

## *Postcolonial Theories of Law*

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THIS CHAPTER EXPLORES postcolonial theories of law that today are more widely recognised than ever before amongst scholars, political theorists and legal practitioners.<sup>1</sup> Concerns with the postcolonial dimensions of legal engagement have been present in some academic circles for over three decades. However, the terms of the conversation have shifted over the years to apply more aptly to current global geopolitical realities. Whereas the language of earlier postcolonial theorists was framed by the parameters of nation-state histories and interests and primarily focused on the dialectic between colonising nations and the colonised, contemporary scholars talk in terms of the relations between what is commonly referred to as the global North and global South. This shift in terminology is important. It expands the lens of analysis from state-centred law in the context of specific national colonial enterprises to a more global post-Westphalian worldview that takes into account the postcolonial dimensions of a range of transnational, regional, state and local legal engagements.<sup>2</sup> It opens up the conversation to include the oppression of all communities historically treated as racially and ethnically inferior to the colonising society, whether or not these communities self-identify as ‘indigenous’ or think of themselves as colonised. Moreover, it allows for rethinking contemporary legal subjectivities by moving beyond Western versus non-Western binaries and acknowledging new forms of colonialism, such as the colonising of East Timor by Indonesia, Eritrea by Ethiopia, and the occupation of Palestinian territories by Israel.<sup>3</sup> And finally it takes into account neocolonial activities by Western and non-Western nations who exert economic and political power or ‘soft imperialism’ over sites of

<sup>1</sup> For general discussions on postcolonialism and law, see E Darian-Smith and P Fitzpatrick (eds), *Laws of the Postcolonial* (Ann Arbor, University of Michigan Press, 1999); SE Merry, ‘Colonial and Postcolonial Law’ in A Sarat (ed), *The Blackwell Companion to Law and Society*. (Oxford, Blackwell Publishing, 2004); A Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 *Adelaide Law Review* 315–57; BS Chimni (ed), Special Issue: ‘Third World Approaches to International Law’ (2011) 3(1) *Trade, Law and Development*; P Dann and F Hanschmann (eds), ‘Post-colonial Theories and Law’ (2012) No 2 *Journal of Law and Politics in Africa, Asia and Latin America* 123–27; N Seuffert and C Coleborne, ‘Law, History and Postcolonial Theory and Method’ (2003) 7 *Law Text Culture* 1–8.

<sup>2</sup> See R Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Ardsley, NY, Transnational Publishers, 1998).

<sup>3</sup> See AT Weldemichael, *Third World Colonialism and Strategies of Liberation: Eritrea and East Timor Compared* (Cambridge, Cambridge University Press, 2012).

former colonial control.<sup>4</sup> Hence today's neocolonial activities includes the soft imperialism of China's industrial activities in Africa as well as the range of 'new wars' in regions such as the Congo that allow for an economy of extraction and exploitation by Northern capitalists over local communities, often in collusion with local elites.<sup>5</sup>

Given the geopolitical expansion of the postcolonial lens, it is not surprising that contemporary scholars of postcolonial law are interested in a wide variety of issues. Some are concerned with exposing the underlying orientalist assumptions in national and international laws that affirm essentialised constructions of cultural difference,<sup>6</sup> and inform many countries' flawed policies of multiculturalism.<sup>7</sup> Other scholars, many from the global South, are critical of the Eurocentric underpinnings of international law and argue for counterhegemonic forms of resistance.<sup>8</sup> Still others are concerned with the shifting conceptualisation of 'human' in the context of new forms of neocolonialism and global racial oppression.<sup>9</sup> And many focus on the historical and contemporary oppression of indigenous peoples, be these in former settler nations such as Canada, Australia and the United States,<sup>10</sup> or in former colonies such as Bolivia, Ecuador, Ghana, Kenya and South Africa.<sup>11</sup>

In trying to summarise postcolonial legal studies one is confronted by a variety of problems. Most of the studies are interdisciplinary and present a range of perspectives. As a result, postcolonial theories of law do not form a coherent field of inquiry. According to one leading postcolonial scholar, Wes Pue, this is a good thing:

The spirit of the intellectual encounter between law and colonialism is of necessity interdisciplinary, diverse in perspective, and unbounded. Scholarship in the field does not—should not—fit into overly-neat disciplinary or perspective-bound categories. Individuals drawn to postcolonial legal studies come to the enquiry with a variety of motivations and an array of interests. Some seek primarily theoretical understanding, others encounter the

<sup>4</sup> See K Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (New York, International Publishers, 1966).

<sup>5</sup> See M Kaldor, *New & Old Wars: Organized Violence in a Globalized World*, 2nd edn (Palo Alto, CA, Stanford University Press, 2006); J Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Durham, NC and London, Duke University Press, 2006).

<sup>6</sup> See T Ruskola, 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179–234; E Said, *Orientalism* (New York, Vintage, 1978); R Falk, *Achieving Human Rights* (London and New York, Routledge, 2009); S Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge, Cambridge University Press, 2011).

<sup>7</sup> B Bhandar, 'The Ties That Bind: Multiculturalism and Secularism Reconsidered' (2009) 36 *Journal of Law and Society* 301–26; CF Marès, 'Multiculturalism and Collective Rights' in B de Sousa Santos (ed), *Another Knowledge Is Possible: Beyond Northern Epistemologies* (London and New York, Verso, 2007) 75–104.

<sup>8</sup> BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3–27.

<sup>9</sup> P Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Cambridge, MA and London, Harvard University Press, 2006); S Esmeir, *Juridical Humanity: A Colonial History*. (Palo Alto, CA, Stanford University Press, 2012).

<sup>10</sup> See eg R Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871–1921* (Vancouver, University of British Columbia Press, 2009); L Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney, The Federation Press, 2003); JR Cattelino, *High Stakes: Florida Seminole Gaming and Sovereignty* (Durham, NC, Duke University Press, 2008); G Frank and C Goldberg, *Defying the Odds: The Tule River Tribe's Struggle for Sovereignty in Three Centuries* (New Haven, Yale University Press, 2010); E Darian-Smith, *New Capitalists: Law, Politics and Identity Surrounding Casino Gaming on Native American Land* (Belmont, Wadsworth, 2004).

