



THE MCGILL JOURNAL OF INTERNATIONAL LAW & LEGAL PLURALISM  
REVUE DE DROIT INTERNATIONAL ET DE PLURALISME JURIDIQUE DE MCGILL  
REVISTA DE DERECHO INTERNACIONAL Y PLURALISMO JURÍDICO

A photograph of a weathered wall with vibrant, layered paint in shades of blue, yellow, and orange. A large, textured red sculpture of a human figure is attached to the wall on the right side. The background shows a tree and a clear sky.

VOLUME 1 | ISSUE 1

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# International Law & Peoples' Resistance

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The cover image was taken by Esther Dionne Desbiens, a student at the McGill Faculty of Law. She took this photograph during a human rights internship at The Ark Foundation in Ghana in 2013. This sculpture mural was located in a market she visited in Tamale, a town located in the North of the country. The artist was anonymous, and the piece was without description, leaving it to us to interpret this colorful work.

Esther Dionne Desbiens est étudiante à la faculté de droit de McGill. Elle a pris cette photo lors d'un stage en droits humains à The Ark Foundation au Ghana en 2013. Cette sculpture murale se trouvait dans un marché d'artisanat qu'elle a visité à Tamale, une ville au nord du pays. Artiste anonyme et sans description, c'est à nous de donner sens à cette œuvre colorée.

La foto de la portada fue tomada por Esther Dionne Desbiens, estudiante de la Facultad de Derecho de McGill. Ella tomó esta fotografía durante su práctica en derechos humanos en la Fundación Ark en Ghana, en el año 2013. Esta escultura mural fue encontrada en el mercado que ella visitó en Tamale, un pueblo localizado en el norte del país. El artista es anónimo, y la pieza no tiene descripción alguna, dejando al observador interpretar este colorido trabajo.

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## Foreword

*Frédéric Mégret\**

The ambition of *Inter Gentes* is to imagine how international law might be conceived as a law *between* peoples and individuals rather than strictly, as has long been the conventional assumption, an interstate law. It thus aims to reclaim some of the long lost origins of the discipline, and to enrich our understanding of international law as solidly dependent on a variety of global exchanges, including legal exchanges. In that respect, the *Inter Gentes* focus differs from the transnational law paradigm that has been in vogue for several years in that it is not only focused on the flow of people across borders or the regulation of corporate actors on a global level. In emphasizing “gentes,” the Journal will be interested in collectives that continue to define the public destiny of international law, although whether peoples are the nation or some other collective such as indigenous groups or diasporas for example will precisely be one of the Journal’s foci.

Emerging from the rich transsystemic experience of the McGill Faculty of Law, at the intersection of the English and French speaking worlds, the common and the civil law, *Inter Gentes* will also draw on the lens of legal pluralism in an effort to move away from the prevalent unitary view of international law (“there is only one international law”) to see international law as multiple based on the logic of actors that resort to it and the myriad of social meanings they impose upon it. International law, no doubt, is many things to different people and both professional and profane, theoretical and practical participations in its ongoing destiny are part of its constitution.

True to this pluralist ambition, *Inter Gentes* will be based on an open, dynamic platform for transnational academic exchange that draws on the many global connections of its faculty and student body. Where even much international legal scholarship remains surprisingly wedded to place and specific histories, it sees engaging various traditions in a dialogue as essential to the process of reinventing international legal forms. The first issue aims to showcase some of the possibilities inherent in its pluralist formula by encouraging a dialogue on the relationship of the idea of resistance to the project of international law.

Resistance *to* international law, resistance *thanks to* international law: there is little doubt that resistance constitutes one of the underlying threads of international law’s genesis and continued existence. Where the dominant view of the centrality of the rule of law, including in its international variant, seems to want to straitjacket all participants into a singular respect for the law as it is, the legal pluralist mindset has always been more sensitive to the way in which international law is constantly shaped and constructed through its interactions, including the less polite interactions, with various actors. Rather than just focus on the “compliance pull” one needs to redirect one’s attentions to the “compliance push:” the degree to which the law’s rejection, or at least strategies to mitigate and evade its application, end up being part of the world’s normative framework broadly understood.

Indeed, the law’s contestation is if nothing else a symptom of the law’s travails. Several authors in this issue emphasize the degree to which resistance to international law is a reaction to its epistemological and, indeed, ontological hermeticity. Peter Fitzpatrick for example emphasizes its “neoliberal enclosing” as suppressing what is nonetheless its “formative plurality.” In highlighting how deep a form of oppression international law constitutes, Pierre-Alexandre Cardinal cautions against international law’s ability to even comprehend forms of resistance that are not expressed within its colonial matrix. And Linda Hamid and Jan Wouters point to the reality of a game in which the rules may well appear heavily stacked against the non-conformist territorial actor. All contributors nonetheless seem to remain

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committed to international law's residual promise, although to varying degrees and with differing agendas. For some clarification is at stake, others normative imagination, and yet others a radical challenge to the law's intellectual limitations. For Irene Watson, for example, speaking from the crucial point of view of the encounter of indigenous peoples with international law (and vice-versa) there is a real doubt about the very possibility of an international law born from the colonial encounter ever being about anything else than that encounter. Hamid and Wouters highlight the fact that dissident territorial actors on the international stage are nonetheless always in demand of international law's recognition. Finally, Otto Spijkers' contribution emphasizes the continued importance of legal imagination as a way to chart a bold prospective normative course to better include global citizens' critical contribution to international law. Although very different in their tone and approaches, it is hoped that this difference will create vivid possibilities for dialogue between different forms of resistance.

## Ultimate Plurality: International Law and the Possibility of Resistance

*Peter Fitzpatrick\**

### Abstract

A formative plurality is identified in the constitution of international law. This plurality embeds resistance yet also blocks it by enabling a neo-imperial enclosing of international law. Ultimately, however, law's plurality can render the enclosure provisional and secure the possibility of resistance.

How much can come  
And much can go,  
And yet abide the World!  
(Emily Dickinson, "There came a Wind like a Bugle")<sup>1</sup>

### *French Translation*

Une pluralité formatrice est identifiée dans la constitution du droit international. Cette pluralité intègre la résistance, mais y fait obstacle aussi, en érigeant une clôture néo-impérial au droit international. En fin de compte, cependant, la pluralité du droit peut rendre cette clôture provisoire, afin d'assurer les possibilités de résistance.

How much can come  
And much can go,  
And yet abide the World!  
(Emily Dickinson, "There came a Wind like a Bugle")

### *Spanish Translation*

Una pluralidad formativa es identificada en la constitución del derecho internacional. Esta pluralidad conlleva resistencia, pero también la bloquea al avalar una concepción neoimperial del derecho internacional. Sin embargo, al final, la pluralidad del derecho puede llevar esta concepción a la provisionalidad y así asegurar una posibilidad de resistencia.

How much can come  
And much can go,  
And yet abide the World!  
(Emily Dickinson, "There came a Wind like a Bugle")

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<sup>1</sup> RW Franklin, ed, *The Poems of Emily Dickinson* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999) at 591.

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## Inter gentes

As a prefiguring of international law, the *ius inter gentes* poses a persistent puzzle: how can the “inter-” of international law be realized? A touch of semantics may help set the issue. In English, and as the Oxford English Dictionary has it, the prefix “inter-” denotes being “[b]etween or among other things or persons; between the parts of, in the intervals of, or in the midst of, something; together *with*,” and it extends as well to being “with each other; mutually, reciprocally...”<sup>2</sup> So, in many of its numerous composites, “inter-” denotes not only relations between distinct entities but also a “something” within which that relation subsists. The “international” of international law provides a convenient instance. Likewise, the Latin *inter* would accommodate being between or among, and so the *ius inter gentes* becomes a law between or among peoples; and its Latin definition would extend also to *inter* being “in the midst of ... something.” Aptly then, the *ius inter gentes* would also be in itself a “something” of surpassing singularity (and the word ‘something’ will now carry a loaded meaning throughout). The puzzle then becomes how this something can be both singular yet constituted in a formative plurality of peoples.

Initially, of course, the Roman empire seemed to oblige and tip the scales very much in the direction of a surpassing singularity. And it was Roman law which initially bestowed influential renditions of *ius inter gentes* within an occidental ‘modernity.’ The telling figure here is Francisco de Vitoria. He will take on further prominence later but for now it may be sufficient to observe how “Vitoria argued that the *ius gentium* of the Roman texts, in which it meant the law shared by all peoples, should be understood also as *ius inter gentes*, that is, a set of rules governing the relations between one people and another.”<sup>3</sup> With Vitoria in the sixteenth century, this *ius gentium* fused scholastic theology and an assertive secularism, and this was done in a way, and in a setting, that enshrined an occidental imperialism.<sup>4</sup> Aptly, Vitoria and the advent of this imperium can be seen as layering a further imperial origin on international law. That further origin is fraught, however.

Such an origin no longer provides a specifically imperial and unitary authority. We are now the denizens of “unseen empires,” as Pope Francis has it—empires operating through “uniform systems of economic power.”<sup>5</sup> The significance of these unseen empires for international law will be teased out later, but with such law in its conventional conception, a specific unitary authority would seem to be not only absent but impossible. In contrast to the absence of fixed internal boundaries in the Roman empire, in the early modern period of occidental history, and as Schmitt notes, “the territorial order of the ‘state’... became the representative of a new order in international law.”<sup>6</sup> And, he would add, “[o]nly as a consequence of the clear demarcation of self-contained territories did *jus gentium* become distinctly and clearly *jus inter gentes* [law among nations], *inter gentes Europaeas* [among nations of Europe].”<sup>7</sup> For this international law, Vattel provided the classic and compact claim that, in and as international law, there remains an “unlimited and unconditional power” of the sovereign state, so that none of the member states of the international “yield ... rights to the general body,” each sovereign state being somehow “independent of all the others.”<sup>8</sup> Yet it is quite impossible for there to be any commonality, any community, of entities each possessed of such an ultimate completeness. Adapting Nancy, with such a pure plurality any formed relation between nations would instead have to be in “communion,” a communion formed by reference to “a divine presence” or, it could be added, by reference to a deific substitute such as an imperial national sovereignty or the ‘community’ of ‘the international community.’<sup>9</sup>

<sup>2</sup> *Oxford English Dictionary*, 2d ed (1989), *sub verbo* “inter-, prefix” meanings 1.a and 1.b, Oxford University Press 1989 [emphasis in original].

<sup>3</sup> Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) at 94–95.

<sup>4</sup> See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, translated by G L Ulmen (New York: Telos Press, 2003) at ch 2–3. See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at ch 1 [Anghie, *Imperialism*].

<sup>5</sup> Pope Francis, “Pope Francis’s address to the European Parliament in full,” *Catholic Herald* (25 November 2014), online: Catholic Herald <[www.catholicherald.co.uk/news/2014/11/25/pope-franciss-address-to-the-european-parliament-in-full/](http://www.catholicherald.co.uk/news/2014/11/25/pope-franciss-address-to-the-european-parliament-in-full/)>.

<sup>6</sup> Schmitt, *supra* note 4 at 129.

<sup>7</sup> *Ibid* [translations in original].

<sup>8</sup> Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and Sovereigns*, translated by C G Fenwick (Washington: Carnegie Institute, 1916) vol 3 at 9.

<sup>9</sup> Jean-Luc Nancy, *The Inoperative Community*, ed by Peter Connor, translated by Peter Connor et al (Minneapolis: University of Minnesota Press, 1991) at 15.

If we cannot accept the abstracted completeness of the nation-state or the evasive transcendence of this ‘international community,’ then we have to account for the coherence of international law in other terms. The same challenge can be put more pointedly if we break down the category that gets called “general international law” and seek the formative force of its more particular manifestations, such as the formative force of *jus cogens*, an ‘imperative law’ of international law which cannot be countered by nation-states; or the formative force of an international criminal law seemingly lacking the singular sovereign voice; or the formative force that goes to constitute a distinct international customary law. With each of these as well as other formations of international law, there is something that is not contained within a consensual pantheon of nation-states, something distinctly beyond that, yet something more cohering and coherent, more actualized than a pure plurality, a simple diversity. The inescapable challenge now becomes what this ‘something’ may be.

### ***International***

Whatever else international law may be, it would not seem to be international. Returning to the story so far, international law emerges from an imperial and religious precursor into a supposedly secular *jus publicum Europaeum*, and there is cogent confirmation that international law still persists as a “European tradition,” with this Europe being “representative of the universal.”<sup>10</sup> Linking then and now, the standard “history of international law has been written so far ... as a history of rules developed in the European state system since the 16<sup>th</sup> century which then spread to other continents and eventually the entire globe.”<sup>11</sup> This is a monistic history, an extraversion of a self-contained Europe or, in terms of another disciplinary designation, this is the product of a European cognitive geography that is supremely singular. Despite then, its “regional dimension” international law still sustains “the label of universality.”<sup>12</sup> Being determinately regional, yet intrinsically of the universal, it does pose a considerable contradiction for a modern, secular international law. As such, this law cannot project its universality from a persistent position of surpassing transcendence. That universality has, then, to be immanent to international law – to its delimited “regional” self. Yet, as Deleuze and Guattari would observe, “whenever immanence is interpreted as immanent *to* Something, we can be sure that this Something reintroduces the transcendent.”<sup>13</sup>

Closer acquaintance with this “Something” refines rather than resolves contradiction. As we saw earlier, and in terms of Vattel’s classic formula, international law was set as an emanation of nation-states, each having and retaining a completeness of power. And as Bauman would deduce, “[i]n a world fully and exhaustively divided into national domains, there was no space left for internationalism.”<sup>14</sup> Yet for there to be an international law nation-states have to relate concordantly to each other. Article 1 of the Montevideo Convention of 1933 includes in its criteria for qualifying as “a person of international law ... [a] capacity to enter into relations with the other states.”<sup>15</sup> And of course, that convention itself is a creation of states relating to each other. All of which would accord an aptness, as far as international law is concerned, to such phrases as ‘the international community’ and ‘the community of nations’ but, as we saw earlier in the company of Vattel, this is an impossible community. Entirely independent entities cannot relate in and as community. They relate, if at all, in and as a quasi-deific, transcendent communion.

It may be wondered how such self-sufficient entities need have, or even would have, the extensive capacity to recognise each other at all. In the scholarship of international law there are two well-worn yet still warring theories of ‘recognition.’ With the more approved declaratory or evidentiary theory, the

<sup>10</sup> See Schmitt, *supra* note 4 at 101, 126, 129. For the confirmation and the quotation, see Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16:1 Eur J Intl L 113 at 114.

<sup>11</sup> Bardo Fassbender & Anne Peters, “Introduction: Towards a Global History of International Law”, in Bardo Fassbender and Anne Peters eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) 1 at 1.

<sup>12</sup> CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies, 16th, 17th and 18th Centuries* (Oxford: Clarendon Press, 1967) (he sees international law shrinking to regional dimensions in the nineteenth century. It will continue to be evident that, in this present article, the regional ascription is of a longer duration.)

<sup>13</sup> Gilles Deleuze & Félix Guattari, *What is Philosophy?*, translated by Graham Burchell & Hugh Tomlinson (London: Verso, 1994) at 45 [emphasis in original]. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 37, 159 (for international law specifically).

<sup>14</sup> Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989) at 53.

<sup>15</sup> *Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS 19, art 1 (entered into force 26 December 1934).

nation-state “exists as such prior to and independently of recognition,” recognition then being “merely a formal acknowledgment of an established situation of fact.”<sup>16</sup> Beyond immediate concerns with international law, the self-subsistence of either facticity or of any particular fact is something intensely contested. But, even putting that on one side, there remains the question of how there can be definitive content given to the particular ‘fact’ of something being a nation-state. The sovereign nation-state, in its self-constituted utter distinctness, cannot defer to another authority laying down the criteria for the very recognition of that distinctness. The contrast then with the alternative theory of recognition, the constitutive theory, could not be sharper. With this theory, recognition creates the nation-state in accord with criteria laid down in international law – criteria such as those contained in Article 1 of the Montevideo Convention of 1933. So, nation-states are constituted by an international law which they constitute.

There can be little reticence in an international law that persistently elevates its own surpassing credentials. So, international law’s identifying itself with ‘the international community’ or ‘the community of nations’ is rarely a matter of self-restraint. The same could be said of the burgeoning presence of human rights in international law and the commensurate claims to the human in such as ‘crimes against humanity.’ International criminal law itself can stand apart from the exceptionally limited consensual adherence of states, propound an ‘international legal personality’ and proscribe “‘universal’ or international crimes” – dictates that in practice have “allowed of few or no reservations.”<sup>17</sup> Rules in international criminal law will overlap with the domain of *jus cogens*, that domain of peremptory norms of international law binding on every state whether or not it has agreed to them. In a like vein, there are obligations *erga omnes*, obligations deemed to be “towards all” in that the obligation is one “to the whole of the international community” in requiring, for example, the “enforcing and protecting [of] fundamental human rights.”<sup>18</sup> Furthermore, no matter what the difficulty in theorizing its ‘recognition,’ a “state may exhibit all the hallmarks of statehood yet be denied recognition by other states by reason of the circumstances of its creation offending fundamental norms of the international legal order.”<sup>19</sup>

Perhaps the most extensive, if comparatively subdued, claim international law would advance in its self-elevation takes the form of custom. Once seen as the very foundation of international law, custom remains central and pervasive. This is not custom as a mordant stasis. Although typically taken to be derived from the ‘practice’ of states, custom is receptively and continually formative of that practice, and it is selectively transformative in its recognizing practice as juridical rule. The court in effecting these processes of formation and transformation is not limited in its range of enquiry – an enquiry that can extend to, for example, “treaties, the practice of states, diplomatic correspondence, decisions of state courts, and juristic writings.”<sup>20</sup> The impact of custom can, in turn, be transformative of other categories of international law such as treaties and decisions of international courts. Here the formative force of custom merges with that of legal interpretation and determination generally where international law routinely manifests its prescriptive elevation, at times spectacularly, so as with the invention and formulation of crimes against humanity.<sup>21</sup>

In all, this engagement with the international of international law seems to have ended in intimations of aporia. Borrowing Carty’s terms, there is “a void at the very heart of international society which is marked by the myth of international legal order;” in the result, “there is no legal solidarity on the part of states towards one another.”<sup>22</sup> Yet, our engagement went on, international law had a generative force and determinate efficacy that seemed able to fill any such void. En route to resolving this seeming contradiction, the next section looks at attempted appropriations of international law that might be considered able to resolve it.

<sup>16</sup> IA Shearer, *Starke’s International Law*, 11th ed (London: Butterworth & Co, 1994) at 120.

<sup>17</sup> Ilias Bantekas, *International Criminal Law*, 4th ed (Oxford: Hart Publishing, 2010) at 2, 8, 14.

<sup>18</sup> *Ibid* at 13.

<sup>19</sup> Shearer, *supra* note 16 at 87.

<sup>20</sup> *Ibid* at 35.

<sup>21</sup> See Bantekas, *supra* note 17 at 185–88.

<sup>22</sup> Anthony Carty, “Myths of International Legal Order: Past and Present” (1997) 10:2 Cambridge Rev Intl Affairs 3 at 10 [emphasis in original].

## ***Appropriation***

The history of modern international law and its expansion touched on earlier can be endowed with impelling content by way of Anghie's supplement: "European International law could not have become universally applicable if not for colonialism. Colonialism justified itself as a civilizing mission."<sup>23</sup> That history derived an origin from "rules developed in the European state system since the 16<sup>th</sup> century."<sup>24</sup> More specifically the Hispanic colonization of the Americas in that century is widely seen as providing another yet related origin—the origin of a unitary comprehension of the world vested in Europe, and this not as a matter of perspective only but also as a matter of pending entitlement, an entitlement beginning with "the New World, America, the land of freedom, i.e. land free for appropriation by Europeans."<sup>25</sup> That acerbic note provided by Schmitt is reproduced in one of his comments on Vitoria's lectures on the occupation of this New World:

It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions.<sup>26</sup>

Whilst that imperial orientation could hardly be expected to have endured into a post-colonial era, it has. For a start, somewhat literally, former colonies entered an international domain that continued, with only marginal modification, to be amply occupied by an Occident now expanded beyond Europe in the absorption of the United States. This entry was not only a matter of being admitted into international institutions, international law itself remained securely 'in place' commanding adherence. Even those not colonized were admitted on the same terms, or lack of terms, and at times earlier. So, Anghie describes "the arduous task successfully undertaken by Japan" and by some others as one of securing admission to the domain of international law "by changing their social, political, economic and legal systems in such a manner as to ensure that they complied with European standards."<sup>27</sup>

This particular 'new international law' is one enmeshed, returning to Pope Francis, in "unseen empires" where "uniform systems" are to be realized, not now as the emanation of some imperium, but through generating commonalities of requisite effect—generating an "imperialism of the same," as Levinas may render it, whilst still sustaining an insistent differentiation.<sup>28</sup> With this more "informal imperialism," borrowing Tully's depiction,<sup>29</sup> those not presently or entirely of the elect are to undergo a process of development oriented towards overcoming that existential deficiency, and to do so by way of a plethora of organizations and, writes Escobar, by way of "an endless number of practices."<sup>30</sup> These seek to orient developing nations consensually, yet they do so more intrusively, more intimately, than the modes typical of the prior and more 'formal' imperialisms. Whilst this overall process can assume a large aspirational and programmatic range and secure a wide measure of acceptance, and whilst it adopts systematic and scientific modes of operation, nonetheless it remains effectively diffuse.

This combination of the diffuse with an infra-imperialism is revealed as more explicitly functional when the mantra of development comes to merge with that of a more expansive "governance" and especially so when that governance is filtered through Foucault's "governmentality."<sup>31</sup> Governance has been:

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<sup>23</sup> Antony Anghie, "Law, Concepts of the International" in Thomas Benjamin, ed, *Encyclopedia of Western Colonialism Since 1450* (Detroit: Macmillan Reference USA, 2007) 724 at 727 [Anghie, "Law, Concepts"].

<sup>24</sup> Fassbender & Peters, *supra* note 11 at 1.

<sup>25</sup> Schmitt, *supra* note 4 at 37.

<sup>26</sup> *Ibid* at 113.

<sup>27</sup> Anghie, "Law, Concepts", *supra* note 23 at 725.

<sup>28</sup> See Pope Francis, *supra* note 5; Immanuel Levinas, *Totality and Infinity: an Essay on Exteriority*, translated by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969) at 87.

<sup>29</sup> James Tully, *Public Philosophy in a New Key: Volume 2, Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008) ch 5.

<sup>30</sup> Arturo Escobar, "Discourse and Power in Development: Michel Foucault and the Relevance of his Work to the Third World" (1984) 10 *Alt J* 377 at 387. See also Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and The Disciplining of Third World States* (Abingdon: Routledge, 2011) (more particularly, for an indispensable critical engagement).

<sup>31</sup> See e.g. Nicholas J Kiersey, Doug Stokes & Jason R Weidner, "Introduction" in Nicholas J Kiersey & Doug Stokes, eds, *Foucault and International Relations: New Critical Engagements* (Abingdon: Routledge, 2011) at xiii.

... often defined as government without readily identifiable governors, and the study of global governance reveals that clear, transparent and hierarchical patterns of authority are typically lacking; indeed, the relative fall from grace of law as a normative order suggests much the same.<sup>32</sup>

Leaving the redemption of law on one side for now, governance imports a mixitive collection of processes and organizations that have a singular efficacy, yet do not have a conspicuous coherence, despite which this governance manages to project a systematic inevitability – something enhanced by its assumed factuality, normality and naturalness, by its being the way things are.

This governance can be more revealingly rendered in terms of Foucault's "governmentality," a governing which would combine a pervasive governing of whole populations with tentacular and generalized disciplinary powers, including and especially the governing by, and disciplinary power of, the market.<sup>33</sup> Such governmentality generates "the effect not of a consensus but of the materiality of power operating on the very bodies of individuals."<sup>34</sup> And whilst it is identified with a tendency "throughout the West [that] has constantly led toward the pre-eminence over all other types of power – sovereignty, discipline, and so on," the role and force of disciplinary power is preserved, as is the force of a state sovereignty that takes on functional, even heightened significance.<sup>35</sup> More expansively, the state serves in bringing to bear a "liberal reason ... established as self-limitation of government on the basis of a 'naturalness' of the objects and practices specific to government" including a naturalness of the economic.<sup>36</sup> Still in this expansive vein, and like its vaporous cousin "global governance," this naturalness characterizes an "economic world" that is "naturally opaque and naturally non-totalizable."<sup>37</sup> Thence no focal totality and no positive bound that could delimit it, even as a blank naturalness, can be called on to do so. Yet, "the form of governmental technology we call liberalism ... [has] its own self-limitation" as its objective.<sup>38</sup> Liberal governmentality, then, assumes an illimitable capacity of self-limitation. This fusion of the illimitable with the limitable enables "the delimitation of phenomena within acceptable limits."<sup>39</sup> And that illimitable range would extend to delimiting what is beyond the domain of what the self-limited may be at any one time – such as delimiting the underdeveloped of the earth.

No matter what the ability of governmentality to 'manage' the relation between the illimitable and the delimited, that ability does not seem capable of endowing international law with a comprehensively cohering force or identity, much less with authority. Governmentality, like informal imperialism and governance, eludes any positively encompassing identity. In that way, its embedding of empire remains 'unseen' and its putatively liberal, modern and post-imperial qualities are shielded from complicity. Further, with its immanent illimitability not tied to any positively encompassing identity, governmentality also eludes the transcendence deduced by Deleuze and Guattari and recounted earlier: "whenever immanence is interpreted as immanent *to* Something, we can be sure this Something reintroduces the transcendent."<sup>40</sup> Or at least almost eludes. Law is essential to liberal governmentality, and this is a law, whether national or international, generated considerably by national sovereigns.<sup>41</sup> The state itself, as we

<sup>32</sup> Jan Klabbers & Touko Piiparinen, "Normative Pluralism: An Exploration" in Jan Klabbers and Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 13 at 28.

<sup>33</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, translated by Graham Burchell [Foucault, *Security*] (Houndmills: Palgrave Macmillan, 2007) 104, 108–09 (in the account that follows Foucault's work on biopower is drawn on as integral to governmentality even though it seems he did not explicitly connect the two).

<sup>34</sup> Michel Foucault, "Body/Power" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Michel Foucault, translated by Colin Gordon et al (Brighton: The Harvester Press, 1980) 55 at 55.

<sup>35</sup> Foucault, *Security*, *supra* note 33 at 108–09.

<sup>36</sup> See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, translated by Graham Burchell (Houndmills: Palgrave Macmillan, 2008) at 21–22 [Foucault, *Biopolitics*]; see also *ibid* at 297.

<sup>37</sup> *Ibid* at 282.

<sup>38</sup> *Ibid* at 297.

<sup>39</sup> Foucault, *Security*, *supra* note 33 at 66.

<sup>40</sup> Deleuze & Guattari, *supra* note 13 at 45.

<sup>41</sup> See Foucault, *Biopolitics*, *supra* note 36 at 294–297. And see generally Ruth Buchanan & Sundhya Pahuja "Law, Nation, and (Imagined) International Communities", in Revathi Krishnaswamy and John C Hawley eds, *The Postcolonial and the Global* (Minneapolis: University of Minnesota Press, 2008) 261 at 262 [Buchanan & Pahuja, "Imagined, International Communities"]; Ben Golder & Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009) at 33–35, ch 2.

saw, is involved in the managing of governmentality and provides, if elusively, the formative force of international law. In so doing, it stakes its own claim to illimitability.

