>152</sup> These linguistic tics came to be rather endearing over the course of the essay. And yet they lent its embrace of ‘contingency-accepting’ conversation some staginess: as though this ‘conversation’ were seeking to assure us of having been cleared in some prior decisional domain; as though Hoffmann were conversing to script. These tics may be no more than marks of the essay having emerged (in part) from Hoffmann’s doctoral research. Or else they might signal — in this search for a ‘basis for human rights praxis’ — a certain holding back from the very decisional ‘jump[ing] into the dark’ that Hoffmann advocates.<sup>153</sup> Then again, who is to say when that leap has been taken?

Just as Hoffmann’s essay seeks to generate ‘contingency-accepting’ conversation,<sup>154</sup> so Liliana Obregón’s essay is directed towards an ongoing conversation.<sup>155</sup> It contributes a rich, detailed account of ‘distinctive Latin American understandings of civilization’ to an ongoing ‘discussion’ about the ‘the connection between the discipline’s civilizing discourse and its parallel expansion’.<sup>156</sup> Obregón regards these ‘constructions of civilization’ as the work of ‘Creole legal consciousness’ discernible in distinct yet related senses, in legal writings of the colonial period and those of 19<sup>th</sup> century, post-independence Latin America.

International law, Obregón contends, was a crucial site for the enactment of this Creole legal consciousness, by virtue of the scope it afforded Latin American scholars at once to ‘represent ... and legitimiz[e] the Creole images of civilization while at the same time participating in the European centre of production of international law’.<sup>157</sup> She demonstrates this by reference to the

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<sup>149</sup> Ibid 229–30, 241 (emphasis omitted).

<sup>150</sup> Ibid 240. One suspects that Hoffmann has some very specific modes and domains of action in mind in this project — as suggested by his repeated references to *favelados* in Brazil — and yet he erects a seemingly large tent, denoting as human rights activism the work of anyone and ‘everyone purporting to “know” what human rights are about vis-à-vis any others’: at 224 (emphasis in original).

<sup>151</sup> Ibid 240.

<sup>152</sup> Ibid 236–9.

<sup>153</sup> Ibid 244.

<sup>154</sup> Ibid 240.

<sup>155</sup> Liliana Obregón, ‘Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America’ in Anne Orford (ed), *International Law and its Others* (2006) 247, 247.

<sup>156</sup> Ibid 247–8.

<sup>157</sup> Ibid 255.

work of three lawyers active in the late 19<sup>th</sup> century, each of whom wrote on international law: Argentine Carlos Calvo, Peruvian Manuel Atanasio Fuentes, and Colombian José María Samper. The relationship of Latin American lawyers to Europe is not, however, one of abjection in Obregón's account. These Latin American internationalists 'did not perceive international law as a foreign and distant model imposed by Europe': 'Latin American international lawyers were preoccupied with different audiences at different historical moments'.<sup>158</sup> Obregón reads these writers as 'coincid[ing] in their intention to articulate ... what they believed represented a regional dimension of international law, while at the same time wanting the region to be understood as part of the community of civilized nations'.<sup>159</sup> Obregón's is a sophisticated and illuminating re-reading of centre-periphery dynamics in international law: a reading that displaces the standard tropes of marginality and exclusion often associated with attention to 'others' in international law.

The 'other', in Frédéric Mégret's critique of international humanitarian law, has a very different inflection to the various particularised 'others' populating Liliana Obregón's account.<sup>160</sup> The 'other', in Mégret's essay, is that generic figure that may not be 'brought within its [international humanitarian law's] protective, hyper-inclusive mantle', but that is nonetheless pressed into that law's service as 'an elaborate metaphor of what the laws of war do not want to be'.<sup>161</sup> This 'other' is 'every individual, concrete or imagined, every state of affairs that the laws of war aim to keep at bay'.<sup>162</sup> In this rendering, Mégret steers much closer to the 'standard' accounts of marginalisation and omission by which international law's 'hyper-inclusive' appetites have traditionally been aroused. Yet, Mégret wants to do more than merely whet those appetites, let alone sate them. Rather, Mégret seeks to have international humanitarian lawyers confront the persistence of the discipline's 'darker antecedents',<sup>163</sup> by recognising contemporary debates as an 'awakening' of international humanitarian law's 'exclusionary strand'.<sup>164</sup>