<sup>11</sup> See eg J Comaroff and J Comaroff (eds), *Law and Disorder in the Postcolony* (Chicago, University of Chicago Press, 2006).

postcolonial as a part of sustained historical research, and others still feel a compelling sense of urgency to develop practical strategies by which to confront the legacies of colonialism ‘on the ground’. Many pursue a more or less mixed method of enquiry and do so from multiple motivations.<sup>12</sup>

While not a coherent intellectual field, what unites contemporary scholars of postcolonial law—irrespective of their focus or analytical framing—is that they all draw upon an intellectual legacy that emerged among non-Europeans in the decolonisation movement post World War II and subsequently filtered into the Western academy in the 1980s in the movement known as postcolonial studies.<sup>13</sup> Hence underlying all postcolonial legal scholarship is a concern with the endurance of historically structured racial and ethnic divides and correlative asymmetrical power relations between the global North and global South, despite a growing appreciation of their respective regional interdependencies. In other words, postcolonial legal theories are not about legal processes in the time after colonialism, when a former colonised state gains independence and presumably a measure of self-determination. Rather, postcolonial legal scholarship underscores that even when colonialism has officially ceased to exist, the injustices of material practices endure over time and in many ways frame emergent legalities and legal consciousness. As scholars are only too well aware, the endurance of colonial legal logics is present—albeit perhaps in new forms—in countries formerly colonised in Africa, Latin America, Asia and so on, as well as within former colonial nations such as Britain, Australia, France, the Netherlands and the United States.<sup>14</sup>

Below I discuss two clusters of postcolonial legal scholarship that form theoretical umbrellas under which specific sociolegal studies can be accommodated. These are scholars engaged with the concept of legal orientalism and scholars identifying with ‘third world approaches to international law’ (TWAIL). I have chosen these two bodies of scholarship because the first underscores the enduring legacy of European legal colonialism, and the second highlights the perspective of the global South in seeking to confront that legacy within subnational, national, international and global contexts. Obviously there exist other lines of inquiry that dovetail into these two clusters of postcolonial legal engagement. For instance, the concept of legal pluralism underpins each in various ways,<sup>15</sup> as does the relationship between law and racism.<sup>16</sup> But legal pluralism and legal racism are not exclusive to colonial/postcolonial contexts and so I treat these concerns as embedded within postcolonial theories of law rather than as the central issue shaping each cluster’s theoretical focus.

<sup>12</sup> WW Pue, Editorial for special issue (2003) No 1 *Law, Social Justice and Global Development Journal* 2.

<sup>13</sup> The exact date at which postcolonial studies took off is hard to ascertain exactly. Scholars such as WEB Du Bois, Franz Fanon, CLR James and many others were writing decades before postcolonial studies was recognised in the Western academy in the 1980s and 1990s as a distinct intellectual theory and body of literature.

<sup>14</sup> One has only to think of the 2012 presidential election results in the United States to appreciate the extent to which the logics of colonialism and plantation economics endures in contemporary American society. As many commentators noted, those states voting for the Republican candidate, Mitt Romney, correlated to a large degree with the former southern states who practised slavery in the pre-civil war era, and implemented the harshest Jim Crow laws discriminating against blacks and other minorities up until the civil rights movement of the 1950s and 1960s.

<sup>15</sup> See BZ Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge, Cambridge University Press, 2012).

<sup>16</sup> See DF Da Silva, *Toward a Global Idea of Race* (Minneapolis, University of Minnesota Press, 2007).

Before engaging with the concept of postcolonialism and the sociolegal theories that it has engendered, I want to mention briefly the shifting landscape of geopolitical power in the current era. These relations of power are very different from that of previous centuries, which were based on the concept of sovereign nation-states operating autonomously in an international arena. This conventional model of state-based power is often referred to as the Westphalian system of governance. This name refers to the German town of Westphalia, where, in 1648, after thirty long years of war, many European nations came together and agreed that each could claim autonomous control over its respective territories and subjects. The modern concepts of 'nation-state', 'nationalism' and 'sovereignty' were inscribed in the Peace of Westphalia and have enjoyed considerable epistemological, ideological and mythical prominence for nearly four hundred years, particularly in the development of modern Euro-American law.<sup>17</sup> Moreover, these concepts historically provided justification for the imperial strategies of European states and these states' overseas oppression and exploitation of colonised peoples.

Today the centre/periphery divide which assumes the West at the center and the third world delegated to the periphery is now no longer seen as an acceptable paradigm for modelling the realities of global economic and political power. Rising powerful global cities and enclaves of extreme wealth contrast with impoverished rural outskirts in many regions around the world. We see this phenomenon happening in Africa, Asia as well as across Europe and the Americas. Today, rich Western nations are experiencing deprivation and poverty formerly only seen in developing nations, and developing nations now have political and economic elites on a par with their Western counterparts. And all countries to varying degrees are experiencing the growth of deluxe shopping malls, office blocks and gated communities alongside shantytowns, refugee camps and impoverished communities.<sup>18</sup> (See Figure 1.) Who are the colonisers and who are the colonised is no longer as clear as it was only sixty years ago in the wake of the decolonisation movement of the mid-twentieth century.

In addition, since the 1990s there has been an extraordinary proliferation of non-governmental organisations (NGOs), private philanthropic foundations and voluntary, often faith-based, organisations around the world.<sup>19</sup> These non-state actors, in conjunction with global economic bodies such as the International Monetary Fund (IMF) and World Bank, are creating new forms of transnational governance and authority that sometimes work in tandem with state interests and sometimes counter to state interests. Moreover, these non-state actors raise all sorts of issues with respect to accountability, dependency, governmental displacement, and the factors driving coun-

<sup>17</sup> J Beard, *The Political Economy of Desire: International Law, Development and the Nation-State* (New York and Abingdon, Routledge/Cavendish, 2006); R Joyce, 'Westphalia: Event, Memory, Myth' in F Johns, R Joyce and S Pahuja (eds), *Events: The Force of International Law* (New York, Routledge, 2011) 55–68.

<sup>18</sup> See JE Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York, WW Norton, 2012); JT Way, *The Mayan in the Mall: Globalization, Development, and the Making of Modern Guatemala* (Durham, NC and London, Duke University Press, 2012); M Davis, *Planet of Slums* (Brooklyn, NY, Verso, 2007).

<sup>19</sup> A-M Slaughter, 'Breaking Out: The Proliferation of Actors in the International System' in Y Dezalay and BG Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of the New Legal Orthodoxy* (Ann Arbor, University of Michigan Press, 2002) 12–36; T Wallace, 'NGO Dilemmas: Trojan Horses for Global Neoliberalism' in L Pantich and C Leys (eds), *The Socialist Register 2004: The New Imperial Challenge* (London, Merlin Press, 2004).