Even more to the point, the national sovereign is self-constituted as illimitably immanent to itself as a delimited ‘something.’ It is caught in Deleuze and Guattari’s *aperçu*. Or, more bluntly and with Derrida, the sovereignty of the nation state remains “a theological inheritance.”<sup>42</sup> Obviously, with the sovereign state being integral to a secular modernism, its deific dimension cannot be explicitly acknowledged, no more than there can be an explicit acknowledgement of that transcendent communion of sovereign states which would, as we saw earlier, be needed to form international law. In all, governmentality becomes an impasse and a puzzle. As impasse, it is of a secular modernity, yet integrally dependent on deific substitutes. With the puzzle, it subsists as a nominate efficacy, yet lacks any compendiously positive presence.

### **Resolution – negation**

In all, not only are the unseen empires of governmentality unable to account for the positive coherence of international law, they also remain tied to the impossibility of extracting a modern, secular presence of international law from formations of the sovereign state. Yet, each of the trio of governmentality, the sovereign state and international law assumes an operative coherence even as its assumption of a singular, positive presence remains impossible or incoherent. Perhaps then, such an assumption comes operatively from a presence negatively generated. That proposition signals a wider argument about the formation of an occidental modernism by way of a negative universal reference, but international law itself evokes a commensurate history of that reference.<sup>43</sup>

It is at this point that Vitoria re-enters. The once subdued recognition of Vitoria as originating international law is changing to become something closer to primal.<sup>44</sup> Vitoria, as we saw, subscribed to the universality of the *ius gentium*, and he did so in a way that would include “the American Indians.”<sup>45</sup> Yet, the all-inclusiveness of the *ius gentium* came with the utter exclusion that could be imperially visited on non-compliance by these Indians with some of its supposed tenets – excluded to the point of their elimination.<sup>46</sup> This was a relation in which the *ius gentium* was not transformed into a *ius inter gentes*. Despite his vaunted concern for these Indians, Vitoria had “no doubt that force of arms were necessary for the Spaniards to maintain an imperial presence,” and not least so because of innate deficiencies of “the barbarians.”<sup>47</sup>

There has to be, however, some hesitation in seeing Vitoria as elaborating “a new, secular, international law” even where that international law emerges as an imperial construct.<sup>48</sup> Vitoria is indeed often hailed as secular and modern, yet he is also and often found to be resolutely religious and theological, and one of his main justifications for imperial appropriation was religious.<sup>49</sup> Yet further, there is much to indicate that Vitoria occupies both sides of this apparent divide. Whilst Vitoria adhered comprehensively to the tenets of scholastic theology, including the supremacy of divine law, still for him the *ius gentium*, derived from Roman law, “has the validity of a positive enactment” – enacted by “[t]he whole world, which is in a sense a commonwealth,” and resulting in a law that “[n]o kingdom may choose

<sup>42</sup> Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 105.

<sup>43</sup> See generally Peter Fitzpatrick, “Foucault’s other law” in Ben Golder, ed, *Re-reading Foucault: On Law, Power and Rights* (Abingdon: Routledge, 2013) 39 at 46–49; Buchanan & Pahuja, “Imagined, International Communities”, *supra* note 41 at 464.

<sup>44</sup> That origin could range more widely than it is usually taken: see Martti Koskenniemi, “Empire and International Law: The Real Spanish Contribution” (2011) 61:1 UTLJ 1 at 2.

<sup>45</sup> Francisco de Vitoria, “On the American Indians (*De Indis*)” in Anthony Pagden & Jeremy Lawrance, eds, *Vitoria: Political Writings*, (Cambridge: Cambridge University Press, 1991) 231 at 283–82, 285–86 [Vitoria, “On the American Indians”].

<sup>46</sup> *Ibid* at 282–83, 285–86, 291–92.

<sup>47</sup> *Ibid* at 286, 290–91.

<sup>48</sup> Cf Anghie, *Imperialism*, *supra* note 4 at 28.

<sup>49</sup> See Anthony Pagden & Jeremy Lawrance, “Introduction” in Pagden & Lawrance, *supra* note 45 at xiii–xv. See also Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013) at 14. See as well the striking instance provided in Anthony Pagden, *The fall of natural man: The American Indian and the origins of comparative ethnology* (Cambridge: Cambridge University Press, 1982) at 7–8.

to ignore.”<sup>50</sup> And whilst a kingdom can be a “perfect community ... one in which nothing is lacking,” a formula that aptly accommodated the already formed ‘sovereign’ states of Europe, still “the power of the sovereign clearly comes immediately from God himself, even though kings are created by the commonwealth.”<sup>51</sup> And, a final; instance, whilst Vitoria in several ways resisted papal authority, his commitment to Catholicism was unwavering.<sup>52</sup>

Unlike the monistic modern, Vitoria had the ‘mediaeval’ capacity to accord ultimate but related, even contesting, sources of power to “the Church” and to the “civil and lay.”<sup>53</sup> As for law, much of the mediaeval period was characterised by a deep affinity between it and theology, an affinity in which the theological assumed an ostensible dominance. Yet, the very inability of “human law” to “contradict divine law,” as Ullmann observes, serves to explain “why law in the Middle Ages assumed so crucial and over-riding a role...”<sup>54</sup> As “the prime vehicle by which government was to be exercised,” law could relate to a large responsive range by way of its “openness,” an openness needed because:

in order to accommodate a great many divergent social systems the law had to manifest a corresponding flexibility so that it was if necessary, capable of absorbing alien matter. This capacity for absorption was particularly necessary in regard to non-Christian elements and usages.<sup>55</sup>

Such law, Grossi would observe, was an “integrated plurality,” one in which law was “both unified and, at the same time, plural” – a feat that will be engaged with a little later.<sup>56</sup> This mediaeval law, responsive and plural, “became the most crucial and vital element of the whole social fabric.”<sup>57</sup>

Such a law could hardly be the torpid, ‘tradition’-tied entity so readily taken to characterize it. Nor could the society so closely tied to such a law suffer from the pervasive stasis routinely attributed to it. The mediaeval did not stop at some point and the modern supervene. Rather, there were numberless and “real ... continuities.”<sup>58</sup> To take a key instance, whilst secularism is exalted as modern in its rejection of a religious Middle Ages, the mediaeval was both religious and secular – qualities combined, yet also held distinct.<sup>59</sup> Further arrogations of the mediaeval can be extracted from another ‘origin’ of international law, one of an even more established variety than that offered by Vitoria, the Peace of Westphalia of 1648.

As a contribution to the modernist mantra, Westphalia (to use the customary abbreviation) is hailed as the precipitate origin of a modern state system, and not only of the modern, secular states, but also of the international law linking them. Crucially, as Koskenniemi notes, this society of independent states “would now arise from itself and not from any religious, moral or political notions of the good external to it.”<sup>60</sup> That marvellous rising came from the constitutive rejection of an utter dependence on the religious and such foisted on mediaeval. Such self-elevation, Koskenniemi would add, embodied “the founding myth of the system,” and by now many studies have identified this mythic, fictive quality and revealed something of the opposite, revealed a dependence of such other “notions,” including the religious, as well as essential continuities with the mediaeval.<sup>61</sup> In more condign terms, the conventional Westphalia becomes ‘history’ but as a retrospective and transcendent attribution, as a modernist history which, as Foucault would see such history, takes on “a suprahistorical perspective: a history whose

<sup>50</sup> Francisco de Vitoria, “On Civil Power” in Pagden & Lawrance, *supra* note 45 at 40.

<sup>51</sup> *Ibid* at 16; Francisco de Vitoria, “Four Letters on Political Matters” in Pagden & Lawrance, *supra* note 45 at 301.

<sup>52</sup> See e.g. Vitoria, “On the American Indians”, *supra* note 45 at 259–61.

<sup>53</sup> Francisco de Vitoria, “I On the Power of the Church” in Pagden & Lawrance, *supra* note 45 at 50.

<sup>54</sup> Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to Sources of Medieval Political Ideas* (Cambridge: Cambridge University Press, 1975) at 46.

<sup>55</sup> *Ibid* at 48, 49.

<sup>56</sup> Paolo Grossi, *A History of European Law*, translated by Hooper Laurence (Malden MA: Wiley-Blackwell, 2010) at 35, 37.

<sup>57</sup> Ullmann, *supra* note 54 at 28.

<sup>58</sup> See Constantin Fasolt, *The Limits of History* (Chicago: The University of Chicago Press, 2004) at 33. See also *ibid* at 21 for further context.

<sup>59</sup> See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) at 89–91, 111–13, 292–93.

<sup>60</sup> Martti Koskenniemi, “What Is International Law For?” in Malcolm D Evans, ed, *International Law*, 3rd ed (Oxford: Oxford University Press, 2010) 32 at 33.

<sup>61</sup> *Ibid*. See generally Peter Fitzpatrick, “Taking place: Westphalia and the poetics of law” (2014) 1:2 *London Rev Int Law* 155 (what follows is drawn from this work, or more accurately, derived from the sources as discussed there).

function is to compose the finally reduced diversity of time into a totality fully closed upon itself.”<sup>62</sup> Or, in Latour’s more mellifluous terms, history as “a fine laminary flow,” a “beautiful order,” drawn out of and away from what is “a turbulent flow of whirlpools and rapids.”<sup>63</sup>

The outcome can be encapsulated in a continuity with the mediaeval, in the mediaeval conception of empire or Empire, a conception that invested the sovereign with imperial authority.<sup>64</sup> With modernity, that authority is absorbed into a heightened territoriality which, as we also saw earlier, typifies the state, this being a “territorial order” which “became representative of a new order in international law.”<sup>65</sup> This incorporation of the illimitably imperial into the territorially delimited provides, by way of a return to Deleuze and Guattari, an instance of that transcendence generated “whenever immanence is interpreted as immanent *to* Something.”<sup>66</sup> This “sublimation of theology in the ‘world,’” as Kathleen Davis most aptly has it, is effected by “a political-theological tear” typified by the rupture between the mediaeval and the modern, a rupture “that paradoxically occupies a transcendent position by virtue of banishing transcendence.”<sup>67</sup> Even as that rupture serves to found a diversity of sites of power, these still operate as an imperium attuned to uniform effect. The dictates of ‘development,’ for example, are not attuned to diversity. The puzzle then becomes how that uniform effect is affirmed given the diffusion and elusion of its constituent powers.

Once the reliance on a focussed theological reference is no longer available explicably, the universality of the modern must be derived from elsewhere. That need is not met by the international order, or disorder, observed earlier. Not only was it found to be diffuse but, as rendered in Foucault’s terms, it would be characterised by plural modes of power that were “indefinite,” “without limit,” “never closed,” or “naturally opaque and naturally non-totalizable.”<sup>68</sup> Vitoria again obliges, at least in significant part. The *ius gentium* for Vitoria was both inclusive and exclusive. It included the barbarians but, as *ius inter gentes*, it excluded them. This seeming contradiction was, in a sense, resolved by holding out the prospect of inclusion, a remote redemption dependent on suitable transformations such as conversion to Christianity. Vitoria was, however and understandably, able to ascribe a largely religious dynamic to that combined process. The modern expedient is to adopt a like process as itself providing the dynamic, and to do so by way of that negative universal reference signalled at the outset of this present section.

A sampling of international law’s copious contributions to this negative universal reference could begin with the return to the standard-issue origin of Westphalia. From the point of its retrospective formation, one could observe with Walker that the “founding mythology” of Westphalia marked “a moment at which another world was ordained in opposition to” the modern; “a world, in part, deemed bereft of civilization and thus legitimately subject to colonial exploitation...”<sup>69</sup> The origin thence “repeat[s] itself originarily” by being set in a spatially realized universal constituted in the opposition to all that is deemed other to it, the content of a universal derived by its being not what the other is or by being what the other is not.<sup>70</sup> There is, however, a pivotal aporia intrinsic to this situated universal which impels the negative reference beyond exclusion. Whilst an appropriated universal excludes utterly, still the universal has to be all-inclusive. Accounts of international law equating it with the civilized provide an indicative instance of both exclusion and inclusion. With the marker of civilization, there is historically both an overlap between, and a shift from, civilization as denoting absolute difference and civilization as the standard of a condition to be achieved by the excluded through ‘improvement’ or, later and constantly in

<sup>62</sup> Michel Foucault, “Nietzsche, Genealogy, History” in Donald F Bouchard, *Michel Foucault: Language, Counter-memory, Practice*, translated by Donald F Bouchard & Sherry Simon (Ithaca, NY: Cornell University Press, 1977) 139 at 152.

<sup>63</sup> Bruno Latour, *We Have Never Been Modern*, translated by Catherine Porter (Cambridge, MA: Harvester Wheatsheaf, 1993) at 72–73.

<sup>64</sup> See Berman, *supra* note 59 at 66–67, 75, 89; Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010) at 288.

<sup>65</sup> Schmitt, *supra* note 4 at 129ff.

<sup>66</sup> Deleuze & Guattari, *supra* note 13 at 45.

<sup>67</sup> Kathleen Davis, *Periodization & Sovereignty: How Ideas of Feudalism & Secularization Govern the Politics of Time* (Philadelphia, PA: University of Pennsylvania Press, 2008) at 18, 84.

<sup>68</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Harmondsworth: Penguin, 1979) at 227; Foucault, *Biopolitics*, *supra* note 36 at 282.

<sup>69</sup> RBJ Walker, *After the Globe, Before the World* (London: Routledge, 2010) at 131–32.

<sup>70</sup> The quoted phrase comes from Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’” translated by Mary Quaintance, in Gil Anidjar, *Acts of Religion: Jacques Derrida* (New York: Routledge, 2002) 230 at 277–78.

the discourse of international law, by way of “progress.”<sup>71</sup> There is also, and eventually, a further shift from progress as an exemplary imperative to its becoming “disciplinary,” a formative and “controlling” discourse.<sup>72</sup> Progress in this guise merges into a ‘development’ characterized by tentacular regulation.<sup>73</sup> And in taking elevated content from its being the contrary of underdevelopment, development typifies the negative universal reference by elevating a universal norm through “the creation of “abnormalities” such as the “underdeveloped,” ... which it would later treat and reform.”<sup>74</sup> That underdevelopment, as traced earlier, comes to merge with regimes of ‘governance’ and governmentality, regimes to do with security, with finance and investment, trade, and much more.

With this culmination, the disciplinary norm generalized through governmentality also comes to bind the elect, and it does so even as the norm remains constitutively attuned to them. Formative concepts of, or brought to bear on, international law now adopt something of a positive universality, yet still avoid confronting the secular imperative by sharing an invented facticity.<sup>75</sup> Such a concept is denied ultimate attribution and “tends to become anonymous in order to attest to a truth imprinted in things.”<sup>76</sup> Drawing on the repertoire already mentioned, the ‘human’ of human rights, the ‘community’ of the international community, along with ‘progress’ and ‘development’ as processes, all become ordered and ordering facts.

Given their burgeoning in international law, human rights can provide a summary instance ending this section. For Pagden, human rights are an “imperial legacy” functioning with a supposed international community “which is, in essence, a secularized transvaluation of the Christian ethic, at least as it applies to the concept of rights.”<sup>77</sup> For Hopgood, the “humanism” that is “(the cultural precondition for Human Rights) ... was a secular replacement for the Christian god.”<sup>78</sup> In being abundantly set within international law against the inhuman, the ‘human’ of human rights derives conceivable content from negation whilst still being inclusively universal. By way of such negation, this ‘human’ can avoid any positive imperial or theological ascription, an avoidance secured in the evasive facticity of the human.<sup>79</sup> Yet, even as the negative universal reference can generate and affect international law and governmentality, it does not positively secure a coherent identity or an enforceability for either.

### ***Resolution: positive***

The semantic search for the “inter-” at the outset saw that it denoted being “[b]etween or among other things or persons; between the parts of, in the intervals of, or in the midst of, something; together *with*,” a being “with each other; mutually and reciprocally.”<sup>80</sup> A further search may situate this “something” within our present concerns. A plurality can be a simple plurality – a term denoting more than one, many – but the prime meaning given to “plurality” in the *Oxford English Dictionary* is “[t]he state of being plural; the fact or condition of denoting, comprising, or consisting of more than one.”<sup>81</sup> This condition, this consisting and relating in and as a plurality, would for Donald Davidson “make sense ... only if there is a common coordinate system on which to plot” the different entities relating plurally, “yet the existence of a

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<sup>71</sup> For a stark example of exclusion see “John Westlake on the Title to Sovereignty” in Philip D Curtin, ed, *Imperialism* (London: The Macmillan Press Ltd, 1972) 45 at 47. See generally for progress Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: TMC Asser Press, 2009).

<sup>72</sup> *Ibid* at 163, 222–26.

<sup>73</sup> See Ruth Buchanan & Sundhya Pahuja, “Legal Imperialism: *Empire’s* Invisible Hand?” in Paul A Passavant and Jodi Dean eds, *Empire’s New Clothes: Reading Hardt and Negri* (New York: Routledge, 2004) 73 at 73.

<sup>74</sup> Escobar, *supra* note 30 at 387.

<sup>75</sup> The element of ‘invention’ here is derived precipitately from Alasdair MacIntyre, *After Virtue: a study in moral theory* (London: Gerald Duckworth, 1981) at ch 7.

<sup>76</sup> Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Cambridge: Polity Press, 1986) at 203

<sup>77</sup> Anthony Pagden, “Human Rights, Natural Rights and Europe’s Imperial Legacy” (2003) 31:2 *Political Theory* at 171, 173.

<sup>78</sup> Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013) at x.

<sup>79</sup> See generally Pagden, *supra* note 77 at 172.

<sup>80</sup> *Oxford English Dictionary*, *supra* note 2 *sub verbo* “inter-, prefix.”

<sup>81</sup> *Ibid*, *sub verbo* “plurality.”

common system belies the claim to dramatic incomparability.<sup>82</sup> This, however, is a compliant commonality which accommodates a seeming paradox of plurality. If, say, entities are to relate in and as a plurality in the sense of a being-together plurally, then the element in commonality cannot be only within each of them because this would leave them as a simple plurality, leave them in dissipation. So the commonality has to be, and be set, in some way determinately apart from them. Yet the determinate commonality cannot be so much apart from them in their singularity that it ceases to relate responsively to them – ceases constitutively to absorb their changeful commonality. This commonality, then, is generated in yet another aporia. It has to be capable of vacating itself and changing in this responsiveness whilst enabling some determinate manifestation apart from itself. Even as that manifestation is enabled, it does not and cannot assume an invariant, much less comprehensive, hold on the commonality. And what is manifest will always be partial and contingent on the ultimate plurality with-in the commonality.

Returning then to the engagement with governmentality, whilst its illimitability would be compatible with and sustained by the commonality with-in its plurality of sites of power, and even as its liberal and developmental dimensions involved some cohering of these diverse powers, still its operative existence entailed its not taking on an extensively generalized manifestation, much less some encompassing imperium. How then might it assume an operative connectivity and cohesion? To have a “common coordinate system,” to have an operative plurality, there has to be cohering connections between the entities relating plurally.<sup>83</sup> That connection and cohesion can be provided by law. Returning to Foucault, the sites of power with-in governmentality and its sustaining disciplinary powers are linked through law as a commonality endowing them with form and force.<sup>84</sup>

Yet, if this law is to contribute the positive resolution being sought in this section, closer inspection could question whether it can resolve anything at all. The issue is posed in this much-quoted passage by Koskenniemi:

We have either chosen a formalism that insists on the law’s validity and binding nature irrespective of its distance from the world of political facts — or we have become realists and stressed the law’s dependence on political facts and ridiculed “binding force” as a formalist fiction.<sup>85</sup>

That impasse courses through Jurisprudence as a discipline but, being necessarily abrupt about it, the resolving response here is that in, and as, law each position is necessary for the other. There is an inescapable point to the realists’ case. Law’s efficacy depends upon its receptive regard for what is ever beyond it. Yet, that responsiveness cannot be confined to “political facts” or indeed to any other avatar. Admittedly, and as we saw, international law could be reduced to, for example, European dimensions or the dimensions of a particular ‘community.’ And as for dominance effected through governmentality, this is vividly echoed in the influential perception that international law is now saturated by managerialism.<sup>86</sup> Yet, even as necessarily abject, this law has to match, extend ever beyond, and delimit the illimitable, the non-totalizable quality of governmentality its constituent powers. Here, international law has to be at a “distance” from its sources, positioned apart in something of a distinct, self-sustaining “formalism.” If, in a realist perception, governmentality were somehow to subsume law comprehensively, it would need to subvert its own essential indefiniteness and take on a conspicuous coherence.

Seeing law in and as plurality may heighten and serve to generalise the significance of the link between formalism and realism. This could be done by evoking another continuity with the mediaeval – this time that of its law. That law was an “integrated plurality” in which it was “both unified and, at the same time, plural.”<sup>87</sup> Such a competence, as we saw, enabled law’s being open and receptive to radically divergent entities. That process, it could now be argued, in drawing on an ever incipient commonality, combined a realist involvement with a diversity and a formalist distancing apart from it. In this way, law

<sup>82</sup> Donald Davidson, “On the Very Idea of a Conceptual Scheme” in John Rajchman and Cornel West, eds, *Post-Analytic Philosophy* (New York: Columbia University Press, 1985) 129 at 130.

<sup>83</sup> *Ibid.*

<sup>84</sup> Michel Foucault, “*Society Must Be Defended*”: *Lectures at the Collège de France, 1975-76*, translated by David Macey (London: Penguin, 2003) at 252–53; Foucault, *Biopolitics*, *supra* note 36 at 296; Golder & Fitzpatrick, *supra* note 41 ch 2.

<sup>85</sup> Martti Koskenniemi, “International Law in a Post-Realist Era” (1995) 16 *Australian YB Intl L* 1 at 4.

<sup>86</sup> See Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013) at 14–17, 216–18.

<sup>87</sup> Grossi, *supra* note 56 at 35, 37.

endowed the commonality as diversity with determinate effect. Understandably enough then, law in the Middle Ages was accorded a “prime” governmental determinacy, “an over-riding ... role.”<sup>88</sup>

Another return to the beginning: the “inter-” of international law may now help account for the surpassing force of that law. “[S]omething” that is “between the parts of, in the intervals of, or in the midst of” could now be seen as the commonality in and as plurality.<sup>89</sup> This commonality takes on a manifest determinacy, yet ever extends responsively beyond any determining domain. So, international law, as we saw, in many ways extended beyond its standard source in the delimited concordance of sovereign states. Returning to just one instance by way of illustration, the imperative force of *jus cogens* is intrinsic and cannot be countered by nation-states.

## ***Resistance***

It may seem a little late to be coming to a focal concern of this essay, but perhaps it will become evident that the whole exercise was oriented towards resistance. We have encountered two types of resistance.

In what could be called the law implicate, and relating it integrally to governmentality, law gives determinate effect to the constituent powers of governmentality, both singularly and in some cohering relation. To do so it has to match the illimitability of those powers and of governmentality itself. As illimitable, this law embeds the possibility of resistance. The insistent realist may contend that, nonetheless, such law remains in thrall to governmentality, but that would be to ignore the intrinsic force of what could be called the law resistant. International law, in its alignment with a commonality of the ultimately plural, cannot be finally reduced to any source, even as it functions to give a source determinate effect.

Likewise with international law conventionally. It derives constitutional content from nation-states, yet ranges illimitably beyond that derivation, refusing subordination to it. Whilst that protean competence opens out to the possibility of resistance through international law, there is still an operative filtering through its existent constitution. Even so, international law still opens onto the prospect, borrowing from Derrida and his contributing a final ‘something,’ a prospect of “something which would go beyond the current stage of internationality, perhaps beyond citizenship, beyond belonging to a state, to a given nation state.”<sup>90</sup>

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<sup>88</sup> Ullmann, *supra* note 54 at 46, 48.

<sup>89</sup> *Oxford English Dictionary*, *supra* note 2 *sub verbo* “inter-, prefix.”

<sup>90</sup> “The Villanova Roundtable: A Conversation with Jacques Derrida” in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 12.

# The world's citizens get involved in global policymaking: global resistance, global public participation, and global democracy

*Otto Spijkers\**

## Abstract

The central question of this contribution is how international policymakers – mostly States - ought to respond to global protests. There are essentially three ways for them to respond. First, they can refuse these critical world's citizens the possibility to take part in authoritative policymaking at the global level and essentially leave this to State representatives. The second option is to embrace and welcome the participation of the ordinary citizens in global policymaking. The policymakers might institutionalize the citizens' involvement, and make their participation an additional element in the process of authoritative policymaking at the global level. The third option is to go even further and replace the inter-State policymaking with a kind of global democracy: a system of representative democracy at the global level. All three scenarios will be explored, with a focus on the second.

## *French Translation*

La question au coeur de cet article est comment les législateurs internationaux - pour la plupart des États - doivent répondre aux protestations globales. Il y a essentiellement trois façons d'y répondre. Premièrement, ils peuvent refuser aux citoyens et citoyennes du monde critiques la possibilité de prendre part dans l'élaboration des lois autoritaires sur le plan global et laisser ce rôle aux représentants de l'État. La deuxième option est d'accueillir la participation des citoyens ordinaires dans l'élaboration des lois internationales. La troisième alternative est d'aller encore plus loin et de remplacer la définition des politiques internationales interétatique avec une sorte de démocratie globale : un système de démocratie représentative sur le plan global. Les trois scénarios seront explorés, avec une attention particulière pour le second.

## *Spanish Translation*

La pregunta central del artículo es cómo deberían responder los responsables de la política internacional - sobre todo, los estado - a las protestas globales. Existen tres formas por las cuales ellos pueden responder. Primero, ellos pueden negar a estos importantes ciudadanos del mundo la posibilidad de tomar parte en el proceso político al nivel global y fundamentalmente dejar esto a los representantes del estado. La segunda opción consiste en adoptar y acoger la participación de ciudadanos ordinarios en el proceso político global. Los legisladores podrían institucionalizar la participación ciudadana y hacer de esta participación un elemento adicional al proceso legislativo autoritario al nivel global. La tercera opción sugiere ir más allá de las otras opciones y reemplazar el proceso político interestatal por una especie de democracia global: un sistema de democracia representativa a nivel global. Todos los tres escenarios serán explorados, con un enfoque particular al segundo escenario.

## 1. Introduction

In a study on world protests in 2006-2013, Isabel Ortiz, Sara Burke, Mohamed Berrada and Hernán Cortés concluded that the world experienced “some of the largest protests in world history” during this period.<sup>1</sup> Others have also researched this phenomenon of world protests.<sup>2</sup> All over the world, critical citizens demand to play a more direct role in policymaking processes that directly shape their lives. In this study, ways for the policymaking institutions to respond to these demands are analyzed. The focus is on policymaking processes that occur at the *global* level. Essentially, the policymaker can respond to demands for more participation in three ways:

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<sup>1</sup> Isabel Ortiz, Sara Burke, Mohamed Berrada & Hernán Cortés, “World Protests: 2006-2013”, *Initiative for Policy Dialogue and Friedrich-Ebert-Stiftung New York Working Paper* 2013 (September 2013), at 5, online <[http://policydialogue.org/files/publications/World\\_Protests\\_2006-2013-Complete\\_and\\_Final\\_4282014.pdf](http://policydialogue.org/files/publications/World_Protests_2006-2013-Complete_and_Final_4282014.pdf)> [World Protests: 2006-2013].

<sup>2</sup> See e.g. Thomas Carothers & Richard Youngs, “The Complexities of Global Protests” *Carnegie Endowment* (8 October 2015), online: Carnegie Endowment for International Peace <[http://carnegieendowment.org/files/CP\\_257\\_Youngs-Carothers-Global\\_Protests\\_final.pdf](http://carnegieendowment.org/files/CP_257_Youngs-Carothers-Global_Protests_final.pdf)> [Carothers & Youngs].