Mégret's preoccupation is with 'founding moments' and founding figures of international humanitarian law, about which and whom he seeks to tell some troubling stories.<sup>165</sup> Henry Dunant and his ilk (revealed as colonialists and colonisers) are cast as embodiments of 'the profoundly dual nature of 19<sup>th</sup> century humanitarianism'.<sup>166</sup> Nineteenth century debates concerning the question of international humanitarian law's application to the 'non-civilised' are relocated to the constitutive centre of international humanitarian law. Those debates are said to reveal 'deeply held beliefs about the nature of international

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<sup>158</sup> Ibid 263.

<sup>159</sup> Ibid 263–4.

<sup>160</sup> Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and its Others* (2006) 265.

<sup>161</sup> Ibid 265–6.

<sup>162</sup> Ibid 267.

<sup>163</sup> Ibid 295.

<sup>164</sup> Ibid 298.

<sup>165</sup> Ibid 271.

<sup>166</sup> Ibid 272–3.

law, “civilization” and “savagery”<sup>167</sup>: both causes and effects of international humanitarian law’s prescriptions.<sup>168</sup> Thus, a ‘central point’ around which international humanitarian law revolves in this account is the sense that “savages” do not wage “civilized war”, therefore, “civilized warfare” cannot be waged against them’.<sup>169</sup>

If Mégret seeks to provoke an ‘awakening’, he also seeks an accounting: ‘It is important’, he writes, to ask ‘what is the balance sheet of international law’s mediation of the colonial encounter’?<sup>170</sup> And he wants to relocate responsibility as well: contemporary savagery, Mégret suggests, is as much a result of ‘the “civilized” [having] “savaged” themselves’<sup>171</sup> (by, for instance, exporting a model of ‘centralized, industrialized violence’) as evidence of the failure of a Western project of ‘civilising’ others.<sup>172</sup> What has been lost, it seems, is the West’s contact with its own savage impulses.<sup>173</sup> One is left, then, with an ambivalent gesture towards re-foundation. Sometimes it seems as though Mégret would strive to close the distance of which he earlier wrote: as though ‘the civilized’ and ‘the savage’, now ‘awakened’, might approach communion in a shared project of ‘(re)discovery’.<sup>174</sup> Elsewhere, though, Mégret seems to relinquish this goal, as though giving ground to inaccessibility: a ‘crumbling’, a ‘stumbling’, and ‘a spiral of decomposition’,<sup>175</sup> at once ‘curious and tragic’.<sup>176</sup>

Dianne Otto takes up this spiral with a thoughtful account of the ‘dualistic and hierarchical production of sexed subjectivities in human rights discourse’ — productive work through which ‘exclusionary effects of [that] discourse ... have been legitimated’.<sup>177</sup> Examining developments in treaty law, feminist activism and international institution-building initiatives from the 19<sup>th</sup> century onwards, Otto relates a ‘complicated history of international engagement with the question of women’s rights’.<sup>178</sup> Recurring throughout this historical narrative are three female subjectivities, which ‘overlap and have ... productive interrelationships’: the wife-mother figure in need of protection; the woman enjoying formal equality with men in the public realm; and ‘the “victim” subject who is produced by colonial narratives of gender, as well as by notions of women’s sexual vulnerability’.<sup>179</sup> With these maimed muses, Otto assesses several generations of feminist engagements with international human rights law, examining the strategic, symbolic and distributional implications of attempts to have international human rights law ‘focus on’, or be reformulated around, ‘women’s

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<sup>167</sup> Ibid 284.

<sup>168</sup> Ibid 314.

<sup>169</sup> Ibid 294.

<sup>170</sup> Ibid 312.

<sup>171</sup> Ibid 315.