**Figure 1.** Rochina Favela, Rio de Janeiro, Brazil. Photograph by Alicia Nijdam. 21 March 2008. This is one of the largest shantytowns in South America with over 200,000 inhabitants. There are many such slums existing alongside modern high-rise buildings in cities of Brazil. Those who live in these shanty towns prefer its prime location next to the city centre, as they can earn a living being close to the city.

tries' social agendas.<sup>20</sup> According to James Ferguson, 'Social policy and nation-state are, to a very significant degree, decoupled, and we are only beginning to find ways to think about this.'<sup>21</sup> As a result, these contradictory socioeconomic reconfigurations of power have fundamentally altered domestic relations within states, as well as profoundly altering the world of international relations that can no longer be conceived solely in terms of interstate activities.

In the early decades of the twenty-first century, the growing global inequalities between rich and poor (as reflected in the Occupy Movement in 2011), and the new configurations of state and non-state power as demonstrated by the proliferation of NGOs, have dramatically altered global assemblages of power and geopolitical realities.<sup>22</sup> We are, in short, in the process of having to reimagine modernist legal geographies.<sup>23</sup> For the purposes of this discussion, these phenomena suggest that the

<sup>20</sup> See GW Wright, 'NGOs and Western Hegemony: Causes for Concern and Ideas for Change' (2012) 22 *Development in Practice* 123–34; see also SS Silbey, 'Let Them Eat Cake: Globalization, Postmodern Colonialism, and the Possibilities of Justice' (1997) 31 *Law & Society Review* 207–36.

<sup>21</sup> J Ferguson, 'The Uses of Neoliberalism' (2009) 41 *Antipode* 166–84, 168.

<sup>22</sup> S Sassen, 'Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights' (2008) 1 *Ethics & Global Politics* 61–79.

<sup>23</sup> E Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge, Cambridge University Press, 2013).



implications of postcolonial theories of law are as relevant to the 99% of white people living within wealthy Western nations as to darker-skinned peoples formerly colonised.

#### 1. DEFINING A POSTCOLONIAL PERSPECTIVE

Postcolonial scholarship over the last thirty years has provided enormous insights into understanding contemporary legal processes. A notable contribution to the field is the theoretical insight of Edward Said, who was a leading figure in postcolonial criticism and whose book *Orientalism* (1978) established a long trajectory of critical thinking about the subjugation of non-Western peoples. Specifically, postcolonial theory reveals the violence and the technologies of power involved in understanding concepts such as modernity and capitalism as well as contemporary state, sub-state and trans-state nationalisms.<sup>24</sup> Moreover, postcolonial theory provides the intellectual bridge linking historical colonial injustices to contemporary global asymmetries of economic, political and social power between a global North and global South. In short, postcolonial theory provides the intellectual platform from which to identify, analyse and assess what is encompassed by the term ‘postcolonial law’ in the twenty-first century.

Postcolonial studies, and postcolonial theory in general, is largely associated with a rethinking of a dominant European historiography that places the ‘West’ at the centre of the world. Contrary to the assumption of European superiority, postcolonial studies posits a plurality of cultural perspectives, concepts and legalities that do not correlate to a hierarchy dominated by Western Christian values and scientific rationality. Associated with South Asian scholarship, subaltern and literary studies as well as analyses of resistance, postcolonial studies emerged out of the global South in the 1980s and gained an increasing presence in Anglo-European universities.<sup>25</sup> With the proliferation of postcolonial research, there was, and is still, much debate over the meaning and scope of postcolonial terminology and its political agenda.<sup>26</sup> Despite these ongoing deliberations, it is helpful to turn to the most significant implications of a postcolonial perspective which mark it as distinctly different from, yet complementary to, other critical investigations associated with critical race theory, critical legal theory, and post-structuralist and feminist theoretical perspectives. This process will help to flesh out the contours of postcolonial studies and, at the same time, underscore its intellectual lineage and relevance to contemporary legal analyses.

Postcolonial theory acknowledges and recovers the ongoing significance of colonised peoples in shaping the epistemologies, philosophies, practices, and shifting identities

<sup>24</sup> U Baxi, ‘Postcolonial Legality’ in H Schwarz and S Ray (eds), *A Companion to Postcolonial Studies* (Oxford, Blackwell, 2000) 540–55; GC Spivak, *A Critique of Postcolonial Reason* (Cambridge, MA, Harvard University Press, 1999).

<sup>25</sup> G Prakash, ‘Writing Post-Orientalist Histories of the Third World: Perspectives from Indian Historiography’ (1990) 32 *Comparative Studies in Society and History* 383–408; G Prakash, ‘Can the “Subaltern” Ride? A Reply to O’Hanlon and Washbrook’ (1992) 32 *Comparative Studies in Society and History* 168–84; R O’Hanlon and D Washbrook, ‘After Orientalism: Culture, Criticism, and Politics in the Third World’ (1992) 34 *Comparative Studies in Society and History* 141–67; D Chakrabarty, ‘Postcoloniality and the Artifact of History: Who Speaks for “Indian” Pasts?’ (1992) 37 *Representations* 1–26.

<sup>26</sup> P Williams and L Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (New York, Columbia University Press, 1994); H Schwarz and S Ray (eds), *A Companion to Postcolonial Studies* (Oxford, Blackwell, 2000); A Loomba, *Colonialism/Postcolonialism*, 2nd edn (London and New York, Routledge, 2005); P Mongia (ed), *Contemporary Postcolonial Theory: A Reader* (New York, Bloomsbury, 2009).

of dominant and taken-for-granted Western subjects and subjectivities.<sup>27</sup> Postcolonial scholars foreground the cultural and psychological relations between the former colonised and colonisers, whom, they argue, cannot be understood except in conjunction with each other.<sup>28</sup> Postcolonial theorists do not claim that colonialism was experienced in the same way under different regimes, just as they recognise that today neocolonialism operates in very different ways from its earlier configurations. Nonetheless, while paying attention to the details of specific contexts, postcolonial scholars agree that in order to understand all contemporary histories of peoples and places, irrespective of whether there historically existed in any given site an explicit colonial regime, it is important to remain aware of the enduring presence of discourses that posit ‘civilised’, ‘progressive’ and ‘lawful’ Europeans against ‘barbaric’, ‘static’ and ‘lawless’ native populations.