- 1) Ignore them;
- 2) Integrate them into existing policymaking processes; or
- 3) Replace the existing policymaking processes entirely with a new and more inclusive kind.

Before looking at these three responses, let's delineate the research a little more, to make it more manageable. First, this contribution looks at ways to respond to *global* protests. Global protests differ from domestic or local protests in two ways: first, people from various parts of the world participate in global protests (a protest with *global participation*); second, a global protest is an action expressing disapproval of or objection to a *global* policy (a protest with a *global cause*).

This contribution is essentially about ways for the traditional policymakers to respond to protests whose cause is to affect the traditional global policymaking. As this sentence makes quite clear, it is unavoidable to employ, in this contribution, various terms which all have a highly disputed meaning. What is "policymaking"? What is "global policymaking"? What is "traditional global policymaking"? Etc. When Michael Walzer was visiting Amsterdam some years ago, he shared with his Dutch audience an illuminating piece of advice. His mentor, H. L. A. Hart, once suggested to him to "never define your terms", by which he meant that one should not overemphasize the importance of definitions, and that defining terms only gets one in trouble.<sup>3</sup> It is true that there is no definition of any of the terms used in this article with which everybody agrees, and no such definition will probably ever be found. Bearing this in mind, brief descriptions of each term employed in the remainder of this contribution will be provided, coupled with concrete examples where possible and appropriate. This is done for a modest purpose: simply to make clear what it is I intend to talk about.<sup>4</sup>

The term "policymaking", as used in this contribution, refers to the process of formulating a specific course of action by an institution with a certain authority. An institution with authority is an institution capable of demanding compliance or obedience with the policies it makes.<sup>5</sup> This must not be a mere paper authority, *i.e.* a formal power alone. Such policies must, in practice, be likely to be respected and obeyed.

"Global policymaking" can then be described as the process of formulating a course of action by institutions with authority, which are cooperating at the global level and whose ambition is to achieve globally shared objectives.<sup>6</sup> Global policymaking thus does not have to be done by a global institution, of which there exist very few. States acting together can also make global policy.

The term "traditional global policymaking", as used in this contribution, refers to global policymaking processes that have been regarded as authoritative for some years. They have proved themselves, and are presently considered as authoritative. The traditional way that global policy is made, is through State representatives. They come together to reach agreements through recognized and highly standardized authoritative policymaking processes.<sup>7</sup> One may think, for example, of the international lawmaking processes (negotiation and conclusion of treaties), or decision-making processes at important international policymaking *fora*, such as the United Nations (think of the adoption of the Millennium Development Goals).<sup>8</sup>

These global policies can touch upon certain principles, to which many people all around the world are committed. And so, when these policies are not in line with such principles, this might

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<sup>3</sup> Marcel Becker, "In gesprek met Michael Walzer [transl: A conversation with Michael Walzer]," in Michael Walzer, *Oorlog en Dood: Over de Rechvaardige Oorlog in Onze Tijd* [transl: *War and Death: On Just War in Our Time*], (Nijmegen: Damon, 2008) at 36.

<sup>4</sup> In doing so, extensive use has been made of Gene Sharp's excellent *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (Oxford: Oxford University Press, 2011) [Sharp, *Sharp's Dictionary*].

<sup>5</sup> This is my own interpretation of the term policymaking.

<sup>6</sup> Sharp, *Sharp's Dictionary*, *supra* note 4, at 221.

<sup>7</sup> Again, this is my own understanding of the term traditional global policymaking.

<sup>8</sup> See also Otto Spijkers & Arron Honniball, "Lessons Learnt from Global Public Participation in the Drafting of the UN Development Goals / MDGs und SDGs: Lehren aus der öffentlichen Beteiligung an der Ausarbeitung der UN-Entwicklungsziele" (2014) 62:6 German Review on the United Nations 251.

constitute a cause of action for people committed to these principles. One might think of global human rights standards as examples of such principles. But there are other types of examples as well. The world protests study referred to above has provided an overview of various global causes and principles worth fighting for.<sup>9</sup> Most of the global protests of recent times are directed against the financial policies of the international financial institutions, especially the International Monetary Fund.<sup>10</sup> Other popular global causes include environmental justice and good global governance of the global commons (climate, biodiversity),<sup>11</sup> protests against the disproportionately large influence of major powers on world affairs,<sup>12</sup> and protests against free-trade.<sup>13</sup>

Although these are all truly global causes, protests for such causes can be sparked by more local events,<sup>14</sup> and they are often initially directed against a specific and/or local actor, such as a particular government, corporation, or (international) organization.<sup>15</sup> As an example of a protest against a specific corporation, one might think of the *March against Monsanto*. Monsanto presents itself as a sustainable agriculture company, delivering agricultural products that support farmers all around the world. But it is seen by others as a company aggressively monopolizing the trade in seeds and herbicides. The first *March against Monsanto* took place in May 2013, followed by subsequent marches in the following years.<sup>16</sup>

Global protests can call for local solutions, in the sense that different policies are called for in different parts of the world, depending on the particularities of the local context. All this does not prevent one from using the label “global protest” when the underlying cause of all these different local protests is global in nature, and the protesters in various parts of the world feel united and connected with each other in some way.<sup>17</sup> Sometimes, local protesters might not initially realize they are part of a global protest. They only become part of it when people in various parts of the world come to understand that the actual policies are made at a higher – global – level, and that various local protesters actually have a shared cause, or a common enemy in a particular global institution.<sup>18</sup> Such realization might trigger others to join the emerging global wave of protests. Carothers and Youngs refer to this as “contagion”, comparing the spread of protests all over the globe to the spread of a wildfire.<sup>19</sup>

Who are these critical citizens that take to the streets all over the world? They are people that refuse to accept their fate as mere objects of the traditional policymakers’ decisions. Who these critical citizens are differs per cause. The “world’s citizens” are a faceless group with no formal representation. But with each issue, and at each specific location, we see individuals that come forward and present themselves as leaders of a particular protest movement. This self-identification as figurehead can then be

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<sup>9</sup> World Protests: 2006-2013, *supra* note 1 at 24.

<sup>10</sup> *Ibid.*, Annex 1. There are dozens of examples of protests directed against the IMF listed there. In India, there were protest against the fuel-price hike in June 2013, and at the same time there was a European demonstration against austerity measures (at 87). On May 1<sup>st</sup> of 2013, there were the annual labor day demonstrations all over the world (at 86), and so on. The study further refers to global protests calling for more and better jobs, improvement of working conditions, and democratic governance of the economy.

<sup>11</sup> *Ibid.* The study refers to various global protests during World Summits on environmental issues, such as Rio+20 and Copenhagen. After publication of the study in 2013, various protests were held against the use of fracking, for example in the US, UK, and Romania. These were aimed at particular projects, but they all had a common theme: to stop fracking.

<sup>12</sup> *Ibid.* The study refers to global protests against Western and US cultural, military and economic imperialism, the wars in Iraq and Afghanistan, the aggression of Israel in Lebanon and Palestine, and so on.

<sup>13</sup> *Ibid.* The study refers, for example, to global protests against the Economic Partnership Agreements with the European Union and African countries and pro-trade liberalization.

<sup>14</sup> Carothers & Youngs, *supra* note 2 at 1, 8: “the current wave of protests is triggered primarily by economic concerns or political decisions, not by transnational issues like globalization that animated some previous protests”.

<sup>15</sup> The Government is mostly the object of the protests, even those with a global cause. Other frequent targets are the IMF and EU. See World Protests: 2006-2013, *supra* note 1 at 34-36.

<sup>16</sup> See “March Against Monsanto” (2016), online: <[www.march-against-monsanto.com/](http://www.march-against-monsanto.com/)>.

<sup>17</sup> See also Paul Kingsnorth, *One No, Many Yeses: A Journey to the Heart of the Global Resistance Movement* (London: Free Press, 2003).

<sup>18</sup> For some telling examples, see World Protests: 2006-2013, *supra* note 1 at 27 (Box 4).

<sup>19</sup> Carothers & Youngs, *supra* note 2 at 6, 22.

supported or contested by others. Such persons could be bloggers,<sup>20</sup> known activists or NGOs,<sup>21</sup> or simply someone who lost his or her job and complained about it at the right time in the right way (with a television camera in sight). It is a chaotic process, with little rules or consistency. A spokesperson emerging as such one day can quickly lose this status the next day.

The central question of this contribution is how the traditional policymakers ought to respond to such global protests. As mentioned above, there are essentially three ways for them to respond. First, the traditional policymakers can refuse these critical world's citizens the possibility to take part in authoritative policymaking at the global level and essentially leave this to State representatives. In other words, they might decide to keep things as they are, and simply ignore the protesters. Small groups of citizens might not accept this and continue to oppose the work of the global policymakers in various ways. Such forms of *global civil resistance*, of which protesting is but one form, will be discussed in section 2.

The second option is to embrace and welcome the participation of the ordinary citizens in global policymaking. The policymakers might institutionalize the citizens' involvement, and make their participation an additional element in the process of authoritative policymaking at the global level. Some of these types of *global public participation* will be discussed in section 3.

The third option is to go even further and replace the inter-State policymaking with a kind of global democracy: a system of representative democracy at the global level. Since this is such an unlikely scenario, it will not be discussed in great detail. Instead, in section 4, the focus is to explain the difference between global public participation and global democracy.

The focus in this contribution is on what is the most likely and feasible type of world's citizen involvement in global policymaking: global public participation. The question that is central to all contributions in this first volume of *Inter Gentes* – whether international law can or should provide the world's citizens with tools of resistance – will thus be answered by offering an alternative. Besides providing critical citizens with tools of resistance, international law can and should provide them with tools of global public participation.<sup>22</sup> In this way, the international legal order can answer the call of the angry citizens in a more positive way, by opening up to their meaningful involvement in authoritative policymaking at the global level. It can do so without going so far as to structure itself into a town meeting of the world, in which all the world's citizens literally get together to discuss global policy. For obvious reasons, such a scenario is hard to realize in practice (see section 4, below).

## 2. Global Resistance

Before discussing global public participation (section 3) and global democracy (section 4), let us look briefly at the alternative scenario in which concerned citizens are refused direct involvement in authoritative processes of policymaking at the global level, causing (some of) them to continue to resist these processes from the side-lines. The purpose of this section is to give a succinct and necessarily somewhat superficial overview of what global resistance might - and does in fact - look like. This is done in order to compare it with global public participation and global democracy. The principal aim here is thus not to engage critically with the relevant literature on the topic of global resistance, which generally focusses on nonviolent resistance to dictatorial or foreign regimes. Indeed, much has been written about nonviolent resistance and the different forms it may take.<sup>23</sup> One particularly interesting collection of essays seeks to demonstrate the use of civil resistance, not only against authoritarian regimes or foreign domination, but also against (global) economic inequality and other forms of structural oppression.<sup>24</sup>

<sup>20</sup> As an example, we could refer to the blog of Lina Ben Mhenni and her involvement in the Tunisian revolution of 2011 (*A Tunisian Girl* (blog), online: <<http://atunisiangirl.blogspot.nl/>> [*A Tunisian Girl*]).

<sup>21</sup> An example is Ons Ben Abdel Karim, head of the NGO Al Bawsala, a group of young people whose mission is to critically follow the Tunisian parliament since the revolution in 2011. Lina Ben Mhenni and Ons Ben Abdel Karim were the subject of a documentary made in 2016 by the Dutch television show Backlight, entitled “Na de revolutie” [transl.: After the revolution], available at <<http://tegenlicht.vpro.nl/afleveringen/2015-2016/na-de-revolutie.html>>.

<sup>22</sup> In section 2, it is explained why resistance and participation must be seen as each other's opposites.

<sup>23</sup> See e.g. Sharon Erickson Nepstad, *Nonviolent Revolutions: Civil Resistance in the Late 20th Century*, (New York: Oxford University Press, 2011); Adam Roberts & Timothy Garton Ash, eds, *Civil Resistance and Power Politics: The Experience of Non-violent Action from Gandhi to the Present*, (New York: Oxford University Press, 2009).

<sup>24</sup> Kurt Schock, ed, *Civil Resistance: Comparative Perspectives on Nonviolent Struggle* (Minneapolis: University of Minnesota Press, 2015).

Let's first explain why resistance and participation are presented here as opposing forces. An act of resistance can be described, in general terms, as an act of defiance or opposition to established power structures.<sup>25</sup> Seen in this way, resistance can indeed be contrasted with public participation, which involves the use of regular institutional procedures, placed at the disposal of the citizens by the policymakers. In the resistance scenario, citizens oppose the policymaking process from the outside.<sup>26</sup> In the public participation scenario, the citizens are themselves part of the policymaking process; they are acting from the inside. In short, resistance is non-institutional, and public participation is institutional.

In this contribution, the term “*global resistance*” is used to refer to opposition, by a considerable part of the world's citizens, to a global policy made through the traditional policymaking processes. In other words, resistance becomes global for the same two reasons protests become global: first, because of the people that participate in the resistance (which must include people from various parts of the world); and, second, because of the causes that drive the resistance (opposition to global policies, an opposition which is motivated by adherence to certain globally shared principles). Of course, this delineation raises many questions: Is there a minimum threshold to meet the “various parts of the world” criterion, and if so, what (roughly) is it? And what about cases where the protests are predominantly taking place in one part of the world, perhaps even in one city, but have supporters and sympathizers in various other parts of the world? The answer to these questions depends on the circumstances of each individual protest; it is difficult to provide a general answer.

The institution that is the target of global resistance is the traditional policymaker. Since there is no global authority responsible for global policy – there is no such thing as a global government – the target is usually States working together at the global level. But it can also be another of the “traditional” international policymakers – IMF, European Union, UN Security Council, The Group of Twenty (G20), etc. – basically any internationally established power structure.<sup>27</sup>

Global resistance can be undertaken violently or nonviolently. Non-violent direct action – also referred to as “civil resistance” – includes protesting. Protesting is a form of peaceful opposition to a policy or a policymaking institution.<sup>28</sup> People get together, take to the streets and express their opinion.<sup>29</sup> Protesting is perhaps not as threatening as armed resistance. But when large numbers of people get together, this can pose a serious threat to the policymaker. Protests may involve the issuance of public declarations and speeches, and could be accompanied by petitions offered to the policymaker, letters in the newspapers, and/or critical remarks at talk shows on television. Artistic expressions can also be used as instruments of protest: literature, music, plays, public performances, and so on.

In principle, any action citizens are not normally expected to perform can be a form of civil resistance. Most forms of resistance will also be unlawful, *i.e.* not in conformity with what the law allows ordinary citizens to do. This does not mean, however, that there is never a legal defense possible for such forms of civil resistance. One can, for example, think of the necessity defense, which exists in many domestic jurisdictions. According to this defense, when the unlawful act is a necessary and proportionate way to protect or warn society against the occurrence of a greater harm, then the person committing the unlawful act (a crime) will not be punished.<sup>30</sup> A more modern form of civil resistance is the hacking of

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<sup>25</sup> In preparing this section, extensive use has been made of Sharp, *Sharp's Dictionary*, *supra* note 4, especially the definitions of resistance (at 253), nonviolent action (at 193), and nonviolent protest (at 200-01).

<sup>26</sup> See George Lakey, “Nonviolent Action Defined”, *Global Nonviolent Action Database* (August 18, 2011), online: *Global Nonviolent Action Database* <<http://nvdatabase.swarthmore.edu/content/nonviolent-action-defined>> where nonviolent action, seen as synonymous with nonviolent resistance, is defined as action “that goes beyond institutionalized conflict procedures like law courts and voting” (*i.e.* public participation).

<sup>27</sup> Sharp defines power structures as “formal and informal networks of power relationships within a society or institution that determines actual policies and actions” (Sharp, *Sharp's Dictionary*, *supra* note 4 at 233).

<sup>28</sup> Sharp defines protest as an “expression of objection and disapproval by words or action.” (*ibid* at 236).

<sup>29</sup> Sharp identifies different forms this may take. He distinguishes (1) the march (“a group of people walking in protest [...] in an organized manner to a place which is regarded as significant to the issue involved” (*ibid* at 173)), (2) the assembly (“a public gathering of a group of people to express opposition to the policies of a government” (*ibid* at 63)), and (3) nonviolent occupation (“refusal to leave a particular place and insistence on remaining there over time” (*ibid* at 200)).

<sup>30</sup> See Francis Anthony Boyle, *Defending Civil Resistance Under International Law* (New York: Transnational Publishers Inc. Dobbs Ferry, 1987); and Matthew Lippman, “The right of civil resistance under international law and the domestic necessity defense” (1990) 5 *Dickinson Journal of International Law* 349.

computers of the policymaking institutions.<sup>31</sup> Other employed tactics include strikes, blockades, whistleblowing, street theater and music, boycotts, hunger strikes and self-inflicted violence.<sup>32</sup> One can also think of a refusal to do one's civil duty, such as taking part in elections (such act is not unlawful in most countries), a refusal to pay taxes, and so on.<sup>33</sup>

Nonviolent action is generally not meant to overthrow the policymaker, or fundamentally challenge its claim to power. Instead, it is used to put pressure on the policymaker, urging it to change its mind on a particular issue, without resorting to violent means. Nonviolent action may, however, be accompanied by a credible threat of violence or armed resistance.

Nonviolent resistance can be organized or non-organized. Individuals with a shared goal or ambition have a natural tendency to organize themselves. Angry citizens can thus make use of existing institutions to organize their resistance – like a church, an existing NGO, and so on – or establish a new institution. They can also decide not to organize in any way. One individual can use social media to encourage others to go out and protest, or rebel in some other way, without there being any institution or other type of structure to support the resistance.

The above was in no way meant to be an exhaustive exploration of the various forms that civil resistance might take, but rather a way to give the reader an intuitive idea. What all these different forms have in common is that they challenge the policies of the traditional policymakers from the sidelines. If policymakers wish to suppress, curtail, control or prevent such resistance, they might want to consider integrating these critical citizens in some way into their policymaking processes. This is the scenario we will look at in the next section.

Before doing so, it is worth noting that it would be naïve to assume that all critical citizens currently employing forms of civil resistance will stop doing so when allowed to participate in the ways described in the next section. Many such citizens are perfectly happy with their role as rebels fighting the system. On the other hand, we often see that successful protesters are indeed integrated in the traditional policymaking processes. Carothers and Youngs acknowledge this. In their view, “if activists achieve some successes, they may enter formalized political life, including by forming political parties and running for office.” And thus they conclude that “the idea of rebels without a cause does not apply consistently, or even very extensively, across the array of recent protests.”<sup>34</sup>

### 3. Global Public Participation<sup>35</sup>

Interestingly, the World Protest study also concluded that a call for “a society in which people participate directly in the decisions affecting their lives” was “the most prevalent protest issue to emerge from the study.”<sup>36</sup> One of the global causes for global protests is thus a call for more opportunities for public participation. After all, this is essentially how “public participation” is defined in this contribution: as direct involvement in decision-making. Protests for public participation occur throughout the world; they are not limited to a particular region or a particular kind of people.

This demonstrates quite clearly that many of the critical world's citizens are attracted to global resistance because they are frustrated by the lack of possibilities to get involved in the existing policymaking processes. Of course, some degree of global resistance is a healthy thing for any society.

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<sup>31</sup> According to the World Protest report, hacking is one of the most common methods of protest found in the period 2006-2013 (World Protests: 2006-2013, *supra* note 1 at 32). For a full list, see *ibid* at 90.

<sup>32</sup> *Ibid*.

<sup>33</sup> The examples referred to above were my own. For a very extensive overview of nonviolent resistance methods, see Gene Sharp, *The Politics of Nonviolent Action* (Boston: Porter Sargent Publisher, 1973) at part 2 “The Methods of Nonviolent Action Political Jiu-Jitsu at Work.”

<sup>34</sup> Carothers & Youngs, *supra* note 2 at 15.

<sup>35</sup> See also Otto Spijkers & Arron Honniball, “Introduction: Developing Global Public Participation: Implementing the “We” in the Future We Want” (2015) 17 Intl Community L Rev 219; Otto Spijkers & Arron Honniball, “Developing Global Public Participation (1): Global Public Participation at The United Nations” (2015) 17 Intl Community L Rev 222 [Spijkers & Honniball, “United Nations”]; Otto Spijkers & Arron Honniball, “Developing Global Public Participation (2): Shaping the Sustainable Development Goals” (2015) 17 Intl Community L Rev 251 [Spijkers & Honniball, “Sustainable Development”].

<sup>36</sup> World Protests: 2006-2013, *supra* note 1 at 22.

Constant criticism keeps the policymakers alert and focused, and it can play a key role in invigorating public debates. But too much resistance may harm the authority of the traditional policymakers, and thus it might be good to think of alternatives. If international law's purpose is to add some predictability and consistency to global policymaking, then international law should be able to put in place certain organized procedures through which to channel the ordinary citizens' involvement in an orderly fashion. As will be explained immediately below, global public participation is the way to do it.

So what exactly does the term "global public participation" refer to? Public participation means providing people with an interest in a policymaking process an opportunity to get involved in some way in that process. *Global* public participation can be described as the practice of involving the world's citizens, especially those substantially affected, in the policymaking and policy-forming activities at the global level.<sup>37</sup> One might think of the work of the United Nations, such as the drafting of UN General Assembly resolutions. But we may also think of inventing ways to involve potentially affected individuals or groups in the drafting process of multilateral agreements under international law.

Public participation is often seen as a process that typically takes place at the local level. Its goal is then to provide those individuals that are closest to the problem an opportunity to resolve it themselves.<sup>38</sup> And global problems, so it is argued, can always be chopped up into millions of tiny local problems. Think of a village that suddenly has to accommodate a substantial number of refugees. The refugee problem - people fleeing from war and poverty - might be a global problem, but the decision whether to establish an asylum seeker center in a particular village is a decision taken at the local level. And is there that people most enthusiastically demand to be involved in the decision-making. Such problems can indeed be defined as local issues, but they might just as well be seen as part of a bigger global issue. And there is no reason to exclude citizens from participating directly in the design of global solutions and policy. Admittedly, at present, the limited legal capacities of the individual in the international legal order amount to a formal reason for excluding citizens from direct participation in the negotiation of international agreements. But various experiments are being undertaken, especially by the United Nations, to allow individuals to participate in a meaningful way in global policymaking.<sup>39</sup> There is no reason to assume that referenda, consultations, and other forms of global public participation - more on these below - might not become part of the drafting process of treaty texts in the future.

*Why* should the traditional *policymakers* facilitate public participation? There are different reasons for them to do so. Global public participation can be considered inherently valuable, or it can be considered an effective way to achieve some external purpose.<sup>40</sup> There are many reasons to consider public participation inherently valuable. Excluding the public from the process might be considered, by members of the public themselves, as unfair, illegitimate, and so on. It is simply not the right thing to do. So even when it is not terribly useful, effective, or cheap, involving the public is nonetheless a must, if one follows this line of reasoning.

Public participation can also be seen as a means to an end. Involving members of the public in policymaking that affects them might prevent them from taking to the streets, going on strike, rioting, looting, and starting a civil war.<sup>41</sup> In other words, public participation might be a way to mollify the public, to avoid the global protests referred to in the introduction, and to prevent other forms of resistance. Used in this rather cynical way, global public participation is merely a *pro forma* exercise, a smokescreen to avoid the much more problematic occurrence of various forms of resistance.

Public participation might also lead to better policies. Directly affected people might have relevant practical experiences, or specific knowledge and expertise, which the traditional policymakers do not have

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<sup>37</sup> This definition is taken from Spijkers & Honniball, "United Nations", *supra* note 35.

<sup>38</sup> See Jacqueline Goldin, "The Participatory Paradigm: Anathema, Praise and Confusion" in Leila Harris, Jacqueline Goldin & Christopher Sneddon, eds, *Contemporary Water Governance in the Global South: Scarcity, marketization and participation* (Earthscan: Abingdon, 2013) 179 at 180-81 [Goldin].

<sup>39</sup> See Spijkers & Honniball, "Sustainable Development", *supra* note 35 at 251-96.

<sup>40</sup> See also Gene Rowe & Lynn Frewer, "Public Participation Methods: A Framework for Evaluation" (2000) 25 *Science, Technology & Human Values* 3 at 10.

<sup>41</sup> *Ibid* at 5. See also Gene Rowe & Lynn Frewer, "Evaluating Public-Participation Exercises: A Research Agenda" (2004) 29 *Science, Technology, & Human Values* 512 at 514.

at their disposal. Allowing people to get involved in the policymaking process might also make ordinary citizens feel responsible for its successful implementation. The public identifies with the policy; they “own” it, and thus want it to be a success.<sup>42</sup> The policymakers might also become more popular with the public when they allow ordinary citizens to participate in their work. And, finally, it might bring people together and create an inclusive global community.<sup>43</sup>

So far, we have looked at reasons why facilitating public participation might be desirable for the traditional policymakers. But *why* would the *ordinary citizens themselves* wish to participate? There are many reasons. Perhaps ordinary citizens take part in the decision-making because it makes them feel in control of their own life. Perhaps they do it because they acknowledge the problem the policymakers want to resolve, and feel a responsibility to “do something”, to contribute. Some people might feel that their particular profession, moral or religious beliefs, oblige them to participate. One might think of University professors, religious leaders, and so on. Another reason is that people simply enjoy doing it, and consider public participation a nice pastime or hobby. It is a great way to meet new people!

*Who* should be invited by the policymakers to participate? Many global policies (potentially) affect all of the world’s citizens. Must all the world’s citizens be approached in some way? If involving literally everybody is at all possible, it might be too costly, inefficient, and it might lead to unreasonable delays in the policymaking process. Should the policymakers instead invite only a select group, *i.e.* only those individuals that are expected to have a particular effect on the implementation of the policy or are especially affected by it? Such participants are often referred to as stakeholders, described as those individuals with a particular interest (stake) in the decision.<sup>44</sup> If the selection of stakeholders can be objectively defined and justified, then those not invited accept to be excluded from the policymaking process. Handing out invitations is always a tricky process, which can easily be used to influence the policymaking process. For example, inviting one part of the population to participate in the policymaking process can be a subtle but highly effective way to further block the participation of another part of the population.<sup>45</sup>

As was the case with individuals engaged in various forms of resistance, individuals participating in global policymaking can do so both in an *organized or unorganized* fashion. Of course, the policymaker can encourage the use of already existing institutions, like relevant NGOs, universities, lobby groups, think-tanks, churches, and so on. The policymaker can also encourage participants to establish an institution especially designed for the particular policymaking process. For example, the policymaker could only invite those citizens to participate that have organized themselves in an NGO established especially for this purpose.

What *types* of global public participation can the traditional policymakers choose from? In earlier research, Arron Honniball and I have identified four types: the “rubber stamp” type, the “define the problem” type, the “advisory” type, and the “co-produce” type.<sup>46</sup>

*First*, let us look at the “rubber stamp” type. Participants are asked to approve or disapprove a particular policy after it is made but before it is put in practice. This can be done through referenda, surveys, citizen panels and other types of consultations. This type of participation does not really allow the public to make policy, only to (dis)approve it at the end.

*Second*, there is the “define the problem” type. Participants are consulted before the policy-making process starts, to clearly define the problem or challenge, and this will help the institution in its policy-making. This can be done through panels, (online) surveys and other types of consultations. If the policymaker wants to hear concerns from specific groups, it could invite them separately. Think of marginalized parts of a community – refugees, migrants, homeless or poor people – but also women,

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<sup>42</sup> See also Paul Burton, “Conceptual, Theoretical and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15:3 Evaluation 263 at 267 [Burton].