<sup>172</sup> Ibid 317.

<sup>173</sup> There is an allusion, too, to a loss associated with the “de-ritualization” of violence’ — a ‘lead’, perhaps, to a way of resuming that contact without the devastating body count: *ibid* 316 (fn 178).

<sup>174</sup> Ibid 313.

<sup>175</sup> Ibid 317.

<sup>176</sup> Ibid 315.

<sup>177</sup> Dianne Otto, ‘Lost in Translation: Rescripting the Sexed Objects of International Human Rights Law’ in Anne Orford (ed), *International Law and its Others* (2006) 318, 319.

<sup>178</sup> Ibid 329.

<sup>179</sup> Ibid 320.



specificities'.<sup>180</sup> Her account is one of (seemingly) eternal return: 'the circular restaging of women's marginalization' decade after decade. From this, Otto seems to derive anxiety, but also 'disrupt[ive]' energy.<sup>181</sup> She glimpses the possibility of this circle's displacement or erasure 'in the image of the hybrid', before '[p]ulling back' and re-committing to 'legal strategies', murmuring of '[h]ope' and 'war[iness]'.<sup>182</sup>

There is, it seems, little inclination to pull back in Juliet Rogers' essay.<sup>183</sup> The 'law' and 'economics' of which Rogers writes writhe with fleshy, trembling things — above all, things with mouths. They talk to Rogers in the language of Jacques Lacan, and Rogers reports back to her reader(s), evoking and diagnosing a 'Western subject represented as a wholly present individual in contemporary democracy'.<sup>184</sup> Emerging from the metonymic dynamics sketched in earlier essays, we enter here a sphere of metaphor and euphemism.<sup>185</sup> The 'international franchise' of legislation against 'female genital mutilation' is read as a 'manual for Being' for the aforementioned subject.<sup>186</sup>

For Rogers, the legal discourses of female genital mutilation offer this Western subject a means of displacing anxiety about its own 'lack' elsewhere. This law occasions an enactment by this subject of its 'economic autonomy' through an inaugural 'covenant' with 'one imagined by the subject of law *qua* Other'.<sup>187</sup> This law is 'economic', Rogers writes, by virtue of its production of the other (the woman that the subject takes itself to be recognising) as 'mutilated' and its engagement of 'a system of exchange where the Western subject can fantasize himself made whole in the exchange'.<sup>188</sup> In this regard, the effect of laws proscribing female genital mutilation is at once 'disturbing and reassuring to the Western subject'.<sup>189</sup>

Law, as the 'gift of legislation', is cast in quite formal terms in this configuration; it is apparently untouched by late modern law's chronic anti-formalism.<sup>190</sup> So too the 'Western subject before the law' is insistently monolingual in this account, conceded a limited array of needs and desires — above all, an appetite for autonomy, wholeness, presence. The final essay in this book, thus, speaks in the declaratory register with which it opened, with Douzinas' essay. Like Douzinas, Rogers seeks to interpose (as an experience of 'the "true" and "correct" symbolic interpretation of language') something other than 'the law as state law' or 'self law'<sup>191</sup> — namely, the law of 'an-Other' that one might name (inaccurately) Lacan.<sup>192</sup> For Rogers, this permits a recording of

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180 Ibid 351.

181 Ibid.

182 Ibid 355–6.

183 Juliet Rogers, 'Flesh Made Law: The Economies of Female Genital Mutilation Legislation' in Anne Orford (ed), *International Law and its Others* (2006) 357.