According to these scholars, colonial assumptions of Western superiority endure across time and undermine contemporary attempts to build more inclusive multicultural societies. This is because categories of racial difference were used to varying degrees by colonial governments to gain power and control over locally subjugated peoples.<sup>29</sup> Today, despite claims of increasing acceptance of cultural diversity and policies of multiculturalism, racial categories and racialised differences continue to exist, though often in less overt manifestations.<sup>30</sup> Moreover, according to many postcolonial theorists, these boundaries of difference are insurmountable, because the psychological intersubjectivity between former colonisers and colonised constantly invites re-representations of difference.<sup>31</sup>

Drawing on a variety of theoretical perspectives—including an Hegelian master/slave dialectic, phenomenological essentialism, and psychoanalytical insights gleaned from Franz Fanon and Jacques Lacan—postcolonial theorists such as Homi Bhabha, Gayatri Spivak and Benita Parry bring to the fore complex understandings of how oppressed peoples resist their oppressors and seek empowerment. In recognising processes of mutual desire and negation between the ‘master’ and ‘slave’, postcolonial scholars have had to grapple with alternative historical narratives and identities other than those conventionally supplied by the West.<sup>32</sup> The irony is that the process of self-determination by peoples formerly colonised requires the adoption of European knowledge, including concepts such as ‘progress’, ‘development’, ‘individualism’ and what it means to be ‘human’. It also means the use of Western forms of government, state-building and, perhaps most importantly of all, European concepts of law. Thus, according to a postcolonial perspective, all assertions of freedom and self-awareness require elements of mimicry and voyeurism. As Douglas Robinson has noted:

<sup>27</sup> See de Sousa Santos (ed), above n 7.

<sup>28</sup> L. Gandhi, *Postcolonial Theory: A Critical Introduction* (New York, Columbia University Press, 1998).

<sup>29</sup> A. Stoler, ‘Rethinking Colonial Categories: European Communities and the Boundaries of Rule’ (1989) 31 *Contemporary Studies in Society and History* 134–61; NB Dirks, ‘From Little King to Landlord: Property Law, and the Gift under the Madras Permanent Settlement’ (1986) 28 *Contemporary Studies in Society and History* 307–33.

<sup>30</sup> DT Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (Oxford, Wiley-Blackwell, 2008); A. Lentin and G. Tittle, *The Crises of Multiculturalism: Racism in a Neoliberal Age* (London, Zed Books, 2011).

<sup>31</sup> P. Fitzpatrick, ‘Passions Out of Place: Law, Incommensurability, and Resistance’ in Darian-Smith and Fitzpatrick (eds), above n 2, 39–60.

<sup>32</sup> H. Trivedi and M. Mukherjee (eds), *Interrogating Post-Colonialism: Theory, Text and Context* (Shimla, Indian Institute of Advanced Study, Rashtrapati Nivas, 1996).

Postcolonial or subaltern scholars claim it is at once essential and impossible to forge a 'new' postcolonial identity: *essential*, because those colonial constructs were at once alien and negative, because they came from the outside and destroyed much of value in the indigenous cultures, and because an effective postcolonial politics requires the development of more positive indigenous visions: but also *impossible*, because colonial discourse continues to inform even these postcolonial attempts to break free of it, and tends to condition even the imagination of a 'new' (postcolonial) identity along 'old' (colonial) lines.<sup>33</sup>

A prominent postcolonial theorist, Dipesh Chakrabarty, has responded to the ironies of alterity by calling for the 'provincialising' or decentring, of Europe and European epistemological knowledge. Chakrabarty (and others) argue that non-Western knowledge has been historically ignored and precluded from historiographical accounts of humanist understanding and intellectual endeavour.<sup>34</sup> In an effort to critique 'the "Europe" that modern imperialism and (third world) nationalism have, by their collaborative venture and violence, made universal', Chakrabarty urges scholars 'to write into the history of modernity the ambivalences, contradictions, the use of force, and the tragedies and the ironies that attend it'.<sup>35</sup>

Nowhere in the histories of modernity has the 'use of force, and the tragedies and the ironies that attend it' been as obvious as they are in the context of legal engagement. European law, in a variety of ways, was the formal mechanism and institutional frame through which many colonial governments oppressed and controlled indigenous peoples throughout the eighteenth, nineteenth and twentieth centuries. Law, emblematic of Enlightenment rationalism, individual property rights and sovereign state authority, provided the justification for domination and exploitation based on racial, ethnic or religious inferiority. Of course, there were many varieties of legal imposition and not all of these were entirely done through force. In some cases, such as in Africa, the imposition of European law sometimes involved co-opting native chiefs and traditional procedures of arbitration and dispute resolution.<sup>36</sup> In other cases, such as Australia, the British declared upon their arrival there that the continent was *terra nullius* or vacant of other humans. On the basis that native populations were thought to be less than human, with no laws or social rules, they were often systematically annihilated (see Figure 2). As a result, traditional local methods of peacekeeping and legal negotiation were often overlooked or deliberately obliterated.

As postcolonial legal scholars often note, it is impossible to separate the laws set up in colonial outposts from the laws developing back in the European 'motherlands'. Hence it can be said that nineteenth- and twentieth-century metropolises such as New York, Paris, Belgium and London were always connected with and influenced by their nation's colonial peripheries, be these geographically distanced outposts beyond state boundaries such as in the Philippines, Algeria, the Congo or India, or socially and politically isolated enclaves (such as native reservations) within it. Similarly, colonial

<sup>33</sup> D. Robinson, *Translation and Empire: Postcolonial Theories Explained* (Manchester, St Jerome Publishing, 1997) 19-20.

<sup>34</sup> D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ, Princeton University Press, 2000).

<sup>35</sup> D. Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for 'Indian' Pasts?' (1992) 37 *Representations* 1-26, 20-21.

<sup>36</sup> M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ, Princeton University Press, 1996).





**Figure 2.** *Mounted Police and Blacks* (1852). Godfrey Charles Mundy. Australian War Memorial. This painting depicts the killing of Aboriginals at Slaughterhouse Creek by British troops.

outposts were intimately connected back to their colonising oppressors. Hence colonial legal regimes did not develop as separate isolated entities, but in collaboration the centralised systems of the colonisers.<sup>37</sup> In short, colonies emerged over time as intricately entangled hybrid societies incorporating European and non-European laws, values and sensibilities.<sup>38</sup>

Building upon this understanding of intrinsic legal hybridity, it becomes clear why the decolonised countries of the post-1945 era could not entirely excise their Euro-American colonial legacies. Moreover, these newly independent nations had in many cases little choice but to adopt European forms of state building and the institutions, bureaucracies and constitutions of their former masters. Such formalities were necessary in order for new states to declare themselves ‘liberal’ and ‘modern’ and to participate in national and international political and economic organisations such as the United Nations. The rule of law exemplifies the postcolonial dilemma that required—and still requires—self-determining nations to be complicit in the imperial strategies they seek to overcome by copying and adopting Euro-American legal concepts and structures. As a result, many postcolonial states embody the contradictions and pathologies of modern European states whose history of evolving democracy is built upon the oppressive logics of imperialism, colonialism and racism.<sup>39</sup>

<sup>37</sup> Merry, above n 1, 569–88.