<sup>43</sup> *Ibid* at 266 (on the importance of this community-feeling).

<sup>44</sup> See Anja Matwijkiw & Bronik Matwijkiw, “Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law” (2010) 10 Intl Crim L Rev 143.

<sup>45</sup> Goldin, *supra* note 38 at 180.

<sup>46</sup> See Spijkers & Honniball, “United Nations”, *supra* note 35 at 239.

business representatives, those practicing a specific profession (farmers), etc. The public can be asked about a very specific issue, or it can be consulted in a very broad sense.

*Third*, there is the “advisory” type, in which participants influence the policy-making during the process, acting as consultants or advisors to the traditional policymakers. They can draft reports with concrete recommendations, or share their expertise at public hearings or inquiries, or at conferences where they exchange ideas with the policymakers. One may also think of advisory committees, comprised of citizens that are always ready to provide the policymakers with advice.

*Fourth* and finally, there is the “co-produce” type of participation. Here, participants basically act together with the policymaker, jointly developing a policy. This is the only type of public participation in which the participants are also formally the co-authors of the policy. As a consequence, it is also the only type in which the policymakers can be bound to implement the input of the participants. If we think of the processes of authoritative international policymaking in existence today – treaty making or policymaking under the auspices of the United Nations – it is clear that there are many hurdles to take before participants can be given a formal role in such processes.

The *selection* of the appropriate type of public participation depends on the type of policy involved, the demands of the policymaker and the potentially interested citizens, and the resources available to the policymaker and the citizens. The selection can be based either on ideological or principled grounds, or on grounds relating more to effectiveness and practical use. If the policymakers feel obligated to facilitate public participation, they are likely to do so out of principle, and not because they see a practical value in it. They might then be inclined to work with a standard checklist or model of what is required for “meaningful” or “legitimate” participation. In order for participation to be effective, it might be more useful to reconsider this model in each particular instance, focusing more on effectiveness rather than legitimacy.

Regardless of which type of participation is ultimately employed, it is important for the policymaker to inform the participants of what was done with the latter’s input. Otherwise, the citizens might feel that their participation only had a “decorative function”, and this might frustrate them and lure them towards global resistance.<sup>47</sup> To avoid this, ordinary citizens could be asked in advance about the way in which they would like to participate. Their experience in participating should be evaluated regularly and such evaluations could be used to perfect the existing opportunities for global public participation.

Hence, global public participation is a better alternative to global resistance when it is done properly. If global public participation is encouraged in words but not implemented in practice, it might prevent global resistance and perpetuate existing power structures, but only for a while. The same is true for global public participation that is overregulated, forcing the citizens to participate on the policymaker’s terms and conditions. Citizens might feel they are being domesticated. One might think of a non-binding referendum that requires an extremely large number of signatures and is limited to a very specific type of decision. This will have the same effect on an angry citizen as a red rag has on an angry bull. It might provoke citizens to challenge the sincerity of the process, for example by using it in ways not intended by the policymaker but still within the limits of its rules. They then use the public participation process as a form of civil resistance from within, a bit like a Trojan horse. They abuse the policymaker’s trust and facilities to oppose them.<sup>48</sup> This is a tricky thing for the policymaker to respond to. Citizens can be reminded of their obligation to engage in global public participation in good faith, and not to abuse opportunities to participate with which they are provided. But this will raise suspicions that public participation only has a decorative function, welcomed as long as it leads to a policy prepared in advance by the traditional policymakers themselves.

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<sup>47</sup> Daniele Archibugi, “Cosmopolitan Democracy and its Critics: A Review” (2004) 10:3 *European J Intl Rel* 437 at 449.

<sup>48</sup> A good example of this is the referendum on the approval of the Association Agreement between the European Union and Ukraine, which was held in the Netherlands on 6 April 2016 (Ministry of the Interior and Kingdom Relations, The Netherlands, “Stemmen voor het raadgevend referendum”, online <[www.verkiezingen2016.nl](http://www.verkiezingen2016.nl)>).

#### 4. Global Democracy

The third scenario is to replace the traditional international policymaking processes with some form of direct citizen participation at the international level. Richard Falk and Andrew Strauss characterized the demand of ordinary citizens to have an influence on decisions, made at the global level, as a call for “democracy.” Their suggestion to respond to these demands was to set up some kind of global democracy: a global parliament.<sup>49</sup> Is this an alternative to global resistance and global public participation?

It is sometimes suggested that representative democracy, at the global level, might indeed be an alternative worth considering seriously. There are reasons to doubt this. Already at the domestic level, we see that democratic governments do not meet the demands of those calling for *direct* participation. What they ask for is *direct* and not *indirect* participation, and democracy is a form of *indirect* participation.<sup>50</sup> There is no reason to presume this would be perceived differently at the global level. In other words, the critical citizens that presently take to the streets, calling for a “society in which people participate directly in the decisions affecting their lives”, might not feel they get what they want if a global parliament is established.

One of the more interesting early comments on the difference between direct and indirect participation is that by Henry Steiner.<sup>51</sup> Steiner’s comment was clearly written at the time of the Cold War, in the sense that Steiner identified a Western and an Eastern interpretation of public participation. According to the Western interpretation, the traditional goal of participation was essentially to “guard[...] the individual against abusive state action.”<sup>52</sup> The most effective way to exercise such political control was through frequent and fair elections, at all levels of government. It is the role of the citizens to serve as the watchdog of the State, *i.e.* to work more or less *against* the State, keeping it on its toes.

However, in the East, Steiner believed that the emphasis was more on *direct* participation. According to this alternative view, “a nearly exclusive reliance on elections heightens the sense of powerlessness of the many to act other than passively by reacting to choices formulated by others.”<sup>53</sup> And “reducing the participation of most citizens to the periodic vote denies them the benefits of a continuing experience of involvement in public life, of ‘taking part’ in the conduct of public affairs.”<sup>54</sup> According to the Eastern view, taking part essentially meant working *with* the State as partner, by assisting the State in the implementation and elaboration of its policy. This type of public participation was highly encouraged in the East, said Steiner, but it lacked the element of political control and critical engagement associated with the *indirect* participation in the West.

Regardless of whether this description of public participation in the politics in East and West is historically correct, it does show very clearly what the difference is between direct and indirect participation. Whilst representative democracy (indirect participation) focuses, roughly speaking, on the “opportunity for citizens to choose between competing political elites with alternative political agendas,”<sup>55</sup> a system which allows active participation requires and makes room for more active citizens. Instead of being passive “consumers” of politics – approving or disapproving the work of the elite every few years – publicly participating citizens are active and responsible “producers” of politics. Citizens are legally entitled and actively encouraged to participate in policy-making themselves, by calling for referenda, organizing petitions, proposing policy ideas, and even co-producing policy. What is required is that “all significantly affected people should have equal possibility to participate” in policymaking, from the very

<sup>49</sup> Richard Falk & Andrew Strauss, “Toward Global Parliament” (2001) 80:1 Foreign Affairs 212.

<sup>50</sup> Ellen Hey & Andria Naudé Fourie, “Public Values and Public Participation in Decision-making in Times of Privatisation” (2011) 4 Erasmus L. Rev. 39. For the distinction between direct and indirect participation, see also “General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service” CCPR, 57th Sess, UN Doc CCPR/C/21/Rev.1/Add.7 (1996) at para 1.

<sup>51</sup> Henry Steiner, “Political Participation as a Human Right” (1988) 1 Harvard Human Rights YB 77 [Steiner].

<sup>52</sup> *Ibid* at 102.

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

<sup>54</sup> *Ibid* at 103.

<sup>55</sup> Magdalena Bexell, Jonas Tallberg & Anders Uhlén, “Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors” (2010) 16:1 Global Governance 81 at 83.

beginning of the process.<sup>56</sup> The goal is “to upgrade the people from passive voters to active citizens.”<sup>57</sup> The problem is that public participation will always be done by a select group of people, whilst many more people participate in democratic elections.

Of course, to contrast (direct) public participation with representative democracy (indirect participation), or “voice” with “vote”,<sup>58</sup> in such black-and-white terms can – and has been – criticized. Both the UN Human Rights Council<sup>59</sup> and the Human Rights Committee<sup>60</sup> encourage direct public participation, and see it as an indispensable element of – and not an irreconcilable alternative to – a healthy democratic system. We also find such a view in the literature. Pratchett believed that, under certain conditions, direct public participation might complement representative democracy, making society even more democratic.<sup>61</sup> Other scholars have equally argued that public participation complements representative democracy, making such systems even more democratic. Burton referred to public participation as “extra-representative engagement,” as offering democratic opportunities “above and beyond the occasional opportunity to vote.”<sup>62</sup> Following this line of thought, public participation has been referred to as “participatory democracy,”<sup>63</sup> “stakeholder democracy”, or an essential part of “deliberative democracy.”<sup>64</sup>

It is important to emphasize that the idea of public participation is to involve citizens in the work of the traditional policymakers, and not that the policymakers tolerate public participation processes, as somehow coexisting next to their own work. The latter is sometimes called “informal public participation,” and is motivated by dissatisfaction with the work of the traditional policymakers, not an urge to cooperate with them.<sup>65</sup> Informal public participation has more to do with global resistance, the scenario we began with.

Most of the discussion above referred to the difference between democracy and direct forms of public participation at the domestic level. The reason for this is clear: there is not yet any form of democracy at the global level. But when we consider establishing some kind of democratic global system, these arguments are relevant and applicable also at the global level, *mutatis mutandis* of course.

## 5. Conclusion

If global policymakers accept for a fact that ordinary world citizens demand to play a role in international policymaking, then they have to think of a way to respond to such demands. In this contribution, global public participation was presented as a reasonable alternative to setting up a system of global democracy – which is a bit too utopian – or refusing any kind of involvement – a scenario that sounds a bit too “realistic”. It was argued that we find a middle-way, and allow citizens to play a modest and regulated role in global policymaking. This way, the traditional policymakers can make positive use of the energy of those resisting to improve policies and muster support for their policies.

Of course, this does not always work. As Carothers and Youngs noted, “some protests have failed to translate protest energy into sustainable institution building or political contestation”, but other protests did have such long-term effects. New political movements were created and integrated into the existing political institutions.

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<sup>56</sup> *Ibid* at 85.

<sup>57</sup> *Ibid* at 87.

<sup>58</sup> Gary Johns, “Relations with Nongovernmental Organizations: Lessons for the UN” (2004) 5 Seton Hall J Dipl & Intl Rel 51 [Johns].

<sup>59</sup> *Human rights, democracy and the rule of law*, GA Res 19/36, UNHRC, 19th Sess, UNGA Doc GE.12-13166, (2012).

<sup>60</sup> *Promoting and consolidating democracy*, OHCHR Res 2000/47, OHCHR, adopted 25 April 2000.

<sup>61</sup> Lawrence Pratchett, “New Fashions in Public Participation: Towards Greater Democracy?” (1999) 52:4 Parliamentary Affairs 616. The two conditions were responsiveness and representativeness.

<sup>62</sup> Burton, *supra* note 42 at 1.

<sup>63</sup> Johns, *supra* note 58.

<sup>64</sup> See e.g. Karin Bäckstrand, “Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development” (2006) 12:4 Eur J Intl L 467.

<sup>65</sup> For the national level, see Oche Onazi, “Legal Empowerment of the Poor: Does Political Participation Matter?” (2012) 14 J Juris 201 at 202.

The challenge is now to find an appropriate way to organize such involvement. At the level of the United Nations, we see interesting experiments going on, for example with the drafting of the Sustainable Development Goals.<sup>66</sup> That might be just the beginning of a new trend, the traditionalizing of global public participation!

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<sup>66</sup> See Spijkers & Honniball, “Sustainable Development”, *supra* note 35.

## First Nations<sup>1</sup> and the Colonial Project

*Irene Watson\**

### Abstract

The colonial project has embodied a centuries-long, ongoing campaign to annihilate, define, subordinate and exclude the ‘native’, and an arsenal of tools has been applied to these ends. Mast-headed with the Christian mission to ‘civilise’, First Nations laws were deemed non-existent and, for more than 500 years, the colonialist construct of an absence of law in First Nations’ territories was supported by its idealised notions about the ‘savage’ and ‘backward native’. European constructs of backwardness and savagery continue to prevail in contemporary times, but First Nations continue to survive, live, practice and assert a law-full<sup>2</sup> way of being in the world, one which is different to the European way of being, but no less valid and perhaps more critical to the future of life on earth.

Many appeals made for recognition under international law by First Nations have failed because international law has been created by colonial nations and in the interests of colonialism itself. International law grew out of the distinctions made between civilized and non-civilized states, and those distinctions confirmed that international law applied only to a civilized ‘family of nations’. Anghie argues that colonialism was not an example of the application of sovereignty, but that sovereignty was constituted through colonialism. With the shaping of international law by colonialism, we are left to consider the question: is it possible to reconstruct international law so that it is liberated from its colonial origins? The subject is made more complex by the fact of the many First Nations confined to the ‘domestic paradigm’, immersed within an occupying settler state, and the state policies which aim at their complete annihilation. This paper will explore the possibility of freedom beyond the domestic paradigm and the absorption of First Nations into the universal ‘civilization’ of Europe.

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.<sup>3</sup>

### *French Translation*

Le projet colonialiste représente une campagne de plusieurs siècles pour annihiler, définir, subordonner et exclure « l’autochtone », et un arsenal d’outils a été employé à ces fins. Percutées par la mission civilisatrice du Christianisme, les lois autochtones étaient considérées non-existantes, et pour plus de 500 ans, la construction colonialiste de l’absence de droit chez les autochtones a été nourrie par des notions idéalisées du « sauvage » et de « l’autochtone arriéré ». Les conceptions européennes du sous-développement et de la barbarie persistent dans l’époque contemporaine, mais les peuples autochtones continuent de survivre, vivre, pratiquer et revendiquer une manière légale d’exister, une qui est différente à la manière d’être européenne, sans être moins valide et en étant peut-être plus critique de l’avenir de la vie sur Terre.

Plusieurs revendications autochtones pour la reconnaissance sous le droit international ont échouées car le droit international a été créé par des états colonisateurs selon les intérêts du colonialisme. Le droit international s’est développé à partir des distinctions entre les États civilisés et les États non-civilisés, et toutes ces distinctions ont confirmé que le droit international s’applique seulement aux familles « des nations civilisées ». Anghie avance que le colonialisme n’était pas un exemple de l’application de la souveraineté, mais que la souveraineté s’est constituée à travers le colonialisme. Avec l’influence formatrice

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<sup>1</sup> I use the term nations throughout this article in reference to First Nations Peoples, to assert a sovereign, relational, ‘we were here first’ standpoint. For example, the term refers to a way of being that is determined by First Nations and which is not limited by the colonial project - international law.

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<sup>2</sup> Law-full is used here to speak back to the idea of terra nullius, and First Nations being without law.

<sup>3</sup> From nineteenth century writer Henry Wheaton, *Elements of International Law* (Boston: Little Brown and Co, 1866) at para 11, cited in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 54.

du colonialisme sur le droit international, nous devons nous demander : serait-il possible de reconstruire le droit international de façon à ce qu'il s'affranchisse de ses origines coloniales? Le sujet devient plus complexe par le fait que plusieurs populations autochtones sont enclavées dans le « paradigme domestique », immergées à l'intérieur d'un État-occupant, ainsi que dans des politiques qui visent leur annihilation. Cet article explorera la possibilité de la liberté au-delà du paradigme domestique et de l'absorption des peuples autochtones dans la « civilisation » universelle de l'Europe.

Y a-t-il un droit uniforme des nations? Il ne s'agit certainement pas du même pour toutes les nations et états de ce monde. Le droit public, à quelques exceptions près, a toujours été, et l'est encore, limité aux peuples civilisés et chrétiens de l'Europe ou ceux d'origine européenne. (De Henry Wheaton, écrivain du XIXe siècle, à 54. Notre traduction.)

### *Spanish Translation*

El proyecto colonial ha encarnado por un siglo campañas de aniquilación, subordinación y exclusión “nativa”, y un arsenal de herramientas ha sido empleado para estos fines. Encabezado por la misión cristiana de “civilizar”, las leyes de las primeras naciones fueron consideradas inexistentes, y por más de 500 años, la explicación colonialista de la ausencia de la ley en dichos pueblos indígenas fue respaldada por esa idealizada noción del pueblo indígena como un pueblo “salvaje” y “atrasado”. Ideales Europeos de retraso y salvajismo permanecieron en la era contemporánea, pero los pueblos indígenas continúan sobreviviendo, practicando y afirmando una medio legal de pertenecer al mundo en una manera diferente al modo de ser Europeo, pero no menos válido y quizás más crítico con relación al futuro de la vida sobre la tierra.

Muchas demandas por el reconocimiento de las leyes internacionales realizadas por los pueblos indígenas han fallado, debido a que el derecho internacional ha sido creado por naciones colonizadoras con fines de colonialismo. El derecho internacional creció basado en la distinción de estados civilizados y no civilizados, y esas distinciones confirman que el derecho internacional ha sido creado para naciones civilizadas, o la “familia de naciones”. Anghie sostiene que el colonialismo no es un ejemplo de la aplicación de soberanía, sino que esa soberanía se construyó a través del colonialismo. Con la organización del derecho internacional resultando del colonialismo, dejamos en consideración la pregunta siguiente: es posible reconstruir el derecho internacional y liberarlo de sus orígenes coloniales? El asunto resulta más complejo por el hecho de que muchos pueblos indígenas se encierran en “paradigmas domésticos”, inmersos en un estado colonial y en políticas de estado, cuyo objetivo es la aniquilación completa de estos pueblos. Este artículo explorará las posibilidades de libertad más allá de paradigmas domésticos y la asimilación de los pueblos indígena dentro una dicha “civilización” universal europa.

Existe un derecho uniforme de naciones? Es cierto que no existe un mismo derecho para todas las naciones y los estados del mundo. El derecho público, con leves excepciones, siempre ha sido, y aún queda reservado a personas “civilizadas”, entendidas como Cristianos europeos o gente originaria de Europa. (Del autor del siglo XIX, Henry Wheaton, a 54. Nuestra traducción)

### **Introduction**

This article is written from a critical Indigenous standpoint which centres an Aboriginal ontology while also examining the colonial project from a similar position which draws from First Nations laws and legal systems.

The Australian colonial project began in the eighteenth century and is ongoing. It continues to impact upon the lives of contemporary First Nations Peoples. Our critical voices provide an account of colonialism's ongoing nature,<sup>4</sup> but even while doing so, those critical voices exist within the colonial matrix of power. This is because the modern state, even while styling itself liberal and multicultural, provides no real platform upon which it could recognise Indigenous autonomy or make space in which there could be

<sup>4</sup> Chakravorty G Spivak, “Culture Alive” (1995) 5 Australian Feminist Law Journal 3 at 10. The author suggests the language of post-colonialism is akin to throwing words around; this is particularly so when the fact of Aboriginality is evidence of the failure of decolonisation. Spivak refers to the danger of the term post-colonialism as applied in the United States, where it claims a time after colonialism.

a challenge to its political economy.<sup>5</sup> And this is in the face of the concerns of Indigenous Peoples living beyond the embrace of white privilege, and includes murder, cultural genocide, ecocide of our territories, incomprehensible incarceration rates and levels of poverty and poor health which vastly outscore those of non-Indigenous persons.

The colonial project is old, but not as old as the First Nations Peoples whose territories have come under the control of the colonising empires which have constructed and imposed their bodies of laws upon First Nations territories and jurisdictions. The colonial project is older than the story of Columbus and his 1492 journey of ‘discovery’ to “distant lands occupied by pagan tribes of savages.”<sup>6</sup> It goes further back than 1770, when Captain James Cook claimed that the lands of New South Wales were the “solitary haunt of a few miserable savages, destitute of clothing.”<sup>7</sup> Cook’s newly ‘discovered’ territories were deemed ‘terra nullius’ and the invader colonists who followed Cook positioned themselves as ‘white’ and ‘European’ while the Indigenous were deemed ‘voiceless’ by the invaders, as if the invaders alone had the “authority to name without being named in return.”<sup>8</sup>

But the lands of the so-called native savages were based upon ancient connections to land. First Nations Peoples maintained long relationships with those territories, but those relationships were (and largely remain today) incomprehensible to the invaders’ legal and political philosophies and knowledge of relationships to the natural world, especially as the British wanted the land themselves. British culture theorised land as property and as being the foundation of their society and culture but they had a limited capacity to understand collective Indigenous relationships to it. So many Indigenous Peoples continue to resist and work hopefully towards an opening which might provide for a resurgence of relational ways of living with and viewing the natural world.

However, the state has deployed an arsenal of tools against the possibility of an Indigenous resurgence and for continuing to contain Indigenous Peoples within the confines of its jurisdiction. And running with its long tried-and-tested methodology, the colonial project continues to define and construct the Aboriginality of First Nations; part of that has excluded the ‘native’ from having any legal subjectivity or personality in international law.

### **The colonial project in positing their laws created the lie of native lawlessness**

Positivist jurisprudence positioned the ‘civilized’ European state as sovereign and the ‘uncivilized’ non-European as lacking in sovereignty; this constructed difference continues to be used by the ‘civilized’ European states to deny the uncivilized non-Europe any legal personality or sovereignty.<sup>9</sup> Characterisation of the ‘savage’ and ‘native’ still prevails as First Nations continue to be considered as being without law and sovereignty. This enables the colonial state to intervene wherever the ‘native’ is deemed to act in a way which is considered to be against universal human rights or which is deemed by the state in any way repugnant. The underlying cause for state intervention is often laid at the feet of culture - that which is characterised by the state as ‘cultural difference’ is often used to justify its intervention in the form of police or military actions. This occurred in what is known as the Northern Territory Intervention and is discussed further below.<sup>10</sup> Whether or not an act is repugnant is evaluated by neo-liberal universal human rights standards and the validity of Indigenous laws is assessed by these same standards – should they be tolerated and or rejected by the state? The United Nations *Declaration on the Rights of Indigenous Peoples* summed up the ongoing intent of colonial states to determine First Nations futures and thus colonisation. Article 46 of the *Declaration* denies the political and territorial integrity of First Nations by re-inscribing

<sup>5</sup> Roger Merino Acuña, “Critical Human Rights and Liberal Legality: Struggling for ‘The Right to Have Communal Rights’” (2013) 3 *Philosophy Study* 246. See also Irene Watson, “Aboriginal Sovereignities: Past, Present and Future (Im)Possibilities” in Suvendrini Perera, ed, *Our Patch, Enacting Australian Sovereignty Post-2001* (Perth: Network Books, 2007) at 23-43 [Watson, “Aboriginal Sovereignities”], on the representation of the Indigenous voice while captive of the colonial project.

<sup>6</sup> Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012) at 179.

<sup>7</sup> *Ibid* at 227.

<sup>8</sup> Walter Mignolo, “Who Speaks for the ‘Human’” in ‘Human Rights’: Human Rights in Latin American and Iberian Cultures” (2009) 5 *Hispanic Issues* 7 at 8, cited in Acuña, *supra* note 4 at 257.

<sup>9</sup> Anghie, *supra* note 2 at 4.

<sup>10</sup> See Irene Watson, “In the Northern Territory Intervention, What is Saved or Rescued and at What Cost?” (2009) 15:2 *Cultural Studies Review* 45 [Watson, “Northern Territory Intervention”], for a discussion on state intervention in the name of human rights.

those powers to the state.<sup>11</sup> This same Article justifies the power of colonial states to reject Indigenous Laws, based on a test which subjects these laws to the ambiguity of universal standards such as ‘human rights’, ‘democracy’, ‘good governance’, and ‘good faith.’ These standards have been translated within a Euro-centric framework to re-inscribe the civilising mission and the colonial project of assimilation.

In 2007, the federal government of Australia authorised its military to enter First Nations territories across the Northern Territory (NT). The authorisation was based on the perception that First Nations communities were rife with violence and the sexual abuse of young children.<sup>12</sup> The NT intervention, officially the ‘Northern Territory Emergency Response’, deployed culture in a way which positioned the moral hegemony of the state and its non-Aboriginal citizens. But accompanying the moral indignation was a highly opportunistic land-management agenda in favour of the federal government - it had nothing to do with the safety of women and children.

It is moreover argued that the interpretation and translation of culture in relation to our bodies has been used and manipulated by colonising states - many times over - to uphold and support the colonial project. Spivak has argued that a particular reading or interpretation of culture could be set up in such a way that it allows the female person and her body “to be the theatre on which this strategic game is manipulated ...we should really think about, the extent of our folly as women.”<sup>13</sup> The idea of a strategic game which can be manipulated is what has occurred in the Northern Territory intervention. The Australian state, empowered to position and subjugate Indigenous women, repositions itself, the agent of colonial violence, to that of the upholder of universal human rights and defender of the rights of women and children against the violence of Indigenous men. In this context the voices of Indigenous women are submerged within the state’s power to conceal the complexity and layers of truth. The image of an Indigenous woman lying dead by the roadside, in Tracey Moffatt’s 1989 work *Something More*, could be re-read as *Aboriginal women - colonial narrative road kill*. As the title *Something More* suggests, there is perhaps a multi-layered alternative to that of the one-truth which dominates the universality mission of the colonial project.<sup>14</sup>

In the case of the Northern Territory, state intervention is represented as the dominant truth, as a humanitarian emergency. But those events which are masked as humanitarian interventions on behalf of the colonial states are re-enactments of the initial colonizing event. They are acts which are being perpetrated for the purpose of justifying and maintaining the ongoing colonised position of Indigenous Peoples<sup>15</sup> and are still based on the idea of native savagery - that Aboriginal women are in need of the colonial state to rescue them from savage native men.

The colonial project is ultimately about justifying the occupation and exploitation of Indigenous land and the maintenance of unequal relationships between non-native and native; it is of paramount importance that the colonised remain contained as objects of the colonial state. And for the Indigenous, the only trajectory is to become totally absorbed and assimilated into the state.

### Tools of the colonial project

Carrying the banner of the Christian mission to ‘civilise’, the Europeans deemed First Nations laws non-existent. For more than 500 years, the colonialist construct of an absence of Indigenous laws was supported by notions of the ‘backward native’. European constructs of backwardness and savagery

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<sup>11</sup> Charmaine Whiteface & Zumila Wobaga, *Indigenous Nations’ Rights in the Balance: An Analysis of the Declaration on the Rights of Indigenous Peoples* (Minnesota: Living Justice Press, 2013), provides an excellent blow-by-blow account on the limitations of the UN *Declaration on the Rights of Indigenous Peoples*. [Whiteface & Wobaga]

<sup>12</sup> In a report by Rex Wild and Pat Anderson, “AmpeAkelyernemaneMekeMekarle Little Children are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse” (30 June 2007), online <[www.nt.gov.au/dcm/inquiry/aac/pdf/bipacsa\\_final\\_report.pdf](http://www.nt.gov.au/dcm/inquiry/aac/pdf/bipacsa_final_report.pdf)>. The Commonwealth government used the findings of a report which recommended closer consultation and community development programs across Aboriginal communities within the Northern Territory; - instead the findings were used to legitimise the military intervention into Aboriginal communities.

<sup>13</sup> Spivak, *supra* note 3 at 8.

<sup>14</sup> Tracey Moffatt, “Something More #9”, (1989), *Roslyn Noxley9 Gallery*, online <[www.roslynnoxley9.com.au/artists/26/Tracey\\_Moffatt/75/32690/](http://www.roslynnoxley9.com.au/artists/26/Tracey_Moffatt/75/32690/)>.