184 Ibid 359.

185 Ibid 360, 364, 379. Cf *ibid* 372, 375; Parsley, above n 55, 113–14.

186 Rogers, above n 183, 357.

187 Ibid 359–60.

188 Ibid 362.

189 Ibid 361.

190 Ibid 362.

191 Ibid 361.

192 Ibid 364.

a 'beyond to [the] jurisdiction'<sup>193</sup> of the autonomous subject: 'the presence of another's law' referring to 'what cannot be known'.<sup>194</sup> Yet this, Rogers maintains, is the very possibility that the laws proscribing genital mutilation seek so aggressively, repetitively, 'lov[ingly]', even 'hysterically' to overwhelm.<sup>195</sup> And there seems something of this impulse in the essay itself as it 'states and restates who and what the subject is', and 'what the subject wants, needs and desires', over and over again.<sup>196</sup> Or perhaps this repetition is by way of intensifying the 'nagging feeling ... that there is more out there' than that of which Rogers writes?<sup>197</sup>

That there may be more 'out there' is what both the concluding essays in this collection intimate. In Antony Anghie's essay, that 'more' is history, as well as the uncertain possibilities of writing critique.<sup>198</sup> What 'remains of [an] older system of governance', Anghie asks, when international law returns to imperial projects mimicking those of another time?<sup>199</sup> This mimicry is, according to Anghie, exactly what may be discerned in international legal arguments made in support of the United States' policy in Iraq and the so called 'war on terror'.

In so writing, however, Anghie is acutely aware of the *limits* of an anti-imperial critique. Merely pointing out the 'continuation of imperial practices' does not, he observes, 'count' any longer as a 'form of criticism',<sup>200</sup> when imperialism is being defended as 'a sound and indeed necessary policy'<sup>201</sup> on a number of fronts — similarly '[non-]viable' is the strategy of pointing to 'contradictions and intellectual incoherence'.<sup>202</sup> For Anghie, further 'disorient[ation]' is triggered by the intensification of public interest in international law.<sup>203</sup> He notes that 'sharp divisions' have arisen within technical legal fields previously experienced as relatively settled, in light of the 'war on terror' being so extensively justified by reference to international law.<sup>204</sup> Thus, even as he notes the 'familiar[ity]' of an international law animated by a crudely divisive civilising mission,<sup>205</sup> Anghie warns that '[t]he older verities ... no longer obtain'.<sup>206</sup> In the face of the many diagnoses and emplacements presented over the course of this book, and against the 'reality' installed by the Bush regime, Anghie is insistent that 'the whole question of what it means to be an international lawyer' remains open, unanswered, and yet to be addressed.<sup>207</sup>

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193 Ibid 365.

194 Ibid 372.

195 Ibid 366–7, 376.

196 Ibid 383–4.

197 Ibid 383.

198 Antony Anghie, 'On Critique and the Other' in Anne Orford (ed), *International Law and its Others* (2006) 389.

199 Ibid 395.

200 Ibid.

201 Ibid 396.

202 Ibid 399.

203 Ibid 396.

204 Ibid 397.

205 Ibid 392.

206 Ibid 397.

207 Ibid 398.

Hilary Charlesworth's and David Kennedy's concluding essay is similarly resolute on the irresolution of this book.<sup>208</sup> 'This book is hard to conclude', they begin. It may have brought into focus a 'need to think in new ways' about the international legal discipline 'as a whole', they suggest. '[A] set of promising intellectual paths forward' might even have been 'illuminat[ed]'.<sup>209</sup> Yet a focus on international law's relationship to 'things it defines as other' should not, they caution, be taken as some skeleton key to the discipline, capable of unlocking the whole.<sup>210</sup> The 'active participat[ion]'<sup>211</sup> in international law that they would call forth is not, then, of a kind dedicated to constructing 'an edifice of ideas and doctrines', however sophisticated or novel.<sup>212</sup> Rather, they urge students and scholars of international law to relish the 'stimulating sense of danger' with which the 'exceptional nature of each new situation' comes charged.<sup>213</sup> Many and varied are the questions they identify for 'further research' — the book having 'less found answers than sketched paths' for inquiry.<sup>214</sup> And those paths themselves are hard to decipher, having 'overlapped, bled into one another'.<sup>215</sup> These future routes are not, however, to be without friction in Charlesworth and Kennedy's account. They remain 'conflicted' and 'intensely political'.<sup>216</sup>