<sup>38</sup> H Bhabha, *The Location of Culture* (London and New York, Routledge, 1994).

<sup>39</sup> See Comaroff and Comaroff, above n 11; JA Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis and London, University of Minnesota Press, 2011); J Reynolds, ‘Third World Approaches to International Law and the Ghosts of Apartheid’ in D Keane and Y McDermott (eds), *The Challenge of Human Rights: Past, Present, and Future*. (Cheltenham, Edward Elgar, 2012) 194–218.

## 2. POSTCOLONIAL LAW AND GLOBALISATION

Today's prevailing discussions about law and globalisation epitomise the ironies presented by postcolonial law. For instance, the United Nations, World Bank, IMF and other international legal arrangements all require that in order for a country to participate in the global political economy, it must demonstrate commitment to, and adherence with, the foundational values of Western law.<sup>40</sup> In a postcolonial world, just as in the colonial context of earlier centuries, there are always ongoing modifications and appropriations between all interacting communities and actors. One only has to think of human rights to appreciate the extent to which its apparently universal application has to be constantly translated, modified and 'vernacularised' to fit the social, political and economic values of particular peoples living in localised places.<sup>41</sup> Similarly, Euro-American law is not entirely impervious to the influence of laws emanating from the global South, as illustrated by the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007. However, despite the legal exchanges and adaptations over time by both colonisers and their former colonies, the global dominance of Euro-American law in the early decades of the twenty-first century is not easily destabilised. And as a result, Euro-American law structurally institutionalises the enduring asymmetries of power between the global South and global North and pervasively fashions and legitimates legal practices, meanings and imaginations that are European in origin.

One consequence of the global hegemony of Euro-American law is that within much Western legal scholarship there lingers a deeply embedded assumption of the global North's legal superiority vis-à-vis the rest of the world. This is evidenced by a majority of US and European scholars continuing to treat the rule of law as a discrete entity and not as a dynamic product of historically contested and culturally informed colonial/postcolonial interactions. Thus well into the twenty-first century, in arguments both for and against the significance of the nation-state amidst the forces of globalisation, the dominance of Western legalism is largely taken as a given. As a result, analysts of domestic and international law tend to look primarily at the privileged domains of legal interaction amongst lawyers, judges, business people and entrepreneurs, and to ignore the perspectives of ordinary people whose culturally informed normative understandings of law may be very different.<sup>42</sup>

One of the central elements of all postcolonial theories of law is the adoption of a bottom-up view that does not ignore the 'contribution of the masses', and in particular the contribution of the masses from the global South.<sup>43</sup> The postcolonial

<sup>40</sup> T Halliday and P Osinky, 'Globalization of Law' (2006) 32 *Annual Review of Sociology* 447–70, 455–56.

<sup>41</sup> SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press, 2006); A Sarat (ed), Special Issue 'Human Rights: New Possibilities/New Problems' (2001) 56 *Studies in Law, Politics, and Society*; W Twining (ed), *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge, Cambridge University Press, 2009); Keane and McDermott (eds), above n 39; R Banakar (ed), *Rights in Contexts: Law and Justice in Late Modern Society* (Farnham, Ashgate, 2010).

<sup>42</sup> P Ewick and S Silbey *The Common Place of Law: Stories from Everyday Life* (Chicago, University of Chicago Press, 1998).

<sup>43</sup> B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press, 2003) 402.

perspective insists that as scholars, we need to be concerned with how globalisation affects peoples in different ways and hence studies should include both the small cosmopolitan, aeroplane-hopping legal elite *and* the millions of peoples from various classes, cultures, ethnicities and religions whose understanding of law may appear to those embedded in a Western legal heritage as ‘traditional’, ‘backward’ or ‘inferior’. Postcolonial legal scholars are constantly vigilant against privileging a Euro-American position and are willing to embrace a plurality of legalities that from the perspective of most doctrinal legal scholars may not be easily understood or even initially recognised as law.

### 3. THEORIES OF LEGAL ORIENTALISM

The presence of postcolonial law requires that scholars and practitioners come to terms with the fact that there is no universal legal code but rather a complex overlapping plurality of legal systems and culturally informed legal meanings.<sup>44</sup> However, given relations between law, capitalism and a global political economy, it is perhaps not surprising that Western legal scholarship has largely ignored (some would argue deliberately) the challenging presence of postcolonial law. In an attempt to move beyond this deadlock, some scholars are coming at the problem of legal plurality by talking about the issue of legal orientalism. These scholars take a long historical view in arguing that legal orientalism has shaped the development of modern Euro-American law from the sixteenth century to the present.<sup>45</sup> This argument forces us to think about how racial and cultural biases continue to inform globally dominant legal concepts and assumptions of Western legal superiority, and may in turn open up ways to challenge or resist these dominant legal understandings of the world.<sup>46</sup>

What is legal orientalism? The concept of legal orientalism draws expressly upon the work of Edward Said, who, as mentioned above, was a leading figure in postcolonial theory. Said coined the word ‘Orientalism’ to refer to the ways in which European societies throughout the nineteenth century constructed their identity and self-understanding through imagining their difference to the Arab and Muslim world.<sup>47</sup> Essential in this process was the West’s stereotyping of the Orient, which included a range of Eastern cultures located in the Middle East as well as China, Japan and South Asia. Orientalist discourses emanating from Europe were not exactly the same as those emanating from the United States because they were usually directed toward the Middle East and China, while in the United States orientalist rhetoric was usually directed to the Philippines and targets closer to home.<sup>48</sup> These differences typically correlated

<sup>44</sup> See Tamanaha et al, above n 15.

<sup>45</sup> See Ruskola, above n 6; Falk, above n 6, 39–54; A Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 *Third World Quarterly* 739–53; P Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (Abingdon, Routledge-Cavendish, 2007).