<sup>15</sup> Watson, “Northern Territory Intervention” *supra* note 9.

continue to prevail in contemporary times. It is apparent in Australia's Northern Territory 'intervention'<sup>16</sup> and in another recent example where the state of Queensland declared a 'state of emergency' in response to the Palm Island 'riot', and provided us with another indicator of the ongoing colonial ordering of Aboriginal spaces.<sup>17</sup>

State interventions occur routinely, but First Nations continue to survive, live, practice and assert a law-full way of being in the world, one which is different to the European or mainstream Australian way of being. For many Indigenous Peoples, their Aboriginal laws exist, not in ivory towers or the power houses of the Australian state, but in the lives, minds and memories of their Indigenous holders.<sup>18</sup> However, while we are left to carry the onus of proof of our existence and the existence of our laws, very few ever consider asking the question: what laws existed before colonization or, what happened to those systems of law? Few ever ask the question: how did the colonial state obtain authority over Indigenous Peoples?<sup>19</sup>

The idea that the colonial project is a thing of the past is a falsehood; colonialism has not ceased, it is ongoing. This ongoing nature of colonialism is evidenced by states' statistical data kept on Indigenous Peoples. The position of Indigenous Peoples is in turn evidence of the states' colonial policies of control and containment. Within colonial containments, policies of disempowerment are routinely maintained. In Australia at present, we see Indigenous people being continually moved from state-controlled Aboriginal reserves in rural and remote areas (rich in minerals) to public housing in cities and towns, and this is occurring along with a steady flow of Indigenous people being incarcerated in Australian gaols and juvenile detention centers. The historic sites of containment have shifted from reserves established and controlled under the *Aborigines Acts*<sup>20</sup> to new sites of control, including the state's criminal justice system or its mental health institutions. The sites of colonial subjugation have shifted from the *Aborigines Acts* concentration camps to prisons, mental health institutions and juvenile detention centers. Far from seeing an end to colonialism, we perceive a prospect where there is no end in sight. Colonialism is alive in these contemporary institutions; but we call the character of our containment by another name. But whatever name is used to describe the subjugation of Indigenous Peoples, the acts of containment remain linked to the colonial history of Australia and that is one which may never be white-washed.<sup>21</sup>

The ongoing existence of colonialism is partly disguised by neo-liberal attempts to recognise Indigenous 'rights' and casting the illusion of recognition. These attempts have been well positioned - so well that the event of colonialism is now appearing as though it is a thing of the past, no longer an ongoing phenomenon, and as though de-colonisation was actually effected. Within the domestic jurisdiction of Australia, 'native title' jurisprudence has come to represent a return of stolen Aboriginal

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<sup>16</sup> The National Emergency Response comprised the following legislation: *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* (Cth). This legislation has affected the position of traditional owners with respect to the *Aboriginal Land Rights Act 1976* (Cth), and also not only effected the suspension of *The Racial Discrimination Act 1975* (Cth), but also has impacted on provisions of the *Northern Territory Self-Government Act 1978* (Cth).

<sup>17</sup> On 26 November 2004, the Queensland government declared a State of Emergency similar to that of 1957 when Palm Islanders protested against slave-like working conditions. In 1957 Palm Islanders went on strike and in response the state sent in forces, which at gun point led chained protesters away to a life in exile from their Palm Island home. For further background see, Joanne Watson, "We Couldn't Tolerate Any More: The Palm Island Strike of 1957" (1995) 69 *Labour History* 149-70. Similarly, in 2004, the Queensland government sent in heavily-armed mainland riot police to land and arrest 43 Palm Islanders who had been protesting against the violent death of an Aboriginal man in custody. Those arrested were detained in mainland Townsville. Lex Wotton, who was among the arrested individuals, was gaolored for two years, see, Chloe Hooper, *The tall man: Death and life on Palm Island* (Camberwell (Vic): Random House, 2009). Following serving a two-year sentence, Wotton was released on parole with an imposed gag order. The order prevented him from speaking (without permission from his parole officer) to the media and public meetings, Alicia Wicks, "Due Process and Parole in Queensland: The Case of Lex Wotton" (2010) 7:20 *Indigenous Law Bulletin* 13.

<sup>18</sup> Globally, Indigenous Peoples have asserted the validity of their laws, and questioned their displacement to the 'domestic jurisdiction' of colonising states. For further discussion, see Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (British Columbia: Theytus Books, 1998) at 135-65. For a discussion on Aboriginal Law and colonialism, see Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, (Abingdon: Routledge, 2015).

<sup>19</sup> Moana Jackson, "Justice and political power: Reasserting Maori legal processes" in Kayleen Hazlehurst, ed, *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Aldershot (UK): Avebury, 1995) at 243.

<sup>20</sup> See for example, the *Aborigines Act 1910* (Vic); *Aborigines Protection Act 1909* (NSW); *Aborigines Protection Act 1886* (WA); *Aborigines Act* (1969) NSW; *An Act to amend an Act intituled "An Act to provide for the Protection and Management of the Aboriginal Natives of Victoria 1886* (Vic) (also known as *Half-Caste Act*); *Half-Caste Act 1886* (WA); *Aboriginal Protection and Restriction of the Sale of Opium Act 1887* (Qld).

<sup>21</sup> In *Mabo v Queensland (No 2)* (1992) HCA 23; (1992) 175 CLR 1, [66] [*Mabo Case*]. Brennan J refers to the 'tide of history' that 'has washed away any real acknowledgement of traditional law and any real observance of traditional customs' and therefore 'the foundation of native title has disappeared'.

lands by the state and the recognition of Aboriginal relationships to them. Native title recognition, however, is a myth. The truth is that native title has an end point which ultimately results in state power to extinguish Aboriginal title. In the case *Mabo (No. 2)*, Justice Gerard Brennan stated:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.<sup>22</sup>

The colonial project is about ensuring that the Aboriginal relationships to all things Indigenous are inevitably extinguished, or reach a point where the Indigenous are absorbed into the ideological abyss of 'progress'. The end of Aboriginality is a form of genocide but the genocide argument has not been successful in Australian courts. (When tested, it was found that the crime of genocide was considered not to be a part of Australian law).<sup>23</sup> So the Australian state enables the cultural genocide of Aboriginal peoples and at the same time escapes the blow torch of scrutiny from the international community. Australia gets away with this in the same way that other powerful members of the United Nations do, partly because of the hegemonic position of the United States and its alliances and complicity with Canada, Australia, and New Zealand. These four states are not the only colonial regimes still working in the world, but they work to support each other on the question of Indigenous Peoples and in particular in the erasure of our rights to self-determination and our ancient territories. In all the colonial states, the 'domestic paradigm' prevails even though the United Nations *Declaration on the Rights of Indigenous Peoples*<sup>24</sup> appears to lead the way towards the protection of land rights and the acknowledgement of Indigenous Peoples' rights to self-determination. Essentially, Indigenous Peoples remain domestic captives without any international subjectivity. The colonial project has worked for centuries to domesticate the international subjectivity of the Aboriginal person and in doing this the colonial states have constructed their own accounts of Aboriginality. Murri<sup>25</sup> artist Richard Bell has famously painted "Aboriginal Art is a White Thing"; I would add: the Australian state's construction of our Aboriginality is 'a white state thing'.

### **In recognition of a colonial foundation**

Many appeals for international law recognition have been made by First Nations, but all have failed. This is largely because international law has been created by and in the interests of colonialism itself. International law grew out of the distinctions made between civilized and non-civilized peoples and those distinctions enabled and confirmed that international law applied only to a civilized 'family of nations'. Anghie has argued that colonialism was not an example of the application of sovereignty but that sovereignty was constituted through colonialism.<sup>26</sup> The sovereignty of First Nations was displaced and ignored, as though it had never existed prior to the colonial invasion, while the Indigenous person is measured by our humanity (or inhumanity) by those who know nothing of the Indigenous life.<sup>27</sup>

But all the while First Nations Peoples have managed to survive within the colonial matrix. What has also survived are Aboriginal world views and Aboriginal knowledges and relationships to country. In the same space, the colonial settler society draws its survival from an illegitimate foundation upon Aboriginal lands. Relationships to the land held by the colonised and colonialist are different. Aboriginal relationships are founded in the view that people belong to land while non-Aboriginal relationships are of

<sup>22</sup> *Ibid.*

<sup>23</sup> In the matter of an application for a writ of mandamus directed to *Re Thompson; Ex parte Nulyarimma and Others* (1998) 136 ACTR 9; *Nulyarimma v Thompson* [1999] FCA 1192, [1999] 96 FCR 153.

<sup>24</sup> For a critique of the Declaration, see Whiteface & Wobaga, *supra* note 10; Sharon Venne, "The Road to the United Nations and the Rights of Indigenous Peoples" (2011) 20:3 Griffith L Rev 557; Irene Watson, "The 2007 Declaration on the Rights of Indigenous Peoples Indigenous Survival – Where to from Here?" (2011) 20:3 Griffith L Rev 507.

<sup>25</sup> It means 'Aboriginal person', a term that is used extensively across Queensland.

<sup>26</sup> Anghie, *supra* note 2.

<sup>27</sup> For a discussion on who names the human-inhuman, see Judith Butler, *Undoing Gender* (New York: Routledge, 2004) at 2.

land belonging to people. The Aboriginal relationship to land goes unrecognized in Australian law - apart from a token recognition in native title rights.<sup>28</sup> In Australia, the native title processes do provide an entry point of neo-liberalist recognition into western property legal frameworks for Aboriginal Peoples, but native title is limited to a beneficial usage and excludes the full range of ownership options which are a part of Anglo-Australian property law. The 'native title' holder is excluded from benefits gained by non-native property ownership and the right to exclusive possession. Aboriginal traditional owners thus possess the most marginal form of property title. This is while title to Aboriginal lands can be extinguished by executive government policy or statutory laws. So the end point of Aboriginal relationships to land is still managed by the state, in these latter days measured by 'native title' principles.

Those principles measure the lives of Aboriginal peoples who, following the colonial holocaust, have been able not only to remain standing but also able to provide evidence of an ancient connection to land which has continued unbroken throughout the violence of colonial history. But if Indigenous Peoples end up being deemed unable to prove they have a continuing connection to country, the alternate native title finding is of extinguishment. This means that any relationship to country, land, law, culture, and Aboriginal life is deemed extinguished. This may be determined where the courts establish a lack of continuity between law, land and peoples and such a determination is usually based on the evidence of non-Aboriginal experts: connection to country cannot be proven. In a court reaching a final determination on the continuity of an Aboriginal relationship to country, oral Aboriginal evidence has been displaced by the account of a white male historian.<sup>29</sup> Under its native-title devices, the colonial legal system determines our Aboriginal capacity to stay in a belonging relationship to land. It determines our connection to country and its endings. The colonising disconnection of Aboriginal relationships to country goes on all the while, while the 'real' land relationships - of colonial ownership and control - are deemed legitimate, maintained and sustained by Australian law. But as with most things in the Australia-Indigenous relationship, these different relationships to land cause the unsettling of both. The colonial state's agenda for two centuries has been a resolution of Aboriginality, a process for bringing it to an end. Civilization brings progress and closure to old worlds, to Aboriginal worlds and to those worlds in which peoples belong to ruwe<sup>30</sup> rather than owning and controlling the land.

However, looking at things within an Aboriginal horizon, the idea of Aboriginal law being extinguished is an alien one. This is because the law is alive. It lives and it cannot be extinguished, for the law lives in this land. It's a fact, a belief, a way of knowing the world which is still alive and waiting for that 'impossible' moment of recognition and activation.

To state that Aboriginal law cannot be extinguished is to resist and to question the power and authority of Australian laws, which inscribe and position themselves over Aboriginal sovereign possibilities and enact and construct themselves so as to erase and extinguish Aboriginal law. But in these acts of erasure, what is the state doing? Can Australian laws really erase an Aboriginal way of knowing the law, a way which sits outside Australian law? How can you erase and extinguish that which you have denied even exists? Colonial power allows for the act of erasure, but is it law-full? And if its acts are unlawful and Australian law then attempts to affirm its own unlawfulness, what kind of laws does it make? Are they laws which move us from genocide to juriscide?<sup>31</sup> Where does justice live in acts which are deemed to be in the name of the law; can you have justice in that place where one law purports to extinguish the law of the other?

How can Australian law erase Aboriginal law when Aboriginal law sits outside of the proclaimed colonial legal foundation? The High Court of Australia in the *Mabo* decision refused to recognise the existence of Aboriginal laws since to give recognition to them would fracture the state's skeletal foundation.<sup>32</sup> From where does the one law driving to extinguish the laws of the other draw its legitimacy?

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<sup>28</sup> For an extensive critique of the limitations of native title rights in respect of Aboriginal land rights, see Irene Watson, "Sovereign Spaces, Caring for Country and, the Homeless Position of Aboriginal Peoples" (2009) 108:1 South Atlantic Quarterly 27.

<sup>29</sup> *Yorta Yorta Aboriginal Community v Victoria and Others* (2002) 194 ALR 538.

<sup>30</sup> It means 'land' in the language of the Tangane-kald.

<sup>31</sup> This term was first suggested to me by Valerie Kerruish; it has no 'authoritative' definition. I understand it to mean the killing of one law by another. A further reference to the term was found in the work by Mary Linda Pearson, *From Genocide to Juriscide, the last Five Hundred Years: A History of the Genocide of North American Indian Peoples* [unpublished manuscript].

<sup>32</sup> *Mabo* Case, *supra* note 22 at 29-30, 43, 45.

Is it simply because it can, because it has the military power to do so? The High Court in *Mabo (No 2)* answered this question: it affirmed that Australia was lawfully settled as an act of state, but at the same time rejected an enlarged view of 'terra nullius' as the foundational principle of Australian law.<sup>33</sup> In the High Court's rejection of terra nullius, many thought that there would appear an opening for an Aboriginal presence, but it became recognition of the limits of Australian law. In a measuring of the 'natives' remaining connection to land in a contemporary colonial context, the court decided it would not give recognition to an Aboriginal presence if it held any possibility of breaking the skeletal framework of the body of the imposed colonial law. The fiction of settlement under international law prevailed in the *Mabo (No 2)* decision. The skeleton of Australian law remained intact and the question of its legitimacy did not arise as the court avoided addressing the question of its own legitimacy. But meanwhile the body of Aboriginal law continues to reside in the land, bodies, minds and spirits of its peoples, even as the skeleton of Australian law lays itself out across them.

In the colonial context, the notion of civilisation has always been part of a process involving the harvesting of the planet's Aboriginal being - its peoples, lands, fauna, and flora. But it is a harvest which is more like mining; inevitably it becomes a contradiction to a sustainable future - and therefore unsustainable. In this process of the mining of Indigenous spaces and places, there is very little sense of future generations or future well-being. What exists predominately is the importance of the now. And it is Indigenous Peoples' lands which are being harvested or mined of their resources, as their peoples are removed from the land. This removal goes on as if there is no future and or relationship between peoples and land. Indigenous Peoples are still being displaced, refugees from Indigenous homelands, and positioned socially, economically, and culturally inferior to any other persons.

#### **A future international?**

The relationship between international law and colonialism is a co-dependant one. If colonialism is a great fault, we should then examine the possibility of a reconstructed international law - one which is liberated from its colonialist origins. In real time, many First Nations are confined to the 'domestic paradigm' of the settler states occupying their lands and are looking down the barrel of settler-state policies which are about their annihilation.

Roger Acuña suggests that human rights instruments could be used by Indigenous Peoples if there were first a critical appraisal of their association with neo-liberalism.<sup>34</sup> Similarly, Anghie recommends that we better understand the relationship between international law and colonialism in order to transform the inequities and imbalances which have resulted from the colonial confrontation with First Peoples.<sup>35</sup> However, in coming to do this work we also need to understand that colonialism institutionalises, legitimises, conceals and enshrines violent power relations. As China Miéville makes clear, we live in a world in which violence is often sanctioned by the rule of law. On this assessment, it is the rule of law which requires an unfolding.<sup>36</sup>

The work of Charmaine Whiteface provides a critical analysis of the *Declaration on the Rights of Indigenous Peoples*, illustrating how the *Declaration*, like other human rights instruments, can be used as a tool for empire. In concluding comments regarding the long process of drafting the *Declaration*, Whiteface asks the question: will the human rights of Indigenous Peoples ever be upheld? She replies thus:

When a system such as the one that dominates the globe today is allowed to run rampant over human beings, over natural resources, and over virtually every piece of matter on the Earth, then that system is destined to fail and eventually will fall. The time left for this current system, which includes the United Nations, is very, very short. Cause and effect is the Natural Law that will prevail.<sup>37</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> Acuña, *supra* note 4 at 246.

<sup>35</sup> Anghie, *supra* note 2 at 38-39.

<sup>36</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Chicago: Haymarket Books, 2006) at 319.

<sup>37</sup> Whiteface & Wobaga *supra* note 10 at 108.

Indigenous Peoples have for more than 500 years survived colonial violence otherwise authorised, legitimised and called the ‘rule of law’. This testament to survival is not a recommendation for more of the same, or to further test the resilience of Indigenous peoples, but is a reflection upon the current predicament of both Indigenous lives and natural world environments and the critical need to alter the trajectory we are currently on.

Perhaps the possibility of shifting away from the current trajectory is seen as impossible. Derrida suggests such moments – moments of aporia – are what are needed to make a decision in order that all life forms have a future.<sup>38</sup>

The colonial matrix has assumed construction of the idea that the rule of law is what holds the world together and it is true that it is that which holds the colonised form together. But alternatively, how might we unfold or disentangle this rule of law, and embrace a different vision, one which is sustainable and which values the thriving survival of future generations? What might we be or where might we end up if we were to unfold from the rule of law which has come to hold the colonial world together? Would we be at the edge of where it had all began, the edge of that which the colonial world had constructed as ‘barbarian’? It would be a world of my ancestors, a world in which the ancestors called up their own ancient laws as the legal system responsible for holding the native and the natural world together. The colonial world unfolding, letting go of itself and instead embracing all that it has worked on to annihilate for centuries may be inconceivable, an impossibility, but that is “exactly where one starts thinking.”<sup>39</sup> It is in thinking through how to engage with First Nations laws that colonial societies become stuck - but that is also where the “ground of impossibility” lies, and that is the ground where our thinking should begin.<sup>40</sup> The taking up of that impossible moment of engagement with First Nations laws is also the moment in which colonial societies engage the opportunity to “take responsibility in order to have a future.”<sup>41</sup> In shifting the current trajectory, the possibility of creating an opening to a future which had not previously existed is revealed.

If the current trajectory of power is not shifted and the steps to embrace the world of the ‘barbarian’ are not taken, the question is left begging: what will become of us if this opportunity is turned away from? Thought is rarely paid to this question for it is assumed that First Nations Laws are a relic of the past, and that outside state powers there are no other ways or legal traditions that can hold our world together.

Is it possible to begin again, for us to find another way of holding the world together?<sup>42</sup> Upon Captain Cook’s arrival in Australia, the denial of the recognition and acknowledgement of the First Nations of Indigenous Australia first arose and all flowed from that moment: the injustices of invasion and colonization; the denial of our Aboriginal presence, our laws, our culture, and our ways of knowing the world. This point – at which recognition or activation is deemed inconceivable – is where we should begin again.

The ‘madness’ of the idea creeps in when we dwell too long at the site of the hard, core, concrete realities of power and how power manifests and is held. But then, First Nations law stories teach us how to deal with those forces. The law story of the frog teaches that through laughter we come to find an alternative to power and violence.<sup>43</sup> Violence was not the way of our past,<sup>44</sup> but do the old ways still work? To become our reality once again, a shift needs to occur.

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<sup>38</sup> Jacques Derrida, “Time & Memory, Messianicity, the Name of God” in Paul Patton & Terry Smith, eds, *Deconstruction Engaged: The Sydney Seminars* (Sydney: Power Publications, 2001) at 63.

<sup>39</sup> *Ibid* at 64-65.

<sup>40</sup> See Watson, “Aboriginal Sovereignties”, *supra* note 4.

<sup>41</sup> Derrida, *supra* note 39.

<sup>42</sup> An idea raised by Kevin Buzzacott when speaking at a pre-Australia day protest meeting held at La Perouse, NSW, on 25 January 1988.

<sup>43</sup> For a discussion of the story of the frog relative to the power of state sovereignty, see Irene Watson, “Buried Alive” (2002) 13 *Law and Critique* 253 at 269.

<sup>44</sup> Anthropologist Peter Sutton has argued that the endemic contemporary violence which exists in some Aboriginal communities is culturally inherent. For a critical analysis of those views and a discussion on the impact of colonialism, see Irene Watson, “Illusionists and Hunters: Being Aboriginal in this Occupied Space” (2005) 22:1 *Australian Feminist Law Journal* 15.

I see First Nations laws as holding the potential for the future growing up of humanity. While this view might be considered marginal (and a position marginalized largely due to Indigenous Peoples being undermined by the colonial project for more than five centuries) it is nevertheless a view which makes sense when all else has failed.<sup>45</sup> This is particularly so when we know that our ancient laws held and still hold our ancient worlds together. These are worlds which continue to survive in the face of modernity and in the face of the very denial that we are still here and that we have survived. From my humble position, I see no reason for First Nations laws not to work – but then again, there are many more who consider that it would be impossible. In their comparatively recent existence, the states have denied the existence of our ancient legal systems, because the places and spaces that Indigenous Peoples occupied are the same places and spaces upon which the states built their violent and colonial foundations. To realize and value First Nations would be to annihilate the state. At another point in the spectrum of ‘knowing’, First Nations can be no longer; there are critical commentators who see the ongoing existence of First Nations laws as impossible, because they have deemed them to no longer exist (if they ever did).

We know the West has sought to dominate all things, that it dominates the west, the east, the south, and the north, and that it feeds its own expansion stealing from the Indigenous and the earth, an expansion that determines its own ending. It is clear also that:

It is not that the contribution of non-Western polities to international law has been *obscured* by colonialism, nor that (Western) international law’s spread across the world is the *result* of colonialism: it is that international law *is* colonialism.<sup>46</sup>

But the thing is, ‘international law’ has not dominated the way we see and know the world. The West has the power to be in the places of our ancient ways but it has no power to kill our law, for the law is the law. It is a song sung and is a song which will continue; there are no endings in this song.

But in re-imagining how we might begin as the First Nations Peoples, I repeat one of our modern day Aboriginal songs: *always was, always will be*, Aboriginal law/land. Lawful peoples. Peoples full of law. Knowers of laws’ relations to the natural world, a world full of law. A way of knowing which is for continuing cycles of life, as Charmaine Whiteface reassures, our natural world will continue to prevail. These are ideas which stand apart from the certainty of the progress trajectory and its own proclaimed conclusion in the end of history.

If we turn away from the possibility of a future First Nations’ survival and our relationship with the natural world, we shall miss the opportunity of living lawfully.

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<sup>45</sup> Climate change is a good place to start when looking for the failings of modernity, along with the critical environmental degradation occurring across the earth.

<sup>46</sup> Miéville, *supra* note 37 at 169.

## Resistance and International Law; De-coloniality and Pluritopic

### Hermeneutics

*Pierre-Alexandre Cardinal\**

#### Abstract

The purpose of this essay will be to engage with the concept of resistance, and to try to map some of the aspects of its relationship with international law. The question that animates the endeavour is that of the capacity of international law to provide sufficient perspective to give a cognizant account of the phenomenon of resistance. My hypothesis is that international law, stemming from European modernity, suffers from irredeemable methodological and epistemic biases that rely on the pre-eminence of the state form in the discipline. Such biases, I argue, produce exclusionary mechanisms inherent to the structure of the discipline, and create distortions of reality along the modern/colonial divide. These distortions enforce a persistent structure or matrix of coloniality that contributes to the ontological negation of the “*damné*”, i.e. the dominated Other who is in a position of resistance. This matrix is defined as a threefold interrelating set of dominations, it includes: a coloniality of power, the interrelation of modern forms of direct domination; a coloniality of knowledge, the control of different areas of knowledge production; and a coloniality of Being engendered by the interrelation of the previous two. It creates a situation of resistance that international law, because of its epistemic and methodological biases, cannot rationalize completely because of the resistant’s departure from the schemes of knowledge of modernity in which the discipline is rooted, and his willingness to negotiate power and not only completely negate it. This resistance by the dominated Other, I will suggest, is a counter-normative response to the distortions created by the matrix of coloniality in international law.

#### *French Translation*

Cet article s’interroge sur le concept de “résistance” et cherche à mieux comprendre sa relation avec le droit international. La question de savoir si le droit international a la capacité d’apporter une perspective suffisante pour comprendre le concept de résistance est à l’origine de cette analyse. Mon hypothèse est que le droit international, compte tenu de ses racines dans la modernité européenne, souffre de biais méthodologiques et épistémologiques irréversibles basés sur la prééminence de la forme étatique dans la discipline. J’avance que ces biais produisent des mécanismes d’exclusion inhérents à la discipline, et créent une distorsion de la réalité selon une division moderne / coloniale. Ces distorsions renforcent une structure persistante, ou une matrice de colonialité contribuant à la négation ontologique du “*damné*”, c’est à dire, l’Autre dominé en position de résistance. Cette matrice comprend trois axes qui s’entrecoupent : la colonialité du pouvoir (les différentes formes de domination directe) ; la colonialité du savoir (le contrôle des différents modes de production du savoir) ; et la colonialité de l’Être, engendrée par l’intersection des deux axes précédents. Ceci crée une situation de résistance que le droit international, à cause de ses biais épistémologiques et méthodologiques, ne peut entièrement rationaliser car le résistant s’écarte des schémas de savoir sur lesquels la discipline est fondée et est disposé à négocier le pouvoir sans complètement le nier. Cette résistance de l’Autre dominé, je suggère, est une réponse contre-normative aux distorsions créées par la matrice de colonialité en droit international.

#### *Spanish Translation*

El presente artículo se enfocará en el concepto de resistencia, con el intento de delinear algunos aspectos de la relación entre este concepto y el ámbito del derecho internacional. La pregunta que motiva este trabajo consiste en contemplar la capacidad del derecho internacional de proveer una perspectiva suficientemente informada por el fenómeno de resistencia. Mi hipótesis se basa en que el derecho internacional, que emana de la modernidad europea, sufre una parcialidad metodológica y epistémica, la cual se funda en la preeminencia del estado dentro esta disciplina. Argumento que esta inclinación produce mecanismos excluyentes inherentes a la estructura de la disciplina, y crea distorsiones de la realidad que se suman a la división moderna/colonial. Estas distorsiones refuerzan una matriz de

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colonialismo persistente que contribuye a la negación ontológica del "damné", es decir, del otro dominado que se encuentra en posición de resistencia. Esta matriz es definida como un conjunto trifásico de dominación; incluye un poder de colonialismo, definido como la interrelación de formas modernas de dominación directa; un colonialismo de conocimiento, entendido como el control de las diferentes áreas de producción del conocimiento; y un colonialismo de "ser", debido a la interrelación de los anteriores. Esto crea una situación de resistencia que el derecho internacional, debido a su parcialidad epistémica y metodológica, no puede racionalizar completamente gracias a la desviación de los resistentes de los esquemas de conocimiento de la modernidad en los cuales la disciplina encuentra sus fundamentos, así como su predisposición para negociar el poder y no negarlo completamente. Sugeriré que esta resistencia es una respuesta contra normativa a las distorsiones creadas por la matriz del colonialismo en el derecho internacional.