## II YET TO BE DECIDED

It is with a profound sense of undecidedness that *International Law and its Others* leaves its readers: not in the sense of vacillation or agnosticism, but rather in the sense of the 'basic' work of international law being unfinished. This book begins with unease about recent 'institutional and political developments' and ends with disavowal of any 'impartial, objective legal order' offering a way out of that unease.<sup>217</sup> It begins with speech and ends with writing, but this trajectory is without governing *telos*: it does not purport to bring a concept into representational existence.<sup>218</sup> What it does call forth is a series of disagreements among some of the most interesting and challenging writers on international law working today. Let me try to list some of those here, by way of identifying some of the choices to be made among those who would take up 'promising intellectual paths'<sup>219</sup> charted by this book:

1. Contributors to this book seem to disagree about critical strategy, including how near to the legal vernacular one should pitch an 'extravernal project'. How and where does one look for that which has come to be understood or

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<sup>208</sup> Charlesworth and Kennedy, above n 2, 401.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.* 408.

<sup>212</sup> *Ibid.* 405.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.* 403.

<sup>215</sup> *Ibid.* 404.

<sup>216</sup> *Ibid.* 404, 408.

<sup>217</sup> Orford, 'A Jurisprudence of the Limit', above n 5, 1; Charlesworth and Kennedy, above n 2, 408.

<sup>218</sup> Douzinas, 'Speaking Law', above n 3, 35; Anghie, above n 198, 400. Cf Jacques Derrida, 'Speech and Writing According to Hegel' (1978) 11 *Man and World* 107 (Alfonso Lingis trans).

<sup>219</sup> Charlesworth and Kennedy, above n 2, 401.

experienced as ‘international law’? How fluent does one need to become in that understanding in order to grapple with it, whether critically or diagnostically? The chapters in this book give sharply divergent answers to these questions.

2. Writers in this book take seemingly incommensurable positions towards questions of access and authority. The prospect of ‘international law’ as such deferring access to itself does not seem to pose much of a problem for some contributors, while others work to *maintain* the idea that international law may not be fully decipherable in advance or in general. In the former scenario, it was intriguing to observe the relative ease with which international legal authorities were often shrugged off, an ease that may account for the refreshing and suggestive quality of the book (the titillating sense that it may be tilling virgin ground). At the same time, however, a clutch of father figures commonly ascribed to other disciplines tended to be venerated in the very chapters doing the shrugging: their work said to offer keys vital to international law’s decoding. And, ironically, this veneration was mostly in the name of relinquishing the aspiration to gain access to what was thought to have been lost in the formation of a self (or in the formation of a discipline). I may have missed it, but it seemed to me that this particular contradiction went unremarked in the book (except, that is, in certain pointed contrasts in footnoting styles). These are likely, I suspect, to remain points of controversy in future work inspired by this collection.

3. The chapters in this book present conflicting accounts of what mode of calculation might be implied in ‘taking responsibility’ for the damage international law sometimes does. Most, if not all, contended that ‘accountability’ as conventionally understood would not do. Beyond that, contributors disagreed intensely about whether and how one should ‘learn ... engage, strategize, manage, shape and exploit’ the disciplinary features and languages of international law in seeking to take responsibility for that which one cannot know.<sup>220</sup> For some, awareness that a ‘decision’ may be a retrospective construction of a ‘form’ seemed profoundly distracting; others set their sites on what might or might not flow from such a decision, whatever its performative provenance.

The very fact that *International Law and its Others* presents its readers with so much to disagree about bespeaks its success in withholding guarantees. The editor, Anne Orford, expressed a hope at the beginning of the book that it might chart some ways to encounters that lie ahead, the addressees and destinations of which remain unknown.<sup>221</sup> Having read and scribbled here on the book’s postcards, I willingly send them on and look forward to reading of their fruitful and wayward travels.

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<sup>220</sup> Danielsen, above n 57, 99. See also Kennedy, ‘Reassessing International Humanitarianism’, above n 84, 155: ‘freedom ... entails responsibility to decide for others, causing consequences that elude our knowledge but not our power’.

<sup>221</sup> Orford, ‘A Jurisprudence of the Limit’, above n 5, 31.

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