<sup>46</sup> B de Sousa Santos and C Rodriguez-Gavarito (eds), *Law and Counter-hegemonic Globalization: Toward a Cosmopolitan Legality* (Cambridge, Cambridge University Press, 2005).

<sup>47</sup> See Said, above n 6; id, *Culture and Imperialism* (New York, Alfred A Knopf, 1993).

<sup>48</sup> D Little, *American Orientalism: The United States and the Middle East since 1945* (Chapel Hill, University of North Carolina Press, 2008); D Brody, *Visualizing American Empire: Orientalism and Imperialism in the Philippines* (Chicago, University of Chicago Press, 2010); R Francavigilia, *Go East, Young Man: Imagining the America West as the Orient* (Logan, Utah State University Press, 2011).

with a country's imperial and colonial interests and often changed over time. However, what united these various forms of orientalist rhetoric and material practice was the assumed oppositional relations between an exoticised Orient and a civilised Occident.

Typically nineteenth-century orientalist discourses about the East were negative and reinforced a presumed hierarchy of Western superiority and Eastern inferiority. However, this was not always the case, as seventeenth- and eighteenth-century Enlightenment philosophers and missionary Jesuits often praised Chinese people for their ingenuity and skill.<sup>49</sup> However, by the nineteenth century European attitudes about Asian peoples had crystallised into derogatory stereotypes.<sup>50</sup> Europeans promoted themselves as modern, rational, moral and lawful in contrast to a projection of Eastern societies as premodern, irrational, immoral and lawless (see Figure 3). Hence, at the same time that commentators such as Alexis de Toqueville were remarking upon the emphasis given to law in the United States in the 1830s, historians and social theorists were pointing to the lack of law in countries such as China, which was essentially viewed as a backward, 'stagnant' society in which lawlessness reigned.<sup>51</sup> But as insisted upon by Said, this did not mean that the 'Orient was *essentially* an idea, or a creation with no corresponding reality.'<sup>52</sup> Rather, 'The Orient is an integral part of European *material* civilization and culture ... with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles.'<sup>53</sup>

Legal orientalism served a variety of purposes. The most obvious of these was that it helped confirm on the world stage the marginality of the East and the centrality of the imperial West. European and American scholars argued that Eastern jurisprudential traditions were based on custom, ritual and religion, in contrast to the so-called rational and scientific legal systems of modern Western nations. Declaring non-Western legal systems inferior helped to justify European law and culture as a superior civilisation, worthy of world leadership and dominance. Orientalist rhetoric also provided the rationale for Western nations to marginalise Asian (and indigenous) peoples within their domestic jurisdictions. For instance, in the United States orientalist rhetoric provided the basis for the Chinese Exclusion Act (1882). This act suspended Chinese immigration into the country and prevented Chinese people already living in the United States from ever being granted citizenship. Under the act, it was argued that Chinese people were non-legal subjects because they were incapable of understanding US law and so deserved to be excluded from the new republic.<sup>54</sup>

Postcolonial legal scholars argue that the oppositional rhetoric between Eastern and Western legal traditions was essential for the development of modern Euro-American law. In other words, European law emerged historically through a perceived difference with non-Western legal concepts. According to the sociolegal scholar Duncan Kennedy, international law must be understood in relation to 'a distinction between the West and the rest of the world, and the role of that distinction in the generation

<sup>49</sup> JS Gregory, *The West and China Since 1500* (Basingstoke, Palgrave Macmillan, 2003); DE Mungello, *The Great Encounter of China and the West, 1500–1800* (*Critical Issues in World and International History*), 3rd edn (New York, Rowman & Littlefield, 2009).

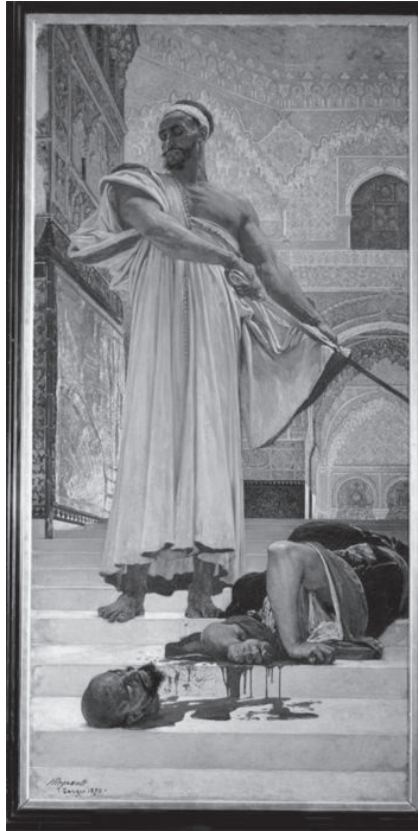
<sup>50</sup> Ruskola, above n 6, fn 175.

<sup>51</sup> *Ibid.*, 181–87, 213–15.

<sup>52</sup> Said, above n 6, 5.

<sup>53</sup> *Ibid.*, 2.

<sup>54</sup> JSW Park, *Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights* (New York, New York University Press, 2004); Ruskola, above n 6, 15–17.



**Figure 3.** *Execution Without Trial Under the Moorish Kings of Grenada*. Henri Regnault, 1870. © Musée d'Orsay. The title of this painting situates the image within an orientalist paradigm whereby exoticised 'others' are presented as lacking law and hence deemed intrinsically barbaric.

of doctrines, institutions and state practices'.<sup>55</sup> This perceived difference helped shape the international legal system, which required the 'invention of legal primitivism' to legitimate the West's universal aspirations.<sup>56</sup>

If one accepts this argument, then it follows that Western law has orientalist assumptions historically built into its language, structure and procedures. This suggests that contemporary Euro-American law, and the international legal system on which it is built, remains to this day intrinsically and pervasively cultural and racially biased.<sup>57</sup> In short, legal orientalism endures in twenty-first-century international law

<sup>55</sup> D Kennedy, Review of the *Rights of Conquest* (1997) 91 *American Journal of International Law* 745–48, 748.

<sup>56</sup> See Anghie, above n 45; JT Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184–211; B Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization' (2005) 7 *Journal of the History of International Law* 1–23; S Wilf, 'The Invention of Legal Primitivism' (2009) 10 *Theoretical Inquiries in Law* 485–509.