CALIBAN

*Prospero, tu es un grand illusionniste : le mensonge, ça te connaît.  
Et tu m'as tellement menti, menti sur le monde, menti sur moi-même,  
que tu as fini par m'imposer une image de moi-même :  
Un sous-développé, comme tu dis, un sous-capable,  
voilà comment tu m'as obligé à me voir,  
et cette image, je la hais! Et elle est fausse!  
Mais maintenant, je te connais, vieux cancer, et je me connais aussi!*

– *Une Tempête, Aimé Césaire, end of Act III, scene V*<sup>1</sup>

In Césaire's *Une Tempête*, his rendition of Shakespeare's classic play *The Tempest*, Caliban becomes the hero of a tale of freedom. This tale is one through which he is able to free himself not only from the physical domination of Prospero, but also from the illusions and lies through which Prospero kept him in a subalternized self-image and condition, a form of despising of his self imposed by Prospero. In the original tragicomedy, Shakespeare provides us with a half-voiced discussion on the morality of colonialism, referring to Montaigne's *Des cannibales*. He also reminds us of Caliban's true savage nature by repeatedly contrasting his mother Sycorax's use of vile magic with Prospero's rational science and civility. Césaire, however, inverts the locus of enunciation of the play and gives space to the agency of the colonized, allowing us to see and understand the same chain of events from a different perspective, that of the damned existence of a resisting colonial Being. For Césaire, the focus of the play is no longer the well-meaning European that saves a savage from his own wickedness, but rather the *damné* who is physically and epistemologically dominated by a colonial master, and stuck in a "coloniality of Being";<sup>2</sup> a constant struggle against an omnipresent negation of the Self. Caliban's resistance is indeed a tale of freedom and justice, but one that also unearths the failures of the *methods* of domination of a decayed system, intoxicated by the marvels of the modern.

The field of international law is, much like Prospero, plagued by meta-narratives and operational logic. The colonial structure is deeply enmeshed in the fabric of public international law.<sup>3</sup> While this phenomenon remains marginally acknowledged, it contributes and justifies renewing the colonial dynamics it denies.<sup>4</sup> Indeed, in the words of Anghie, international law creates a "dynamic of difference" by which he means "the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society."<sup>5</sup> According to this view, there are backward systems of law, pre-logics, and uncivilized people that need to be "modernised."<sup>6</sup> Then, much like Prospero's science in Césaire's work, international law becomes the enunciation of a conflicting power-

<sup>1</sup> *Une Tempête, Aimé Césaire, end of Act III, scene V*.

<sup>2</sup> Nelson Maldonado-Torres, "On the Coloniality of Being" (2007) 21:2-3 *Cult Stud* 240 at 252-57.

<sup>3</sup> Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 *Third World Q* 739 at 742 [Anghie, "The Evolution of International Law"].

<sup>4</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005) [Anghie, *Imperialism*].

<sup>5</sup> *Ibid* at 4. See also Anghie, "The Evolution of International Law", *supra* note 3

<sup>6</sup> Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 *Harv Int'l LJ* 1 at 78 [Anghie, "Finding the Peripheries"].

relationship between two poles in which one defines the other as irremediably different in a bid to deny its status as a legal actor, its agency, and consequently its sovereign capacities and claims to territorial independence. The subalternized Other, when faced with the normative power of international law is, then, much like Caliban's mysticism against Prospero's science/magic, forced into opposition to the law's normative claims.

The purpose of this essay will be to engage with Caliban's opposition, with the concept of resistance, and to try to map some of the aspects of its relationship with international law. I first question the capacity of international law to provide a coherent account of the phenomenon of resistance. My hypothesis is that international law, stemming from European modernity, suffers from irredeemable methodological and epistemic biases that rely on the pre-eminence of the state form. Such biases, I argue, produce exclusionary mechanisms inherent to the structure of the discipline, and create distortions of reality, or dynamics of difference, along the modern/colonial divide. These distortions, I finally propose, enforce a persistent structure of coloniality which contributes to the ontological negation of the *damné* – Caliban –, i.e. the dominated Other who is forced into a position of resistance to maintain his Being. This process creates a situation of resistance that international law, because of its epistemic and methodological biases, cannot rationalize or subsume completely because of the other pole's departure from modernity's schemes of reference. This resistance, I will suggest, is a counter-normative response to the distortions imposed by the matrix of coloniality in international law. This matrix is defined as a threefold interrelating set of domination. It includes: a coloniality of power, the interrelation of modern forms of direct domination; a coloniality of knowledge, the control of different areas of knowledge production; and a coloniality of Being engendered by the interrelation of the previous two, the lived experience of self-denial of the colonial subject, described at length by Fanon for example.<sup>7</sup> The argument will be divided into three parts. First, I will make a claim with regards to the intertwinement of a matrix of coloniality and international law, creating an epistemic privilege. Then, I will engage with the concept of resistance and its meaning as a counter-normative process. Finally, I will reflect on some tools for overcoming the epistemic privilege.<sup>8</sup>

## I. International law and epistemic biases; the centrality of the state actor

PROSPERO

*Je suis [...] le chef d'orchestre d'une vaste partition : cette île.  
suscitant les voix, moi seul,  
et à mon gré les enchaînant,  
organisant hors de la confusion  
la seule ligne intelligible.  
Sans moi, qui de tout cela  
saurait tirer musique?  
Sans moi cette île est muette.*

– *Une Tempête, Aimé Césaire, end of Act III, scene V*

In this section, I will provide the groundwork for my engagement with the concept of resistance, namely, a particular genealogical understanding of the study of social sciences, and more precisely international law. I will argue that international law, as a discipline stemming from European modernity,

<sup>7</sup> Frantz Fanon, *Peau noire, masques blancs* (Paris: Editions du Seuil, 1952). See also Maldonado-Torres, *supra* note 1 at 242–43; Michael Ennis & Anibal Quijano, “Coloniality of Power, Eurocentrism, and Latin America” (2000) 1:3 *Nepantla* 533 [Ennis & Quijano]; Walter D. Mignolo, “The Splendors and Miseries of ‘Science’: Coloniality, Geopolitics of Knowledge and Epistemic Pluri-Versality” in *Cognitive Justice in a Global World: Prudent Knowledges for a Decent Life*, Boaventura da Sousa Santos ed (Lanham: Lexington Books, 2007) 375 at 377–82 [Mignolo, “Splendors”].

<sup>8</sup> The arguments I propose in this text are heavily indebted to the pioneering works of Balakrishnan Rajagopal (B Rajagopal, “International Law and Social Movements: Challenges of Theorizing Resistance” (2003) 41 *Colum J Transnatl L* 397 [Rajagopal, “International Law”]; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003)) and Frédéric Mégret (Frédéric Mégret, “Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l’ambition normative internationale” (2008) 39:1 *Études int* 39; Frédéric Mégret, “Grandeur et déclin de l’idée de résistance à l’occupation: réflexions à propos de la légitimité des ‘insurgés’” (2008) 41:1-2 *Rev b dr Intern* 382). However, the emphasis of this essay will not address the same questions since my central focus is on questions regarding the epistemology of international law, and the ontology of actors affected by it. Joining the analysis of these two authors, my argument approaches the question through the resistance of a (colonized) group against a state actor, and seeks to portray the latter as a vehicle of a multitude of forms of oppression (such as imperial domination, and formal/informal colonialism) that inevitably seek homogenization of its “other”. The proposal is thus not simply a socio-historical explicative understanding of resistance in international law, but rather a methodological counter-normative standpoint with regards to the discipline.

suffers from its epistemic biases, which prevent it from making sense of the structures' excluded "Others", namely, non-European ontologies (societies/polities). My hypothesis, then, is that the discipline has inherited modernity's colonial matrix, a mechanism of exclusion that became an essential part of international law. This divide allowed the Europeans to always situate knowledge from its own particular experiential standpoint. The modern then makes sense of the world from a monotopic hermeneutic, a single monological structure of reference.<sup>9</sup> I will propose that such a mechanism of exclusion is pervasive in international law because of its intertwinement with "methodological nationalism"<sup>10</sup>, supported by scientific positivism. International law's reliance on the state as the supreme normative actor and central methodological concept in international law, I propose, frames the norms and principles of the organization of the world-society in a particular way.<sup>11</sup>

Methodological nationalism is a cognitive bias. It is a method that analyzes phenomena by assuming the state as *the* point of analysis, as the keystone of a scheme of reference to make sense of the studied "object". "Society" and the "state" then become reducible to each other in a way that both become reified and indistinguishable, and thence, while the latter becomes the standard fundamental norm of political organization, any study of society becomes a study of the statist structural organization.<sup>12</sup> Then, the development of the state posited itself as a constitutive element of European modernity, enforcing an appearance of categorizable naturalness to a world divided into societies equated to national-state lines. This then blurred the existence of other dividing lines perceived as less stable, more traditional (such as religion), which could not lead to a progressive advancement of society. Indeed, affinities such as religion have been, and still are considered by international jurists as unstable and unable to establish a territorially "durable idea of nationality", emphasizing the bias in favour of the state form as the only possible subject for the development of society.<sup>13</sup>

Problematically, this is where the central issue of the bias lies; methodological nationalism obscures a quantity of other possible loci of enunciation. Mignolo, over the years, has consistently and strongly maintained that modernity and its universalizing enterprise only served imperial western purposes.<sup>14</sup> He argues that scientization and the creation of "scientific knowledge" to rationalize, rule and make sense of the totality of the objectified world led modern European thinkers to create dynamics of difference through the ability to classify, to establish European knowledge as omniscient, as total versus the Other's incapacity, attributable to its tradition or mysticism. Indeed, "science" is not a mere objective truth-finding practice, but is affected by a metadiscourse that first defines certain practices as science and attributes them value, and, secondly, disqualifies other knowledges that do not fit the metadiscourse.<sup>15</sup> Modernism thus becomes an exclusionary and engulfing reality-mediating principle that instantiates the matrix of coloniality, a structure that goes beyond the strict limits of physical colonisation, holding its grip over knowledge production. This matrix allows European knowledge-making to manage and control the traditions of the Other, and alongside this operation, take away the Other's ways of making sense of the world. In so doing, the European creates an observable, positive *humanitas*, who defines itself in its own

<sup>9</sup> In this hermeneutic, this exercise of interpretation, the understanding subject is not the other, but can only be the "same" as the modern because he benefits from the epistemic privilege of his position to invent (misrepresent/misinterpret) his exteriority, his other, for the purpose of self-definition, and not for the purpose of epistemic justice with regards to the other's immanent Being. R Panikkar, *Myth, Faith and Hermeneutics. Cross-Cultural Studies* (New York: Paulist Press, 1979) at 8–9; Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2012) at 17 [Mignolo, *Local Histories*]; Madina Tlostanova & Walter Mignolo, "On Pluritopic Hermeneutics, Transmodern Thinking and Decolonial Philosophy" 1:1 Encounters 11 at 16–18.

<sup>10</sup> For an entry point in the debate, see Andreas Wimmer & Nina Glick Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences" (2002) 2:4 Glob Net 301; Daniel Chernilo, "Methodological Nationalism and the Domestic Analogy: Classical Resources for their Critique" (2010) 23:1 Cambridge Rev Intl Aff 87.

<sup>11</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2002) at 140.

<sup>12</sup> Daniel Chernilo, "The Critique of Methodological Nationalism: Theory and History" (2011) 106:1 Thesis Eleven 98 at 99–100; Ulrich Beck & Natan Sznaider, "Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda" (2010) 61 Brit J Soc 381 at 3; Anthony Giddens, *The Class Structure of the Advanced Societies*. (London: Hutchinson, 1973) at 265.

<sup>13</sup> *Nationality Decrees in Tunis and Morocco (French Zone)*, *Mémoire du gouvernement français* (8 November 1921), PCIJ (Series C) No 2, 1 at 3 (the expression comes from the French agents); s For a broader discussion, see Nathaniel Berman, "The Sacred Conspiracy: Religion, Nationalism, and the Crisis of Internationalism" (2012) 25:01 Leiden J Intl L 9; Amr GE Sabet, "Wilayat al-Faqih and the Meaning of Islamic Government" in Arshin Adib-Moghaddam, ed, *A Critical Introduction to Khomeini* (New York: Cambridge University Press, 2014) 69.

<sup>14</sup> Tlostanova & Mignolo, *supra* note 9 at 11–12; Walter Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (Ann Arbor: University of Michigan Press, 1995); Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Durham: Duke University Press, 2011); Walter Mignolo, "Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-Coloniality" (2007) 21:2-3 Cult Stud 449.

<sup>15</sup> Mignolo, "Splendors", *supra* note 7 at 375–76.

observation and interpretation of the *anthropos*, which becomes its “darker side.”<sup>16</sup> While positivism theoretically creates a space for the neutrality, equality and objectivity of the law, its Eurocentric modernist bias precludes it from seeing from other positions, from other normativities, thus resulting in the promotion of a substantive inequality in favour of the epistemic hegemon.<sup>17</sup> Coloniality, through its codified scientific ramifications (such as international law) is then the enabling structure of this misrepresentation, supported in this endeavour by positivism.

Methodological nationalism is the vector through which the epistemic privilege of modernity translates the modern/colonial divide in international law. The primary function of international law has, since the discipline’s etiological foundation in the “Westphalian model”,<sup>18</sup> been to identify “as the supreme normative principle of the political organisation of mankind, the idea of a society of sovereign states [...] by stating and elaborating this principle and by excluding alternative principles [...] establish[ing] this particular realm of ideas as the determining one for human thought and action in the present.”<sup>19</sup> Indeed, the categorization of everything through the state led to portray the international legal field as a litany of successive judicial affairs centred around states, reinforcing their centrality, and overshadowing countless historical, economic, social and political circumstances that led to the field’s emergence.<sup>20</sup> This canonical set of pre-ordained authorities creates the metanarrative structure that defines the exclusionary bias and the epistemic privilege inherent to international law, giving it an ethereal location outside of its geopolitical Eurocentric origin.<sup>21</sup> This metanarrative enforces a divide between the European/statist world and the non-European/non-statist world, a geopolitics of knowledge that suggests that any “different” actor seeking agency and participation in the forums of the discipline must abide by the canon established by ordained (European or euro-centered) officials of international law. In case of non-adherence to the *lingua franca* of the discipline, the Other faces the matrix’s trigger reaction, which gives effect to the “salvation”, “civilization” or “development” of the Other (read direct colonisation). This ideological matrix is a “totalitarian model [that] denies rationality to all forms of knowledge that did not abide by its own epistemological principles or its own methodological rules”<sup>22</sup>, thus implementing the universalization of a discourse that is specific to the lived experience of Europe.

Critiques are often levied against the limited analytical capacities of a state-centric perspective. Indeed, many outstanding scholars have substantively and eloquently dealt with the links between colonialism and international law.<sup>23</sup> Nevertheless, it remains rarely questioned that the state, as the actual locus of enunciation of international law, reinforces an epistemic privilege rooted in European modernity, and consequently, the matrix of coloniality. Only marginal attention has been paid to the underlying structure of the matrix of coloniality. One of the conceptual moves I propose here diverges from the concept of colonialism used previously by TWAIL scholars, most of whom referred to colonialism as a process of “territorial annexation and occupation of non-European territories by European States.”<sup>24</sup> Dealing with the phenomenon of coloniality, however, involves accounting for the omnipresent claims to universality

<sup>16</sup> *Ibid* at 379. See also the other works of Mignolo, *supra* note 14; Osamu Nishitani, “Anthropos and Humanitas: Two Western Concepts of ‘Human Beings’” in *Translation, Biopolitics, Colonial Difference*, Naoki Sakai & Jon Solomon ed (Hong Kong: Hong Kong University Press) 259.

<sup>17</sup> Eve Darian-Smith & Peter Fitzpatrick, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) at 4.

<sup>18</sup> Ignacio De La Rasilla Del Moral, “The Shifting Origins of International Law” (2015) 28:3 *Leiden J Intl L* 419 at 426; Ralf Michaels, “Globalization and Law: Law Beyond the State” in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Oxford: Hart Publishing, 2013) 287 at 292.

<sup>19</sup> Bull, *supra* note 11 at 134-35.

<sup>20</sup> Rajagopal, “International Law”, *supra* note 8 at 401–07.

<sup>21</sup> On this see, amongst others, Santiago Castro-Gómez, “The Missing Chapter of Empire” (2007) 21:2-3 *Cult Stud* 428; Santiago Castro-Gómez, *La hybris del punto cero: ciencia, raza e ilustración en la Nueva Granada (1750-1816)* (Bogotá: Pontificia Universidad Javeriana, 2005); Walter Mignolo, “Epistemic Disobedience, Independent Thought and Decolonial Freedom” (2009) 26:7-8 *Theor Cult & Soc* 159 at 167 [Mignolo, “Epistemic Disobedience”].

<sup>22</sup> Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 12.

<sup>23</sup> See e.g. Anghie, *Imperialism*, *supra* note 4; Anghie, “The Evolution of International Law”, *supra* note 3; Martti Koskenniemi, “Why History of International Law Today?” (2004) 4 *Rechtsgeschichte Legal History* 61; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002) [Koskenniemi, *The Gentle Civilizer of Nations*]; James Thuo Gathii, “Imperialism, Colonialism, and International Law” (2007) 54:4 *Buff L Rev* 1013; Nathaniel Berman, *Passions et ambivalences. Le colonialisme, le nationalisme et le droit international* (Paris: Pedone, 2008); Siba N’Zatioula Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-determination in International Law* (Minneapolis: University of Minnesota Press, 1996).

<sup>24</sup> The concept shall be used here in reference to James Thuo Gathii’s definition, which proposes that colonialism is a process of “territorial annexation and occupation of non-European territories by European States” (See Gathii, *supra* note 23 at 10104).

of the European episteme. Accounts of “coloniality,” versus accounts of “colonialism,” take the focus away from the actions of the colonizer, and account instead for the experience of the Other in challenging the matrix of coloniality and the privilege of the Eurocentric episteme, addressing the inherent epistemic injustice in international law.

## II. Resistance and international law; epistemic domination

PROSPERO

*Eh bien moi aussi je te hais!  
Car tu es celui par qui pour  
la première fois j'ai douté de  
moi-même*

[...]

*Je ne laisserai pas périr mon œuvre...  
Hurlant  
Je défendrai la civilisation!  
Il tire dans toutes les directions.*

– *Une Tempête, Aimé Césaire, end of Act III, scene V*

Following the discussion of the previous section, if dialogue is not a possibility for the Other under the dominant scheme of international law, what is left for him is resistance. Yet, I propose that the relationship between resistance and the dialogical frame of international law remains tenuous because of the epistemic privilege latent in the field's episteme, a privilege that prevents it from giving a full understanding of the phenomenon of resistance. The perspective I suggest here, following Koskenniemi, is that however we wish to change the biases of the field of international law from within its disciplinary limits, we always remain constrained by the vocabulary, techniques and sets of meaning that are accomplices to the history of European domination.<sup>25</sup> Then, any dialogue that is done from the monological perspective of international law will necessarily remain trapped within the biases of the discipline as, by accepting it as a neutral medium for negotiation, we accept the modern/colonial divide and structure of coloniality that underlies it.

Michel Foucault famously argued that where there is power, there is resistance, and that the diversity in power sources creates an equal diversity of resistances that cannot then be reduced to a single denomination.<sup>26</sup> By this, he sought to highlight that multiplicity, and thus impossibility of homogenization, were the conditions of existence of power relationships. Wherever there is an exercise of power, there is a concomitant act of resistance, of agency against the use of power. Then, resistance is not a mere passive reactionary underside to domination, doomed to forever remain in a subaltern position; but rather an active force of agency, an immanent subjectivity. Resistance is the irreducible opposite, the anomaly that, when appropriately codified, makes the upsetting of the institutional arrangement of power relations possible. In international law, then, resistance is given effect by an Other that refuses to submit to the form, or method, of the state, and that thus cannot be subsumed under methodological nationalism/non-nationalism.

It would appear that the modern/colonial divide and epistemic privilege found in international law represent such an exercise of power against an Other. The driving force of the divide seeks to “develop[...] techniques to normalize the aberrant society”<sup>27</sup> of the Other. Then, in the structure of coloniality, the exercise of power by the dominant and homogenizing drive of the European is opposed by the resistance that is the anomaly of the Other (this Other who sees its ontology condemned to damnation, in the sense of Fanon's *damnés*, because of the monological frame of understanding imposed

<sup>25</sup> Martti Koskenniemi, “Histories of International Law: Significance and Problems for a Critical View” (2013) 27:2 *Temp Intl & Comp LJ* 215 at 223 [Koskenniemi, “Histories of International Law”].

<sup>26</sup> Michel Foucault, *The History of Sexuality: The Will to Knowledge* (New York: Penguin, 2008) at 96.

<sup>27</sup> Anghie, *Imperialism*, *supra* note 4 at 4; Anghie, “The Evolution of International Law”, *supra* note 3.

on it). This Other is consequently forced into a coloniality of Being, constantly facing the death of its Being, its reality, its way of understanding the world that the European master seeks to subsume under the categories accorded by international law. The *damné* is, for the ontology of the modern, the being who is “not there”, or that should not be there, and without the *damné*'s knowledge of its existence and of the structure of coloniality, there would be a total erasure of that existence.<sup>28</sup> Then, the *damné* is the anomaly. It is, by its existence, the constant irreducible Other whose reality is defined and constituted by its negation, by death and damnation of its Being under the homogenizing gaze of the Other. The mere fact of existence for the *damné* is not its encounter with mortality, but rather its desire to evade that death sentence, a cry to resist and exist.<sup>29</sup> In the scheme of the coloniality of international law, then, resistance of the Other is an anomaly, a counter-claim to the privilege and the epistemic prejudices of the discipline, an opposite that seeks not to deny the European, but rather to re-establish itself as a possibility, but against the structure of coloniality. This structure cannot exist if the resistance of the Other is to succeed as it is the reason why resistance exists; it is the exercise of power that constitutes itself from the anomaly of the Other's Being.

In that sense, I want to propose that the recent enthusiasm for the study of the interaction between the discipline of international law and resistance<sup>30</sup> is a moot question that, in the end, misses the whole point of the practice of resistance. Douzinas has convincingly argued that a right to resistance can scarcely become a legal possibility, an enshrined right,<sup>31</sup> and that if so, then this right only turns out to be an “insurance policy” for the maintenance of an already existent social order<sup>32</sup>, and not an “external” possibility to counter this order. Resistance, then, would be the performance of a collective will that does not recognize itself in a set of social circumstances and rules given effect by the existent legal order, and that is thus unrecognized by the norms it itself does not recognize in its counter-claims.<sup>33</sup> The only possibility for resistance to be actively accepted and incorporated into international law is through a retroactive normative effect; quite a few revolutions and resistances have indeed shaped the field, such as the decolonisation and anti-apartheid movements of the 1960s-70s. In that sense, resistance, from its inception, seems to be forever doomed to stand outside of international law, that which it struggles against, while always remaining close to it as the condition of existence of power relationships. This is so because international law maintains a certain order premised on a structure of coloniality that denies the agency of the Other through the discipline's inherent epistemic privilege enshrined in methodological nationalism.

In that respect, and to illustrate the effect of the epistemic privilege of international law on resistance, I would like to briefly discuss the thorough and strongly rooted analysis of the phenomenon of semi-peripheral agency provided by Becker Lorca. He effectively argues that the discipline of international law developed through the interactions of peripheral actors with those from the Western core.<sup>34</sup> Becker Lorca claimed that semi-peripheral states' adoption and internalization of the rules developed by the core through the careers of numerous semi-peripheral international legal professionals, as a form of resistance inspired by specific types of semi-peripheral legal consciousness,<sup>35</sup> led to the development of international law as we know it. Henceforth, the field is in fact less a product of imperialism, and more a hybrid that has been made sense of from the conflicting practices and experiences of the semi-periphery and the core. However, Becker Lorca draws from Wallerstein's “world-system analysis” and proposes that “semi-

<sup>28</sup> Maldonado-Torres, *supra* note 1 at 253.

<sup>29</sup> *Ibid* at 251–63.

<sup>30</sup> See e.g. both works by Mégret, *supra* note 8; see also Frédéric Mégret, “Civil Disobedience and International Law: Sketch for a Theoretical Argument” (2008) 46 Can YB Intl Law 143; Simon Caney, “Responding to Global Injustice: On the Right of Resistance” (2015) 32:01 Soc Phil & Pol'y 51; Costas Douzinas, “Philosophy and the Right to Resistance” in *The Meaning of Rights: The Philosophy and Social Theory of Human Rights* in Costas Douzinas & Conor Gearty, eds (Cambridge: Cambridge University Press, 2014) at 85 [Douzinas]; Carol Hay, “The Obligation to Resist Oppression” (2011) 42:1 J Social Philosophy 21; William E. Scheuerman, “Recent Theories of Civil Disobedience: An Anti-Legal Turn?” (2015) 23:4 J Political Philosophy 427; Mario Turchetti, “Droit de Résistance, à quoi ? Démasquer aujourd'hui le despotisme et la tyrannie” (2006) 640:4 Rev Historique 831.

<sup>31</sup> Douzinas, *supra* note 30.

<sup>32</sup> *Ibid* at 88.

<sup>33</sup> *Ibid* at 104–05. See also Slavoj Žižek, *Less Than Nothing: Hegel and the Shadow of Dialectical Materialism* (London: Verso, 2012) at 433.

<sup>34</sup> Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press, 2014) [Becker Lorca].

<sup>35</sup> *Ibid* at 36–37.

peripheral actors” refers to those that “have acquired some margin of autonomy to insert themselves strategically in the global economy and that aspire to move upwards, but that because of geopolitical or economic reasons still do not amass enough power to become part of the world’s core.”<sup>36</sup> As part of this category, we find, amongst others, Japan, China, Argentina, Brazil, Russia and, to an extent, Turkey and Persia, all relatively strong regional powers that for multiple reasons were able to resist direct and formal colonial subjugation. Yet, Wallerstein’s world-system analysis is, in fact, still captured by methodological nationalism as it presupposes the dualism of national/international, and sees as subjects of analysis only states and positional groupings of states.<sup>37</sup> What is striking in this account is that semi-peripheral actors could not be colonized, and were seen as roughly constituted following the contemporary canons of international law. Their adoption of international law meant their submission to a certain standard of civilization. I argue that this adoption of the rules of international law, including that of state sovereignty, was made in order to be seen as roughly equal, but it also meant that the Other would always remain trapped in the modern/colonial divide.

It is therefore my position that Becker Lorca’s analysis provides only a limited account of the understanding of resistance, as, as he recognizes himself,<sup>38</sup> international law can provide only limited avenues for resistance to actors from the periphery. What we gather from his analysis is that recourse to international law was not an option for most actors into a relation of direct domination, and could offer only very limited avenues for those that were, during the interwar period, under a League mandate.<sup>39</sup> This process sought to informally absorb those states (semi-peripherals) into the Eurocentric epistemic canon led by the state – an informal expansionist policy of methodological nationalism pushed through the forums of international law such as the League of Nations.<sup>40</sup> Consequently, eurocentrism and the modern/colonial structure of international law and methodological nationalism is evident, for example, in the defeat of the racial equality clause proposal put forward by Japan at the Paris Peace Conference in 1919, on the basis that it encroached upon the sovereignty of League members.<sup>41</sup> The state form consecrated at the Peace Conference through the acceptance of a form of international organization sought to create equal “states” under a particular canon of knowledge, and not equal “people”, as was required by Japan’s “resistance” in seeking this equality; some people remain less modern than others. Then, resistance here was subsumed and coopted under the headlining legal conceptions of the state; Japan was given membership in the League as a member state, but defeat of its proposal made clear that non-state considerations were to be left aside. What Becker Lorca’s analysis tells us is that the only resistance that is relevant for the discipline is that which is given recognition by its epistemic framework. In that sense, acceptable resistance is to be subsumed under the epistemic privilege of modernity. The modern/colonial divide then maintains the epistemic, but also ontological, supremacy of the European master who seeks to homogenize the other in becoming its “same”. Then, conclusively, any idea of dialogue between a semi-peripheral/peripheral actor and a core state, under the dialogical framework of international law, remains a doubtful point; *humanitas* is engaged not in dialogue, but in categorization and domination of *anthropos*. Why would the latter be interested in talking with the former if her ontology and agency is denied from the beginning of the dialogical system? Moreover, the dialogical system suffers from its own epistemic biases, under which semi-peripheral resistance can only retain the primacy of the state form, as required by the episteme. On this, the author’s conclusion is manifest; the paroxysm of semi-peripheral resistance led to the Montevideo convention, and the consecration of the standard of statehood. Resistance meant the adoption of the rules of the core, not the contestation of these rules’ epistemic roots, which still impose the modern/colonial divide.

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<sup>36</sup> *Ibid* at 18.

<sup>37</sup> See Ulrich Beck, “The Cosmopolitan Condition: Why Methodological Nationalism Fails” (2007) 24:7-8 *Theory, Culture & Society* 286 at 289.

<sup>38</sup> Becker Lorca, *supra* note 34 at 20 (to be fair, his “book [...] focuses mostly on semi-peripheral states and their international lawyers” as “[i]n the semi-periphery, international law played a distinctive role”).

<sup>39</sup> *Ibid* at 19.

<sup>40</sup> For a discussion on this and the failure of non-state actors to achieve recognition, see *ibid* at 237–43, 263–86.

<sup>41</sup> *Ibid* at 175–78.

### III. Resistance and immanence; pluritopic hermeneutics

PROSPERO

*Et que ferais-tu tout seul, dans cette île hantée du diable et battue par la tempête?*

CALIBAN

*D'abord me débarrasser de toi [...] Toi, tes pompes, tes œuvres!*

[...]

CALIBAN

*Ce n'est pas la paix qui m'intéresse, tu le sais bien. C'est d'être libre.*

– *Une Tempête, Aimé Césaire, end of Act III, scene V*

What we understand from the previous section is the position of epistemic superiority that the dialogical frame of international law was able to install over the practice of resistance. The securing of limited achievements for resistance is indeed accorded only under the auspices and respect of the episteme of modernity; the modern/colonial frame dictates the terms of the dialogue, and thus, of the surrender. The relationship is then not dialogical, but rather one of domination and negation of the ontology of the Other. In this section, I propose that resistance, from the perspective of the *damné*, can bridge this gap. My premise rejects the position that resistance is necessarily a reactionary all-or-nothing antagonism to the locus of power it opposes. Instead, I will demonstrate that resistance is not merely a possibility to accept or reject the epistemic position of the Other, but is rather another way, that of immanence, which seeks to break from being self-defined in relation to the power liaison with an “opponent” other. The defiance of the Other, I propose, is a “border-thinking” perspective that implies that it is contesting the *monotopical universalist understanding* of reality that is immanent to international law and the hegemonic state form.

To clarify, in the words of this essay, resistance is not statist or anti-statist, but rather another ground, one that does not deny the possibility or reality of both positions, but that seeks to move away from that dichotomic terminology itself. In fact, resistance seeks to delink itself from the episteme defined by the dominant other. This method seeks to level the playing field by refusing a dialogue under the rules of the dominant power. In doing so, seeking to negotiate rather than completely negate terms of the opposition.<sup>42</sup> I argue that resistance is a counter-normative enterprise that seeks to change the modern monotopical frame of reference of international law, in favour of a structure of dialogue with the Other in its immanence/ontology, and according to its own epistemic frame of reference. I will further propose that resistance instates a “pluritopic hermeneutic”, a critique of a universalised Eurocentric episteme that suggests a turn to a pluralist “equality in difference” and seeks to effect epistemic justice. In international law, this translates into the refusal of the accepted languages and frames of reference of the discipline, namely, the epistemic bias that lies in methodological nationalism and the recognition of other forms of (non-statist) social organization and agency. My proposition is, following Hanafin’s,<sup>43</sup> that resistance is a radical sovereign (not in the sense of state sovereignty, but of ontological sovereignty) stance that allows one to create a subject as a possible Being. Then, the claim of resistance is situated outside an established legal structure.

As resistance is a phenomenon that remains outside of the legal framework, it cannot be understood under the limited framework of international law that, as I have proposed, seeks to reduce it to “sameness”. I would like to argue, however, by making a *rapprochement* with Hannah Arendt, that resistance is a kind of “right to have rights”, a bare minimal existence that creates the minimal dignity and agency of all living subjects, a right for “every individual to belong to humanity.”<sup>44</sup> Étienne Balibar proposed that this concept found its roots in resistance, as the fundamental ontic spark that develops into a constituent ontology. In his words, “nobody can be emancipated from outside or from above, but only

<sup>42</sup> See Uday Chandra, “Rethinking Subaltern Resistance” (2015) 45:4 J Contemporary Asia 563 at 563 [Chandra].

<sup>43</sup> Patrick Hanafin, “A Cosmopolitics of Singularities; Rights and the Thinking of Other Worlds” in Rosi Braidotti, Patrick Hanafin & Bolette Blaagaard, eds, *After Cosmopolitanism* (New York: Routledge, 2013) at 40–56.

<sup>44</sup> Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1966) at 298.

through its own action and its collectivization.”<sup>45</sup> The point here is not to replace a scheme of rights with another one that would be more “natural”, or more fundamental. Instead, the point that I seek to make here is that resistance is an immanence, one that stems directly from the subject’s realization of its ontological submission and denial, and seeks to reinstate that ontology in reality. Resistance is not therefore a right but an immanent constituent claim, an act that makes the subject’s identity appear and assert itself by seeking to change reality to account for this existence.

When seeking dialogue, this immanence cannot merely accept the schemes proposed by the negating order. A community struggling against a state in international law does not seek to portray itself as just another state, but rather as a “differentiated polity” that neither adopts nor negates the state system. As explained above, seeking to understand resistance by accepting and using the epistemic schemes of international law under the modern/colonial divide would lead to a complete lack of understanding of the negotiation of power between the parties. It provides only a partial description by one side of the epistemological divide, reproducing the marginalization and negation of the resisting entity. Instead, the existence of resistance points to another method, one that drives us away from the modern bias of methodological nationalism. Resistance tells us that, to understand its claims, we need to be able to see the multiple sign systems that are being contested or negotiated in its action.<sup>46</sup> Resistance is then the act that allows us to understand the position of epistemic domination of the established systems of modernity and its colonial discourse that served to misrepresent and dominate the Other. As I have sought to argue, the proximity between Modernity and international law makes it so that epistemic domination is present in international law, through the state form, amongst other technologies and modes of operation. Resistance allows for a change of perspective, and to bring to light the frameworks of cultural and knowledge production that were at play in the modern/colonial divide. This perspective necessarily moves away from the monotopical frame of reference that I have proposed is at the center of international law, as the means of its self-reproduction. In fact, meaningful understanding of the processes of the modern/colonial divide and of the purpose and place of resistance requires a *pluritopic hermeneutic* so that we can do away with the prejudiced power structures inherent in the schemes of the matrix of coloniality. International law, through its maintenance of the epistemic privilege of Western modernity, enforces the capacity for a dominant state actor to impeach knowledge and meaning-production in the interaction between two encountering parties. Resistance is then in a scheme of reference alien to international law.

Resistance posits itself as the claim of a collective agency that seeks to recover a negated ontology. It never completely situates the meanings of its claim within the field of the dominant episteme, of international law, nor completely in its own scheme of reference. Resistance is a process of “border-thinking” that describes and makes sense of the reality of both sides of the divide without taking the position of either side.<sup>47</sup> However, it does not situate itself in a completely disembodied, “objective” realm of cognizance either, as this would entail the reinforcement of a new knower/known or modern/colonial divide, but rather in an embodied experiential position of an agent who understands both sides of the divide by means of crossing these two spaces or traditions. Pluritopic hermeneutics is the consecration of this possibility of interactive knowledge, of being able to cross, or to bridge spaces. Resistance is then theoretically an act of pluritopic hermeneutics. This method seeks to reconstruct the space of the known by “stress[ing] the social, political and ontological dimensions of any theorizing and any understanding, questioning the Western locus of enunciation masked as universal and out-of-concrete-space,”<sup>48</sup> and thus, I think, to emphasize the differences in the subjects and their enunciation of knowledge beyond the cultural relativism that was inherent to and imposed by modernity. Pluritopic hermeneutic does not propose an epistemic cultural relativism, which makes both sides of a conversation radically unable to understand one another, but rather a cross-cultural sensitivity that entails that both sides make sense of the other as well as of themselves. From that point on, it also entails that knowledge is produced by negotiation between the two poles, without the negation of either one.

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<sup>45</sup> Etienne Balibar, *La crainte des masses: Politique et philosophie avant et après Marx* (Paris: Editions Galilée, 1997) at 446.

<sup>46</sup> See Mignolo, “Local Histories”, *supra* note 9 at 17.

<sup>47</sup> *Ibid* at 18.

<sup>48</sup> *Ibid*.

In monotopic hermeneutics, or what Vandana Shiva conceptualized as the totalitarian “monocultures of the mind” of the West<sup>49</sup>, the (modern) subject claims to understand the other through his acquisition of a limited pre-understanding and an anticipation of the Other’s scheme of meaning. As discussed above, this was effected by positivism in modern sciences. The rational westerner that observes the actions of the Other necessarily has enough pre-understanding to define it as “traditional”, “archaic” or any other derogative term, without understanding this Other in its own terms, but rather emphasizing both sides’ radical difference, which needs to be modernized. For example, Levy-Bruhl’s objects of analysis would not have referred to themselves as being marked by a “*prélogique*”, as the anthropologist claims in his *La Mentalité primitive*. In the same vein, no resistance movement will claim that they are a “non-state actor”, but will instead refer to themselves as having one or another form of legitimacy, whether it is, for example, a revolutionary ideal, a call for justice, a caliphate, etc. Pluritopic hermeneutics allows us to understand schemes of thoughts that are not part of our horizon, and this faculty is embodied in the *anthropos* that seeks to regain its ontology, its reality. This subject has the faculty to think from its own body and experience, thus subsuming the type of rationality that plagues the modern/colonial divide; the *anthropos*, the resisting collective, advances an epistemic revolt that denounces the *humanitas* and its dehumanizing schemes that forced this *anthropos* to the bare minimal exercise of resistance.<sup>50</sup> The realization by *anthropos* of being made “Other” by *humanitas* opens up the possibility of trans-modernity as another space for thinking and acting that is no longer modern, as modern means being dominated and controlled by *humanitas*. This new space is that which allows the “appropriating, absorbing and delinking the emancipating promises of modernity and transforming them into the liberating projects of trans-modernity.”<sup>51</sup> It is a possibility to expand the ideals of modernity beyond its horizons of possibility. To return to Césaire, while Prospero dwells in a territory from which he can only see the frontiers and the “Other”, the outside, Caliban inhabits the other side, the borderlands. From there, he affirms his lineage with his “witch” mother Sycorax and his identity, thereby resisting Prospero’s homogenizing gaze through which he was tricked into believing his own submission. Caliban is the one who can transcend the frontiers set by Prospero.

The implication of my argument for international law is that resistance is a method of counter-normativity. As discussed above, resistance is not cognizable under the international legal framework itself as it seeks to mitigate and negotiate the effects of the law from a radically different perspective. It is a different set of norms that makes a claim against a normative order that has sought to negate an Other’s ontological existence, its schemes of making sense of the world, its norms. I would propose that resistance is the consecration of pluralism; it is the recognition of the existence of a plurality of possible universes of knowing, of ways of knowing, of normative standards. Resistance is a border-thinking experience that envisages what I would term a “border-normativity”, a method of negotiation between existent normativities that proposes not the reduction of one of them to an inferior status, but a position of understanding, of sensibility, of dialogue between two schemes of thought in order to effect a decolonization of the modern/colonial divide. Conceived in this way, resistance seeks to liberate the relationship between two interacting actors of its oppositional character given effect by the epistemic biases of modernity. If, as I have proposed, international law is indeed plagued by the epistemic privilege of modernity, under the form of methodological nationalism, and is thus disconcertingly negating the non-European from the normative processes of the discipline, then resistance and border-thinking do not seek an alternative international law, but an alternative *to* international law. Resistance and border-thinking therefore offer a critical reappraisal and rethinking of modernity; it seeks to do away with the modern/colonial divide, and the cult of methodological nationalism and state centrism in the discipline. Resistance proposes the “consciousness of the Borderlands,”<sup>52</sup> a consciousness that seeks to give effect to a negated ontology by reinstating it as a valid knowledge-producing agent in a negotiated normative process, but that also seeks the consecration of the existence of a pluri-verse, and not a uni-verse. It is a negation of international law’s positive and negative effects, its emancipatory and conservative premises. It seeks to delink from the modern precepts of the discipline and its universalization of a specific experience. It is a

<sup>49</sup> See Mignolo, “Epistemic Disobedience” *supra* note 21 at 167; Vandana Shiva, *Monocultures of the mind: perspectives on biodiversity and biotechnology* (London: Zed Books Ltd, 1993).

<sup>50</sup> Tlostanova & Mignolo, *supra* note 9 at 17.

<sup>51</sup> *Ibid* at 19.

<sup>52</sup> See Gloria Anzaldúa, *Borderlands: The New Mestiza = La Frontera* (San Francisco: Aunt Lute Books, 2007). Throughout her book, Anzaldúa uses many other expressions to refer to the same concept, such as “double consciousness”, “new mestiza consciousness”, “alien consciousness”, “una conciencia de mujer”. Chapter 7 of her book is one of the places where she best describes this idea.

move towards an acceptance and recognition of plural existences and knowledges, and thus of the pluriversality of possibles, Enrique Dussel's "trans-modern."<sup>53</sup>

### Conclusion: Modernism, and epistemic violence

To conclude, I would like to emphasise that one of the central purposes of this essay has been to make visible the existence of coloniality in international law. As I have sought to demonstrate, it has always been there, though not accounted for. The matrix of coloniality is the complex metanarrative structure that has twisted the original utopian concepts of modernity to create structures of difference and domination that have served the imperial and colonial purposes of the European. Indeed, by resorting to the structures of coloniality, international law has activated an epistemic bias that took the form of methodological nationalism, a cognitive misrepresentation of the actual diversity of social agency/organization. While this conclusion does overlap with other existent narratives of colonialism such as those of Anghie<sup>54</sup> and Koskenniemi<sup>55</sup>, with which I totally agree, I propose that the conceptual tool of the duality of "colonial[ity]/modern[ity]", coined by Anibal Quijano<sup>56</sup>, goes beyond both of those accounts in its temporal setting and in the depth of its critique of the international system. Coloniality highlights how epistemic and ontological domination are the invisible and constitutive sides of European modernity, inexorably leading to a colonization of knowledge and Being itself. The inscription of international law as a modern science necessarily creates its darker side, its negation of what is on the other side of the colonial divide.

I have proposed that while resistance cannot be made sense of under the schemes of international law, the struggle of resisters rather bears a great progressive importance for the discipline. Indeed, because of the discipline's epistemic bias, which seeks to make sense of resistance as merely a non-state phenomenon, it hides from sight the Other's existence. I have argued that resistance, as a border-thinking endeavour, proposes a counter-normative standpoint to this problematic dynamic. Resistance then seeks to advance international law, to develop it in order to make sense of the challenges it faces, but in a way that delinks it from its reductive epistemic bias, and from the universalist propensities of modernity. As I have argued, resistance is the performance of the *dammés*, those that are left out of the project of modernity because of the dynamic of difference that it imposes of the spheres of knowledge it affects. International law cannot make sense of resistance because it negates and denies the ontological and epistemic existence of the agents of resistance and reduces their agency into a mere being-for-others. Resistance is the project that seeks to do away with this process, and coloniality is the conceptual apparatus that opens up the possibility of genuine, resurgent resistance, outside of the epistemic domination of the colonial matrix. Accounting for coloniality allows for the restitution of silenced histories and repressed subjectivities, of subalternized knowledges and negated collective agencies.

While the argument rests on a mainly theoretical engagement with colonialism, I do think that it reaches broader horizons by allowing us to perceive and understand the ramifications of the epistemic privilege of modernity and the geo-politics of knowledge. The strength of this perspective is that other accounts of resistance, while providing insightful intuitions, leave out the epistemic and ontological dimensions and thus relegate their own engagement to the monotypical field of the discipline. This certainly provides an impoverished understanding of the immanent meanings of resistance, and cannot account for the strictly Eurocentric knowledge of the discipline. Indeed, our positionality as scholars usually remains quite constrained by our own disciplinary epistemic biases. In that sense, however much we may wish to change the biases of the field of international law from within its disciplinary limits, we always remain constrained by the vocabulary, techniques and sets of meaning that are accomplices to the history of European domination, and its geo-political centrality.<sup>57</sup> While I do not propose that it is possible to completely do away with such distortions, I do believe that a serious engagement with the

<sup>53</sup> Enrique Dussel, "Eurocentrism and Modernity (Introduction to the Frankfurt Lectures)" 20:3 *Boundary 2* at 65-76; Enrique D Dussel, "Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation" (2012) 1:3 *Transmodernity* at 41-42.

<sup>54</sup> Anghie, *Imperialism*, *supra* note 4; Anghie, "The Evolution of International Law", *supra* note 3; Anghie, "Finding the Peripheries", *supra* note 5.

<sup>55</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 23.

<sup>56</sup> Ennis & Quijano, *supra* note 7; Anibal Quijano, "Globalización, colonialidad y democracia" in *Tendencias básicas de nuestra época: Globalización y Democracia*, Instituto de Altos Estudios Diplomáticos Pedro Gual ed (Caracas: Instituto de Altos Estudios Diplomáticos Pedro Gual, 2001) 27.

<sup>57</sup> See Koskenniemi, "Histories of International Law", *supra* note 25 at 223.

Others' immanent conceptions allows us to more fully comprehend the encounter between the discipline and the Others it has negated. In that sense, resistance should first and foremost be comprehended as a method that "seeks to level the playing field" by refusing a dialogue under the rules of the dominant power because this power does not seek dialogue, but rather domination and epistemic homogenization. Resistance is that process that proposes a negotiation, and not a complete negation of social power.<sup>58</sup> It seeks an ethic of epistemic justice to account for the pluriversal trajectories, a pluralism of normative and counter-normative existences.

International law in general, and more specifically in its relationship with the resisting Other, is not a mere "discours oblique sur son sujet de prédilection, à savoir l'État" as Mégret questioned<sup>59</sup>, but rather a full blown narrative of domination. What I have proposed is that resistance was one of the means that sought to delink international law from its Eurocentric modernist metanarratives. There could not be any "right to resistance" in international law, or any understanding of resistance whatsoever, if we do not rethink the modernist foundations of the discipline. Otherwise, if we understand from my argument that resistance is merely an Other situated outside of the field, we are completely missing the point. Resistance is an act that is directed against physical domination as much as it is an epistemic and ontological thrust against an epistemic and ontological domination. Resistance is, for us as scholars, the action we take in our teachings and writings to struggle against the mortification and disembodiment of the discipline. As Mégret has pointed out, the recent internationalist enthusiasm to condemn separation walls (such as in Palestine, India and Mexico) is nonsensical as internationalists are themselves the upholders of the most insurmountable of barriers: state frontiers.<sup>60</sup> Indeed, most internationalists fall into the epistemic privilege of modernity, methodological nationalism, and are agents of the naturalization of difference and division. Moreover, our geopolitical situation constantly reproduces the epistemic privilege of modernity and enforces the epistemic colonial difference.<sup>61</sup> International legal scholarship finds its origin in a handful of countries from the North and replicates the reason and ambivalences that plague the discipline itself (except maybe for TWAIL). Then, in thinking of resistance and international law, our role as scholars, if we are to do our discipline a service, is one of resistance, one of questioning our own biases and disciplinary boundaries so as not to let epistemic injustice and domination hold authority. We are to resist epistemicide, the negation of other epistemes, and thus oppose our cooptation to the processes of hegemony.

In that sense, I would like to conclude by recalling that "the key method [against the established tradition of methodological nationalism and Euro-universalism] is an ethics of respect for diversity that produces mutually interdependent subjects and thus constitutes communities across multiple locations and generations."<sup>62</sup> As internationalists resisting against our own cooptation to the cognitive biases and injustices of the discipline, the implications are that we must consider "subjects" of international law as complex singularities with complex immanent schemes of meaning that need to be comprehended from a pluritopical perspective, one that takes the Other as a vital entity in the relational structure. This entails that we dis-identify ourselves from certain pathos of thought, such as those that enforce epistemic injustice. This will allow us to grasp the deeper meanings of resistance, against its limited significance for modern Eurocentric international law. Indeed, such a conception of our role as internationalists, and of the discipline itself, is crucial at a time when the traditional boundaries are crossed daily, metaphorically and physically, by phenomena that international law contents itself with otherizing, from the constant migrant crisis of our global order, to the constant insurrection of the Global South against the North.

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<sup>58</sup> See Chandra, *supra* note 42.

<sup>59</sup> Frédéric Mégret, "L'Étatisme spécifique du droit international" (2011) 24:1 RQDI 105 at 127.

<sup>60</sup> *Ibid* at 123.

<sup>61</sup> See Ramón Grosfoguel, "Colonial Difference, Geopolitics of Knowledge, and Global Coloniality in the Modern/Colonial Capitalist World-System" (2002) 25:3 Rev (Fernand Braudel Center) 203; see also Walter Mignolo, "The Geopolitics of Knowledge and the Colonial Difference" (2002) 101:1 South Atlantic Q 57 at 59.

<sup>62</sup> See Rosi Braidotti, "Becoming-world" in Rosi Braidotti, Patrick Hanafin & Bolette Blaagaard, eds, *After Cosmopolitanism* (New York: Routledge, 2013) 8 at 24.

## We the People: Self-Determination v. Sovereignty in the Case of De Facto States

*Jan Wouters and Linda Hamid\**

### Abstract

On 17 February 2008, Kosovo declared its independence from Serbia. Soon thereafter, the United States, as well as a host of other States formally recognized Kosovo. The recognition of Kosovo's statehood by a majority of Western Powers has sparked renewed hopes of independence for a number of de facto States. Yet, the countries that have recognized Kosovo's independence argue that this is a 'unique' case. But is Kosovo really a one-off? De facto States too, either implicitly or explicitly, claim a right to self-determination that includes secession as a remedy. So why is it then that the people of Kosovo have been able to attain independent statehood, whereas the people of Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria have not? Our contribution will explore this question by looking at how this divergent practice has reshaped the contours of the modern-day right to self-determination and, thereby, it will also extrapolate the current criteria that a people must meet in order to obtain independence.

### *French Translation*

Le 17 février 2008, le Kosovo a déclaré son indépendance de la Serbie. Peu après, les États-Unis, ainsi que d'autres États, ont reconnu formellement l'État du Kosovo. La reconnaissance du statut étatique du Kosovo par une majorité de pouvoirs occidentaux a réveillé les espoirs renouvelés de nombreux États "de fait". Or, les États qui ont reconnu l'indépendance du Kosovo prétendent qu'il s'agit ici d'un cas "unique". Mais le Kosovo est-il réellement un cas exceptionnel? Les États de fait aussi, implicitement ou explicitement, revendiquent un droit à l'autodétermination incluant la sécession comme un remède. Ainsi, pourquoi est-il que le peuple du Kosovo a pu atteindre l'autodétermination, alors que les peuples de l'Abkhazie, de l'Ossétie du Sud, du Haut-Karabakh ou de la Transnistrie, ne l'ont pu obtenir? Cette contribution explorera cette question en regardant comment cette pratique divergente a défini les contours du droit moderne à l'autodétermination et tentera ensuite d'extrapoler les critères actuels qu'un peuple doit satisfaire afin d'obtenir l'indépendance.

### *Spanish Translation*

El 17 de febrero de 2008, Kosovo declaró su independencia de Serbia. Poco después, los Estados Unidos, así como una serie de otros Estados, reconocieron formalmente el Estado de Kosovo. El reconocimiento de la condición de Estado de Kosovo por la mayoría de las potencias occidentales despertó esperanzas renovadas de independencia de una serie de Estados "de facto". Sin embargo, los Estados que han reconocido la independencia de Kosovo argumentaron que se trataba de un caso "único". Pero es realmente Kosovo un caso excepcional? De hecho, los Estados de facto también reclaman, de manera implícita o explícita, el derecho a la libre determinación que incluye la secesión como remedio. Entonces ¿cómo es que el pueblo de Kosovo ha sido capaz de alcanzar un Estado independiente, mientras el pueblo de Abjasia, Osetia del Sur, Nagorno-Karabaj, Transnistria no puede? Nuestra contribución explorará esta cuestión, examinando cómo esta práctica ha reconfigurado los contornos del derecho a la libre determinación y, por lo tanto, también extrapolará los criterios actuales que un pueblo debe cumplir a fin de obtener la independencia.

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## Introduction

“We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign State.”<sup>1</sup> With these words, on 17 February 2008, Kosovo proclaimed its independence from Serbia. Soon thereafter, the United States, as well as a host of European Union (EU) Member States formally recognized the independence of Kosovo.<sup>2</sup> However, its parent State and certain other countries, such as Russia, Moldova or Romania, argued that the unilateral declaration of independence and Kosovo’s subsequent secession from Serbia constituted a breach of international law.<sup>3</sup> Nevertheless, Kosovo’s recognition by a majority of Western Powers sparked renewed hopes of independence for a number of de facto States. In this respect, Serbia’s then president, Boris Tadić, stated that “there are dozens of other Kosovos in the world, and all of them are lying in wait for Kosovo’s act of secession to become a reality and to be established as an acceptable norm.”<sup>4</sup> As time would show, he was right.

Immediate responses were observed in the Caucasus, where the de facto presidents of Abkhazia and South Ossetia announced that they too would seek their independence before various international fora.<sup>5</sup> While there was no prompt response, Russia formally recognized the independence of the two break-away entities just a few months later.<sup>6</sup> This was no surprise, as even before Kosovo’s declaration of independence, Vladimir Putin had warned that, “[i]f someone believes that Kosovo should be granted full independence as a state, then why should we deny it to the Abkhaz and the South Ossetians?”<sup>7</sup> Similarly, Igor Smirnov, the leader of Transnistria, indicated that Kosovo’s impending recognition as a State exposed double standards: “[i]f this is a really fair, universal approach to conflict settlement, it must be applied also to Transnistria, and Abkhazia, and South Ossetia, and Nagorno-Karabakh.”<sup>8</sup> Nonetheless, the countries that recognized Kosovo’s independence have since argued that Kosovo is a ‘unique’ case that does not set a precedent for other separatist movements.<sup>9</sup>

Is Kosovo indeed a one-off? Obviously, the various situations in these territories are factually different. In this respect, they are all unique. However, de facto States contend that their cause for independent statehood is no less just as Kosovo’s. In this respect, either implicitly or explicitly, they too claim a right to self-determination that includes secession as a remedy.<sup>10</sup> So why is it then that the people of Kosovo have attained independence, whereas the people of Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria have not? The present contribution will explore this question by looking at how divergent practice has reshaped the contours of the present-day right to (external) self-determination and, thereby, extrapolate the current criteria or conditions that a people must meet to obtain

<sup>1</sup> Republic of Kosovo Assembly, *Kosovo Declaration of Independence* (7 February 2008) (Jakup Krasniqi), online: Assembly Kosova <[www.assembly-kosova.org](http://www.assembly-kosova.org)>.