<sup>57</sup> See Pahuja, above n 6; L Westra, *Globalization, Violence and World Governance* (Leiden and Boston, Brill 2011).



and global legal relations.<sup>58</sup> Legal orientalism continues to fuel assumptions about the global North's legal superiority over the global South and has been deployed in a range of national and international legal forums such as asylum and refugee claims, as well as indigenous demands for recognition.<sup>59</sup> Moreover, legal orientalism is evident in the ways the global North interprets law in the Middle East, particularly in the wake of the events of 9/11, and how Western nations view legal institutions in China, Africa and Latin America. However, as the international legal scholar Teemu Ruskola remarks, the point of recognising the presence of contemporary legal orientalism is not to overcome ingrained cultural biases—an impossible task—but rather to ask why certain orientalist images of law developed, why they continue to resonate in the contemporary world, and what can be done to dilute these negative stereotypes that undermine international law and prevent sincere global dialogue and creative legal collaboration.<sup>60</sup>

#### 4. THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TMAIL)

There is considerable overlap between scholars who talk about legal orientalism and the intellectual movement associated with TMAIL. TMAIL is linked to a network of critical international legal scholars that first gathered at Harvard Law School in 1997.<sup>61</sup> This network quickly expanded to include a range of practitioners and academics, many of them 'born almost entirely in ex-colonies or part of their diasporas'.<sup>62</sup> The primary objectives of scholars who identify with TMAIL are to critique the uses of international law in perpetuating asymmetrical power relations between Europeans and non-Europeans, 'first' and 'third' worlds. As Gbenga Oduntan and others have argued, the hegemonic forces of the West have operated collectively to underdevelop an inclusive international law regime that empowers non-Western countries and regions.<sup>63</sup> Moreover, TMAIL scholars are concerned with resistance by the oppressed to the normative operation of law, seeking 'to transform international law from being a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggle and aspirations of Third World peoples and which, thereby, promotes truly global justice'.<sup>64</sup> Above all, TMAIL scholars are determined

<sup>58</sup> D Otto, 'Subalternity and International Law: The Problems of Global Community and The Incommensurability of Difference' in Darian-Smith and Fitzpatrick, above n 1, 145–80.

<sup>59</sup> SM Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 *International Journal of Refugee Law* 7–40. B Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' (2004) 9(1) *Deakin Law Review*.

<sup>60</sup> Ruskola, above n 6, 222.

<sup>61</sup> See M Matua, *What Is TMAIL? Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000); JT Gathii, 'TMAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', Special Issue: Third World Approaches to International Law (2011) 3(1) *Trade, Law and Development*; Chimni, above n 1.

<sup>62</sup> L Eslava and S Pahuja, 'Beyond the (Post)Colonial: TMAIL and the Everyday Life of International Law' in P Dann and F Hanschmann, *Post-colonial Theories and Law*, Special Issue (2012) No 2 *Journal of Law and Politics in Africa, Asia and Latin America* 197.

<sup>63</sup> G Oduntan, 'International Law and the Discontented: How the West Underdeveloped International Laws' in A Parashar and A Dhanda (eds), *Decolonization of Legal Knowledge in India* (Routledge, India, 2009) 92–126.

<sup>64</sup> A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) No 2 *Chinese Journal of International Law* 77; U Baxi, 'What May the "Third

to destabilise a normative legal orthodoxy that assumes the centrality of Western law and as a consequence fails to take into account diverse legal contexts and experiences that inform and constitute the dynamic field of international/transnational/global law.

Among TWAIL scholars there is a divergence of opinion about the meaning and use of the 'third world'.<sup>65</sup> This is, perhaps, not surprising given the vast diversity of ways international law has played out over time across colonies/postcolonies in countries, regions and continents. Nevertheless TWAIL scholars are persistently committed to using the terminology 'third world' because of its explicit political framing of the historical and contemporary oppositional relationship between the West and the non-Western world. In this context, the third world does not refer to a monolithic geographical reality but rather is a contingent referencing of a shared set of experiences and concerns by peoples and nations who share histories of subordination and oppression.<sup>66</sup> Using more vague terminology such as the 'global South' is viewed as diluting this political and ideological critique, in a way not dissimilar to minorities in the United States often rejecting the terminology 'African American' or 'Native American' and preferring instead the politicised terminology of Blacks and Indians.

Among TWAIL scholars there is also divergence on methodologies and priorities, with some focusing on the histories of international law,<sup>67</sup> or the limitations of human rights discourse and its claims to universality.<sup>68</sup> Other scholars are more obviously activist in their leanings and concentrate on resistance to and anti-hegemonic struggles against Western dominance and the development paradigm.<sup>69</sup> And some scholars are involved in all of these areas.<sup>70</sup> However, as Obiora Okafor has argued:

despite its healthy differences and variegation, TWAIL scholars (or 'TWAILers') are solidly united by a *shared ethical commitment* to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order.<sup>71</sup>

Some critics of TWAIL highlight its limitations as a scholarly movement in an effort not to discount its attack upon the hegemony of international law, but to sharpen

World" Expect from International Law?' Special Issue: Reshaping Justice—International Law and the Third World (2006) 27 *Third World Quarterly* 713–26.

<sup>65</sup> R Bachand, 'Les Third world approaches to international law: Perspectives pour une approche subalterniste du droit international' in E Jouannet, H Ruiz-Fabri and M Toufayan (eds), *Droit international et nouvelles approches sur le Tiers Monde*, vol 32 (Paris, Société de législation comparée, 2013).

<sup>66</sup> OC Okafor, 'Globalism, Memory and 9/11: A Critical Third World Perspective' in F Johns, R Joyce and S Pahuja (eds), *Events: The Force of International Law* (New York, Routledge, 2011) 234–45, see 235–36; K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse (1998) 16 *Wisconsin International Law Journal* 353.

<sup>67</sup> M Koskenniemi, *The Gentler Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, Cambridge University Press, 2004); A Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, Cambridge University Press, 2005). T Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan–Pakistan Frontier' (2011) 36 *Brooklyn Journal of International Law* 1.

<sup>68</sup> MW Matua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201–45.

<sup>69</sup> Chimni, above n 8.

<sup>70</sup> Rajagopal, above n 43.

<sup>71</sup> OC Okafor, 'Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Review* 171–91, 176–77. See also OC Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 371–78.

its capacity to affect change. So, for instance, Rémi Bachand points to the need to explicitly fold into the analysis of global oppression other categories such as gender, class, race, ethnicity and religion which are too often presumed to be embedded within TWAIL's third/first world framing.<sup>72</sup> As Bachand discusses, complex class, ethnic and cultural interactions are often subsumed or overlooked within this binary model.<sup>73</sup> As a result, Bachand argues, TWAIL scholars fail to fully account for how intersectional forces play out within Western and non-Western states, perhaps altering the terms of the largely taken-for-granted oppositional relationship. For example, little analysis has been done with respect to national elites within many postcolonial states who through active engagement with Western capitalists may be complicit in the oppression of their own peoples.

Other scholars within the TWAIL movement seek to push further the agenda of deconstructing international law by rethinking its universalising potential. This move is driven by the dilemma many TWAIL scholars and practitioners face as critics of international law while at the same time continuing to have faith in its emancipatory and reformist capacities.<sup>74</sup> Against this impasse, Luis Eslava and Sundhya Pahuja argue for a bottom-up ethnographic approach that explores the sites, spaces, performances and things through which the 'international' is constituted, but which are often not recognised as such. 'These other sites of practice we have in mind are not necessarily—or even usually—"international" in name, or imagined to be so in terms of their vision, outlook, size or scale.'<sup>75</sup> These sites would be the more obvious sites of courtrooms and customs agencies, as well as less obvious places and practices such as visa processing agencies, border security mechanisms, environmental regulations, urban zoning, and censorship of mobile phone and digital communications. As Eslava and Pahuja go on to say:

Once we consider this plethora of spaces—or new 'jurisdictions'—in which international law is being materialized today, it becomes clear that we cannot confine our interrogations to only those sites that present themselves as 'international'. The increasing number of jurisdictional forms that are now being created or recreated, in the name of good governance, sustainability or economic competitiveness deserve detailed attention: one capable of linking the existence and operation of these spaces to the ways in which the current global order is unfolding in the everyday lives of people across the world.<sup>76</sup>

Eslava and Pahuja's call for an ethnography of international law that explicitly seeks to engage with the 'regulatory proliferation of international law' in the lives of ordinary people suggests a significant contribution in furthering the political objectives of TWAIL scholarship.<sup>77</sup> First and foremost, it suggests new ways for scholars to appreciate the small moments of daily resistance to localised manifestations of international regulatory power. In this sense, Eslava and Pahuja's call for an ethnographic exploration of the universality of international law refers to the universality of everyday forms of resistance, revolution and struggle by oppressed peoples against the hege-

<sup>72</sup> Bachand, above n 65.

<sup>73</sup> For a notable exception see Otto, above n 58.

<sup>74</sup> See Anghie, above n 45, 752.

<sup>75</sup> Eslava and Pahuja, above n 62, 218.

<sup>76</sup> *Ibid*, 218–19.

<sup>77</sup> *Ibid*, 221.

monic power of international law. Significantly, this approach seeks to overcome the contradictory impasse described above by widening and deepening TWAIL critiques of international legality while at the same time retaining optimism about international law's emancipatory potential and capacities to effect change.

Personally, as a scholar deeply sympathetic to TWAIL, it seems to me that both the call for greater intersectionality and for an ethnographic methodology aid critical approaches to international law in dealing with the challenges of the twenty-first century. As discussed briefly in the introduction, the geopolitical realities of our contemporary world have moved beyond a state-centrist system to include a range of non-state actors above and below the level of the nation-state. Unfortunately, much analysis of international law remains stuck in a modernist worldview that speaks more to the second half of the twentieth century than to the current moment. This worldview prioritises a state's legal interrelations with other states and fails to pay sufficient attention to the ever-expanding field of NGOs, volunteer organisations, religious and ethnic regional affiliations, and the mass movement of peoples in search of greater human security. Together these emerging non-state actors and global forces challenge the core principles of international law in profound ways. The calls for greater intersectionality and for an ethnographic methodology provide ways to side-step these challenges by decentering the state and emphasising new sites, locales, objects and processes through which international law is constituted and made meaningful to a diverse range of people.

##### 5. CONCLUDING COMMENTS

One thing that is certain—whether one frames asymmetrical power relations between the global North and South in terms of legal orientalism or critical approaches to international law—is the need to move past a modernist hierarchy of legal authority based on simplistic binaries of rational versus non-rational and civilized versus uncivilized legal systems. Deorientalising and decolonising the twenty-first century's normative global legal order and stereotyped legal divides is seen, by some scholars and analysts at least, as ultimately necessary for the stability and peace of global, international, national, regional and local relations.<sup>78</sup> As the Nigerian legal scholar Ikechi Mgbeoji has eloquently stated, 'the North and South are mutually vulnerable, sharing a common destiny, which cannot be realized unless notions of a civilized self and barbaric other are abandoned'.<sup>79</sup> Moreover, with the deorientalising of law, the naturalised centrality and superiority of a Euro-American legal perspective would be dislodged and necessarily 'provincialised', borrowing Chakrabarty's terminology discussed above.

Postcolonial theorists offer some insights as to how to get past historically structured racialised divides between peoples and communities. The political theorist Duncan Ivison in his book *Postcolonial Liberalism* (2002) argues for the need to

<sup>78</sup> See Santos (ed), above n 7; Y Onuma, *A Transcivilizational Perspective on International Law*. Hague Academy of International Law (Leiden and Boston: Martinus Nijhoff Publishers, 2010).

<sup>79</sup> I Mgbeoki, 'The Civilized Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security' in R Falk, B Rajagopal and J Stevens (eds), *International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008) 151–65, 152.

create a ‘genuine “multilogue” not just between the state and indigenous peoples, but between them and other cultural and national groups as well’.<sup>80</sup> In his arguing that indigenous peoples can make considerable contributions in the thinking of how to build more inclusive societies, Ivison notes that this will take time and a firm commitment to ‘the ideal of a political order in which different national groups, with different modes of belonging and different conceptions of the good and the right, nevertheless share a willingness to live under political arrangements that reflect this plurality’.<sup>81</sup> Ivison’s argument underscores the political challenge of a postcolonial perspective with respect to law. In order for there to be ‘a context-sensitive and embedded form of public dialogue and deliberation’,<sup>82</sup> we must first rethink the prevailing Eurocentric, state-bound understanding of what constitutes law and what processes are deemed legal. In other words, embracing postcolonial legal theories and coming to terms with deeply problematic histories of colonial oppression that endure in today’s new geopolitical configurations is perhaps the first step in a process toward building a global legal future that is more responsible, equitable and inclusive of humanity, however defined.

<sup>80</sup> D Ivison, *Postcolonial Liberalism* (Cambridge, Cambridge University Press, 2002) 163.

<sup>81</sup> *Ibid.*, 166.

<sup>82</sup> *Ibid.*, 163.