<sup>2</sup> 23 out of 28 EU Member States have recognized Kosovo as a State. Cyprus, Greece, Romania, Slovakia and Spain do not recognize it.

<sup>3</sup> See Christopher J Borgen, “Introductory Note to Kosovo’s Declaration of Independence” (2008) 47 ILM 461 at 461.

<sup>4</sup> UNSCOR, 63rd Year, 5839th Mtg, UN Doc S/PV/5839 (2008).

<sup>5</sup> Nina Caspersen, “The South Caucasus after Kosovo: Renewed Independence Hopes?” (2013) 65:5 Eur Asia Stud 929 at 929.

<sup>6</sup> See e.g. “Russia Recognizes Georgian Rebels”, *BBC News* (26 August 2008) online: BBC News <[http://news.bbc.co.uk/2/hi/in\\_depth/7582181.stm](http://news.bbc.co.uk/2/hi/in_depth/7582181.stm)>.

<sup>7</sup> Robert Parsons, “Russia: Is Putin Looking to Impose Solutions to Frozen Conflicts?”, *Radio Free Europe/Radio Liberty* (2 February 2006) online: RFE/RL <[www.rferl.org/content/article/1065363.html](http://www.rferl.org/content/article/1065363.html)>.

<sup>8</sup> Christopher J Borgen, “Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts”” (2007) 9 Oregon Rev Intl L 477 at 520, citing “Transnistrian President Jealous About Kosovo Variant” *Infotag* (17 February 2006) [Borgen, “Imagining Sovereignty”].

<sup>9</sup> Illustrative, in this respect, is the statement of Condoleezza Rice, the US Secretary of State at that time: “[t]he unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today” (US Department of State, Media Release, “U.S. Recognizes Kosovo as Independent State” (18 February 2008) online: <<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>>).

<sup>10</sup> For example, Abkhazia’s 1999 Declaration of Independence reads as follows: “we appeal to the UN, OSCE, and to all States of the world to recognise the independent State created by the people of Abkhazia on the basis of the right of nations to free self-determination” (People’s Assembly of the Republic of Abkhazia, *Act of Independence of the Republic of Abkhazia* (12 October 1999) (S. Djindjolia), online: Unrepresented Nations and Peoples Organization <<http://www.unpo.org/>>).

independence. This will be done as follows: (I) first, the evolution of the right to (external) self-determination will be analysed through the lens of the self-determination v. sovereignty discourse; (II) second, an outline of the criteria or conditions that appear to facilitate (or obstruct) unilateral secession will be drawn; (III) third and final, we will endeavour to explain why, as opposed to other break-away territories, de facto States have been unable to achieve independent statehood.

## I. The Self-Determination v. Sovereignty Conundrum

Self-determination is probably one of the most-often invoked norms of international law. Surprisingly, it is also one of the most misunderstood, as it has been plagued by uncertainty and inconsistency from its very outset.<sup>11</sup> The concept initially gained international prominence with Woodrow Wilson's revered 'Fourteen Points' speech to the United States Congress on January 8, 1918.<sup>12</sup> While President Wilson contended that "[s]elf-determination' is not a mere phrase", but "an imperative principle of action, which statesmen will henceforth ignore at their peril,"<sup>13</sup> at that time, the concept was nothing more than an "aspirational ideal" without any legal content.<sup>14</sup> However, since 1945, the concept of self-determination evolved into a fundamental principle of the UN and, most importantly, the vehicle of choice for the decolonization movement.<sup>15</sup> Furthermore, since 1960 it has been recognized in the UN context as a legal right, not just a principle<sup>16</sup> and, as such, it was included in the main international human rights covenants adopted in 1966.<sup>17</sup> Today, the basic norm of self-determination has come to refer to the right of all peoples to freely "determine their own destiny."<sup>18</sup> But what does this right entail exactly?

The application of the right to self-determination in the post-Cold War era has been, at the very least, inconsistent. However, it is now generally accepted that this right is comprised by two distinct dimensions: internal and external self-determination.<sup>19</sup> The internal aspect of self-determination refers to the right of all peoples to "participate ... in the decision-making processes of the State,"<sup>20</sup> or that of ethnic, racial, or religious minority groups "not to be oppressed by central government."<sup>21</sup> This, it is often argued, is the prevailing rule.<sup>22</sup> For instance, the Supreme Court of Canada, in its opinion on the secession of Québec, indicated that the right to self-determination is "normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an

<sup>11</sup> See generally Hurst Hannum, "Rethinking Self-Determination" (1993) 34:1 Va J Intl L 1. On the evolution of the right to self-determination, see also Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: La Documentation Française, 1999).

<sup>12</sup> Hannum, *supra* note 11 at 3. See also Woodrow Wilson, "The Fourteen Points Speech" in Ray Stannard Baker & William E Dodd, eds, *The Public Papers of Woodrow Wilson: Authorized Edition*, vol 1 (New York: Harper & Brothers, 1927) at 155.

<sup>13</sup> Woodrow Wilson, "War Aims of Germany and Austria" in Baker & Dodd, *supra* note 12, at 180.

<sup>14</sup> See Christopher J Borgen, "The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia" (2009) 10 Chicago J Intl L 1 at 7 [Borgen, "Language of Law"].

<sup>15</sup> See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter] (which stipulates that "[t]he Purposes of the United Nations are [...] [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" art 2(1)). See also *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684 (1960) [*Declaration on the Granting of Independence*]; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp No 28, UN Doc A/2625 (1970) [*Friendly Relations Declaration*].

<sup>16</sup> See *Declaration on the Granting of Independence*, *supra* note 15. See also *Friendly Relations Declaration*, *supra* note 15; Malcolm N Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 82.

<sup>17</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 art 1 (entered into force 3 January 1976) [ICESCR].

<sup>18</sup> See ICESCR, *supra* note 17 art 1. See also Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers" (2009) 8:3 Chinese J Intl L 573 at 574, citing Thomas M Franck et al, "The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty" in Anne F Bayefsky, ed, *Self-Determination in International Law: Québec and Lessons Learned* (Cambridge: Kluwer Law International, 2000) 241 at 248.

<sup>19</sup> See generally James Summers, *Peoples and International Law*, 2nd ed, Martti Koskenniemi, ed, *The Erik Castrén Institute Monographs on International Law and Human Rights*, vol 17 (Leiden: Brill Nijhoff, 2014) at 60–70. See also Véronique Huet, *Le principe de l'autodétermination des peuples : Concept et applications concrètes* (Paris: L'Harmattan, 2013) at 11–13.

<sup>20</sup> David Raič, *Statehood and the Law of Self-Determination, Developments in International Law*, vol 43 (The Hague: Kluwer Law International, 2002) at 237.

<sup>21</sup> Antonio Cassese, "Political Self-Determination: Old Concepts and New Developments" in Antonio Cassese, ed, *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) 137 at 137.

<sup>22</sup> See Borgen, "Imagining Sovereignty" *supra* note 8 at 483.

existing [S]tate.”<sup>23</sup> Yet, there have been many instances where afflicted minority groups claimed a right to unilaterally secede from their parent State. In this respect, some argue that the external dimension of self-determination is limited to colonial cases,<sup>24</sup> while others contend that it also applies to subjugated peoples outside the colonial context.<sup>25</sup> However, since the external aspect of the right to self-determination outright clashes with the principle of State sovereignty, this remains the “subject of much debate.”<sup>26</sup>

As some have argued, “the defining issue in international law for the 21st century” is to find a compromise “between the principles of self-determination and the sanctity of borders.”<sup>27</sup> In this respect, the principle of State sovereignty, also known as the “backbone” of the Westphalian structure, aims to uphold the current parameters of the international system.<sup>28</sup> One of the corollaries of State sovereignty is the principle of territorial integrity, which acts as a guarantee against the dismemberment of a State’s territory.<sup>29</sup> International legal scholarship favours the idea that, outside the colonial context, “the right [to] self-determination is limited by the principle of territorial integrity.”<sup>30</sup> Otherwise, as accurately observed by Andrew Coleman, “the floodgates would open and the international community would come to be comprised of literally thousands of micro-[S]tates.”<sup>31</sup> In this regard, the 1970 Friendly Relations Declaration provides that the right to self-determination shall not “be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”<sup>32</sup> Independent statehood, it seems, is not an entitlement under international law. However, the Declaration also stipulates that only “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples”<sup>33</sup> can rely on the principle of territorial integrity. This formula insinuates that the right of States to territorial integrity is by no means unqualified. Actually, in accordance with the normative shift from “sovereignty as authority” (control over territory)” to “sovereignty as responsibility”,<sup>34</sup> the principle of “territorial integrity is in its turn limited by international law.”<sup>35</sup> Therefore, neither of the two principles is absolute.<sup>36</sup> Arguably then, under the correct set of circumstances, such an approach would leave the door open for unilateral secession. If, on the contrary, secession were absolutely excluded, the right to self-determination would be rendered illusory.<sup>37</sup>

According to Marcelo Kohén, ‘secession’ refers to “the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter.”<sup>38</sup> Obviously then, it is the lack of consent of the parent State that makes unilateral secession such a

<sup>23</sup> *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 126 [*Reference re Secession of Québec*].

<sup>24</sup> See Franck et al, *supra* note 18 at 248, 279–80.

<sup>25</sup> See Simone F van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013) at 50.

<sup>26</sup> Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) 271 at n 140.

<sup>27</sup> Lorie M Graham, “Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace”” (1999) 6 ILSA J Intl & Comp L 455 at 465.

<sup>28</sup> See e.g. Ioana Cismaş, “Secession in Theory and Practice: the Case of Kosovo and Beyond” (2010) 2 Goettingen J Intl L 531 at 548, citing A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, (New York: Cambridge University Press, 1995) at 333.

<sup>29</sup> Territorial integrity has been elevated to the status of a fundamental principle of international law through its proclamation in the UN Charter. See *UN Charter*, *supra* note 15 art 2(4).

<sup>30</sup> See e.g. Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice” (2010) 6:1 St Antony’s Intl Rev 37 at 37.

<sup>31</sup> Andrew Coleman, “Determining the Legitimacy of Claims for Self-Determination: A Role for the International Court of Justice and the Use of Preconditions” (2010) 6 St Antony’s Intl Rev 57 at 58.

<sup>32</sup> *Friendly Relations Declaration*, *supra* note 15.

<sup>33</sup> *Ibid.*

<sup>34</sup> Jennifer Welsh, “Introduction” in Jennifer Welsh, ed, *Humanitarian Intervention and International Relations* (New York: Oxford University Press, 2004) 1 at 2. See also Anne Peters, “Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E Sweetser, Emma Dunlop and Amrita Kapur” (2009) 20:3 EJIL 569.

<sup>35</sup> Raič, *supra* note 20 at 323.

<sup>36</sup> See van den Driest, *supra* note 25 at 166.

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

<sup>38</sup> Marcelo G Kohén, “Introduction” in Marcelo G Kohén, ed, *Secession: International Law Perspectives* (New York: Cambridge University Press, 2006) 1 at 3.

problematic issue in international law. Indeed, when separation from the territorial State is a consensual process whereby the parent State recognizes the newly independent State, the international community will normally follow suit.<sup>39</sup> When consent from both parties exists, the right to secede is not at all controversial.<sup>40</sup> Unilateral secession, however, sparks general hysteria among the international community. This is precisely why, outside the colonial context, the international community supports a right to external self-determination only in “the most extreme of cases and, even then, under carefully defined circumstances.”<sup>41</sup> In other words, unilateral secession represents a last resort option or, if you will, an “*ultimum remedium*” for blatant breaches of internal self-determination and human rights.<sup>42</sup> Accordingly, if a right to remedial secession exists,<sup>43</sup> it too is a qualified one.<sup>44</sup> Looking at the secessionist struggles that have taken place since the end of World War II, only Bangladesh,<sup>45</sup> and now possibly Kosovo,<sup>46</sup> are instances where non-consensual secession has led to independent statehood.<sup>47</sup> In comparison, a myriad of other attempts at unilateral succession remain unsuccessful.<sup>48</sup> To give but a few examples, in the cases of Abkhazia, South Ossetia, Chechnya, Nagorno-Karabakh, Transnistria, or Republika Srpska, the self-determination discourse has lost out against the principle of territorial integrity. In other words, most times, sovereignty trumps self-determination. As a result, some secessionist movements have been (forcibly) re-incorporated by their parent States, while others have achieved de facto independence through effective control of their territories and, even decades after separating from their parent State, uphold an aspiration for international recognition.<sup>49</sup> A sovereign and independent State is the Holy Grail of break-away entities across the globe. In this respect, their secessionist claims, much as in the case of Kosovo, revolve around the right to self-determination. Nevertheless, in the eyes of the international community, these territorial entities remain “criminalised, ethnic fiefdoms that constitute a threat to security.”<sup>50</sup> Winners and losers, it seems. But what, then, are the rules of the game?

## II. Unilateral Secession: A User’s Manual

As seen here, the concept of self-determination does not establish a general *jus secedendi* under international law. However, it neither precludes this possibility. Declarations of independence,<sup>51</sup> as well as unilateral secession, are legally neutral acts under international law.<sup>52</sup> Yet, in non-colonial situations, the external dimension of self-determination needs to be balanced against the principle of territorial integrity. Accordingly, when the consent of the parent State is not given, the only “maybe-legal option”<sup>53</sup> for

<sup>39</sup> For example, the consent of the Soviet Union to the independence of the Baltic States.

<sup>40</sup> See generally Cismaş, *supra* note 28 at 581.

<sup>41</sup> *Reference re Secession of Québec*, *supra* note 23 at para 126.

<sup>42</sup> See van den Driest, *supra* note 25 at 166. See also Rein Müllerson, “Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia” (2009) 8:1 Chinese J Intl L 2 at 19.

<sup>43</sup> See *Reference re Secession of Québec*, *supra* note 23 (whereby the Court held that “it remains unclear whether this [...] actually reflects an established international law standard” at para 135). Legal support for this right, some argue, may however be found in the Aaland Islands dispute, the Friendly Relations Declaration, the *Katangese Peoples’ Congress v Zaire* case, the Québec secession case, and the practice of successful and unsuccessful unilateral secessions. In this respect, see *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LNOJ, 1920, Supp No 3, 4; *Friendly Relations Declaration*, *supra* note 15; The African Commission on Human and Peoples’ Rights, 1994, 16th Session, Communication No. 75/92, *Katangese Peoples’ Congress v Zaire*, Banjul, The Gambia at para 6; *Reference re Secession of Québec*, *supra* note 23. See also Ryngaert and Griffioen, *supra* note 18 at 579–585.

<sup>44</sup> Ryngaert & Griffioen, *supra* note 18 at 579.

<sup>45</sup> See James Crawford, *The Creation of States in International Law*, 2nd ed (New York: Oxford University Press, 2006) at 415.

<sup>46</sup> But see Vidmar, *supra* note 30 (arguing that the examples of Bangladesh and Kosovo do not correspond to the logic of remedial secession). For arguments against the existence of a right to remedial secession, see also Olivier Corten, “Déclarations unilatérales d’indépendance et reconnaissance prématurées: du Kosovo à l’Ossétie du Sud et à l’Abkhazie” (2008) 4 *Revue générale de droit international public* 721.

<sup>47</sup> See Borgen, “Language of Law”, *supra* note 14 at 9–10 (where Borgen notes that “in that period, there have been at least twenty unsuccessful secessions.”).

<sup>48</sup> *Ibid* at 10.

<sup>49</sup> Abkhazia, South Ossetia, and Nagorno-Karabakh are just a few examples.

<sup>50</sup> On the ‘image’ of de facto States and beyond, see Nina Caspersen, “From Kosovo to Karabakh: International Responses to De Facto States” (2008) 56:1 *Südosteuropa* 58 at 59 [Caspersen, “From Kosovo to Karabakh”].

<sup>51</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at para 84.

<sup>52</sup> See Crawford, *supra* note 45 at 390.

<sup>53</sup> Cismaş, *supra* note 28 at 581.

peoples seeking independent statehood is found in the so-called right to remedial secession.<sup>54</sup> This right, so it is argued, can be exercised as a “self-help [remedy]”<sup>55</sup> in extreme situations. Therefore, as Antonio Cassese mentioned, remedial secession is “the most radical form of external self-determination”.<sup>56</sup>

Dugard and Raič, two authors supporting the idea that international law allows for remedial secession in certain exceptional circumstances, argue that the application of this right can only be triggered when the following criteria are met: (i) first, the group invoking the right must be a ‘people’ with a distinct identity, “forming a numerical minority in relation to the rest of the population of the parent State”, but constituting “a majority within a part of the territory of that State”; (ii) second, the parent State must have exposed said people to “serious grievances” amounting to massive violations of fundamental human rights of that people and/or a constant denial of the people’s right to internal self-determination; (iii) third, “no (further) realistic and effective remedies for the peaceful settlement of the conflict” are left, since all negotiations between the people and the parent State have failed.<sup>57</sup> However, we find that, when measured against the practice of non-colonial State creations, these conditions appear, at best, insufficient. As a matter of fact, international practice has yet to provide even a single example whereby a break-away entity has emerged as a sovereign and independent State by simply fulfilling the foregoing criteria. Hence, to find the missing piece(s) of the puzzle, one must have a closer look at the practice of successful attempts at unilateral secession.

The emergence of Bangladesh as a sovereign State and, more recently, the unilateral secession of Kosovo, are generally cited as examples supportive of the remedial secession doctrine.<sup>58</sup> To a greater or lesser extent, both Bangladesh and Kosovo had exhibited the cumulative conditions described above before their leap for independence. Bangladesh, for instance, proclaimed its independence in 1971, followed by a period of martial rule that “involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India.”<sup>59</sup> Twenty-eight States, including India, immediately recognized Bangladesh.<sup>60</sup> While the unilateral secession of Bangladesh may well have ended oppression, it also remains true that universal recognition only followed in 1974, after Pakistan formally recognized its former province.<sup>61</sup> Since it was the consent of the parent State that, in the end, led to the formal recognition of Bangladesh, it can be assumed that secession was not yet perceived as a prerogative under international law.<sup>62</sup>

Kosovo’s independence follows a similar pattern. Indeed, while the proclamations included in the Declaration of Independence may, at times, resemble remedial secession arguments,<sup>63</sup> it is difficult to understand how unilateral secession in 2008, after Kosovo had been governed independently from Serbia for almost nine years, could end any oppression. If remedial secession is indeed a last resort remedy, Kosovo should have declared independence as early as 1999, at the very height of its oppression.<sup>64</sup> The conditions relating to human rights abuses and/or denial of internal self-determination, the fulfilment of which may trigger unilateral secession, were simply no longer in place at the time of the Declaration of Independence.<sup>65</sup> Nonetheless, Kosovo has since been embraced as an independent State by a considerable

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<sup>54</sup> While recognized by many authors, the existence of a right to remedial secession is also disputed by a number of international legal scholars as a matter of international law. For an overview of these disputes, see van den Driest, *supra* note 25 at 103–121.

<sup>55</sup> Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 96.

<sup>56</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 120.

<sup>57</sup> See John Dugard and David Raič, “The Role of Recognition in the Law and Practice of Secession” in Kohen, *supra* note 38, 94 at 109, citing Raič, *supra* note 20 at 332.

<sup>58</sup> See Christian Tomuschat, “Secession and Self-Determination” in Kohen, *supra* note 38, 23 at 42.

<sup>59</sup> Crawford, *supra* note 45 at 141.

<sup>60</sup> See Vidmar, *supra* note 30 at 43.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> The document made reference to “years of strife and violence in Kosovo, that disturbed the conscience of all civilised people” and declared Kosovo to be “a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law” (*Kosovo Declaration of Independence*, *supra* note 1); See also Vidmar, *supra* note 30 at 48–49.

<sup>64</sup> See Vidmar, *supra* note 30 at 49.

<sup>65</sup> See Ryngaert & Griffioen, *supra* note 18 at 585.

part of the international community. What this suggests, we argue, is that the doctrine of remedial secession cannot, in and by itself, determine the legitimacy of secessionist claims.

In the case concerning the secession of Québec, the Supreme Court of Canada held that “[t]he ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.”<sup>66</sup> A favourable outcome to an attempt at nonconsensual secession, it seems, is highly dependent on international recognition. Arguably, when oppressed people invoke the right to remedial secession, the international community may be more willing to ignore the territorial integrity of the parent State and bestow recognition upon the secessionist entity.<sup>67</sup> Whether a legal entitlement or not, it appears that the doctrine of remedial secession provides political and normative legitimacy to aggrieved secessionist groups and, as a result, may encourage other States to recognize their independence. For instance, the majority of the countries that recognized Kosovo as an independent state invoked the elements of remedial secession to explain their reaction.<sup>68</sup> Unilateral secession, it seems, can only become effective through widespread international recognition. While this argument could be seen as problematic in view of the general understanding in contemporary international law that recognition is a declaratory and not a constitutive act, it also remains true that, in cases concerning entities with ambiguous status, recognition is important as it attaches certain rights and duties to the entity in question, facilitates its relationship with other States, brings about legal capacity, and potentially full membership in international organizations.<sup>69</sup> Arguably then, extensive international recognition will turn independence into an irreversible option.<sup>70</sup>

Alternatively (or possibly even cumulatively), international involvement in the form of a UN international administration mission would, in all likelihood, facilitate a break-away entity’s attempt at unilateral secession.<sup>71</sup> While the international community has rarely intervened to assist peoples in the realization of their secessionist claims, it also remains true that, in those few cases where the level and form of such intervention was significant, independent statehood almost always followed.<sup>72</sup> Illustrative in this respect are the examples of East Timor and Kosovo.

The East Timorese struggled for independence from Indonesia for several decades. However, it was not until the UN Security Council established a peacekeeping mission and, immediately thereafter, a transitional administration mission (United Nations Transitional Administration in East Timor), that East Timor finally became a sovereign and independent State.<sup>73</sup> Despite the exceptionality argument,<sup>74</sup> the almost unprecedented UN involvement in Kosovo has further contributed to the crystallization of this practice. For instance, in his Report on Kosovo’s future status, Martti Ahtisaari indicated that prolonged and significant involvement by the international community could potentially justify a move away from the UN’s defence of the territorial integrity of its Member States.<sup>75</sup> The United Nations Mission in Kosovo (UNMIK), he further contended, had created an “irreversible” situation whereby Serbia had ceased to exercise “any governing authority over Kosovo.”<sup>76</sup> The establishment of UNMIK, as well as the gradual loss of Serbia’s sway over Kosovo had generated “an unstoppable momentum” toward independent

<sup>66</sup> *Reference re Secession of Québec*, *supra* note 23 at para 155.

<sup>67</sup> See Vidmar, *supra* note 30 at 41–42. See also Malcolm N Shaw, “Peoples, Territorialism and Boundaries” (1997) 8:3 *Eur J Intl L* 478 (he argues that “recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights” at 483).

<sup>68</sup> See Grace Bolton & Gezim Visoka, “Recognizing Kosovo’s Independence: Remedial Secession or Earned Sovereignty?” (Occasional Paper No. 11/10, 2010) *South East European Studies at Oxford* at 17–21, online: <<http://doras.dcu.ie/17126/1/RecognizingKosovosindependence.pdf>>.

<sup>69</sup> See Crawford, *supra* note 45 at 93.

<sup>70</sup> See generally Jure Vidmar, “Explaining the Legal Effects of Recognition” (2012) 61:2 *ICLQ* 361 at 374–376; Crawford, *supra* note 45 at 501.

<sup>71</sup> Some authors contend that this is an essential condition for peoples seeking self-determination. In this regard, see Milena Sterio, “On the Right to External Self-Determination: “Selfstans”, Secession, and the Great Powers’ Rule” (2010) 19 *Minn J Intl L* 137 at 170.

<sup>72</sup> For more on the relationship between the right to self-determination and the international administration of territories, see Huet, *supra* note 19 at 119–161.

<sup>73</sup> See *Ibid* at 158–160.

<sup>74</sup> For an in-depth discussion about the precedential value of Kosovo’s unilateral secession, see Anne Peters, “Has the Advisory Opinion’s Finding that Kosovo’s Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?” in Marko Milanović & Michael Wood, eds, *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: Oxford University Press, 2015) at 291.

<sup>75</sup> *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status*, UNSC, 2007, UN Doc S/2007/168 at para 7.

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

statehood.<sup>77</sup> Arguably then, some form of international involvement in self-determination seeking regions may ultimately determine the success or failure of a claim to independence.

The above, we believe, illustrates the remaining criteria for unilateral secession. To us, the practice of successful non-consensual secessions indicates that the conditions currently underlying the theory of remedial secession cannot, by themselves, secure independent statehood. Widespread international recognition and/or significant UN involvement are needed in addition. Otherwise, an entity that claims independence from its parent State, whether justified or not under the rules of remedial secession, will, most likely, fail to attain *de jure* statehood. This, some argue, is the story of *de facto* States.

### III. De Facto States: Victims or Pariahs?

*De facto* States are “territories that have gained *de facto* independence,” but no international recognition or support.<sup>78</sup> Break-away entities such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria uphold, to the exclusion of the central government, effective control over the territories they lay claim on, but for one reason or another, have failed to secure sovereign and independent statehood.<sup>79</sup> Instead, although they also claim a right to remedial secession, *de facto* States are forced to languish at the fringes of an international community that views them as nothing more than pariahs that have violated the principle of territorial integrity.<sup>80</sup> Whether accepted or not, claims for independence are invariably made on the basis of the right to self-determination, which, in the words of Marc Weller, “encapsulates the hopes of ethnic peoples and other groups for freedom and independence.”<sup>81</sup> On this matter, some legal scholars contend that *de facto* States are victims of circumstance: their claims for remedial independence unjustifiably rebuffed by the international community and their quest for sovereign statehood unreasonably hindered by the exceptionality discourse put forward with respect to some of their counterparts.<sup>82</sup> However, it is submitted here that this could not be further from the truth. Indeed, it is painfully obvious that these territories fail to fulfil most, if not all, the criteria or conditions for unilateral secession. In this respect, Dugard and Raič assert that an attempt at unilateral secession in the absence of these criteria could very well constitute an “abuse of right” and a “violation of the law of self-determination.”<sup>83</sup> Additionally, if the criteria for unilateral or remedial secession are not met, and a *de facto* State is nonetheless created in violation of the law of self-determination, the international community will most likely withhold recognition.<sup>84</sup> The very existence of these statelets, we argue, supports this proposition.

The reason why these territories have failed to attain independent statehood is simple: the underlying criteria for unilateral secession are not met. Take, for instance, the cases of Abkhazia and South Ossetia where, prior to the outbreak of any secessionist struggle, it is possible that individuals of Abkhazian and South Ossetian origin did not constitute a clear majority of the population in the areas they claimed as their own.<sup>85</sup> When a people do not constitute a majority of the population inhabiting the territory that it claims, independent statehood becomes an almost unattainable goal.<sup>86</sup> The absence of serious human rights violations by Georgia is also relevant here. In this respect, the request by the Prosecutor of the International Criminal Court (ICC) to open an official investigation into the situation in Georgia casts

<sup>77</sup> Ryngaert & Griffioen, *supra* note 18 at 586.

<sup>78</sup> See Caspersen, “The South Caucasus”, *supra* note 5 at 932.

<sup>79</sup> See *ibid.* See also Caspersen, “From Kosovo to Karabakh”, *supra* note 51 at 62–64.

<sup>80</sup> See Caspersen, “From Kosovo to Karabakh”, *supra* note 50 at 62. See also, e.g. Joint Session of the Nagorno Karabakh Oblast and Shahumian Regional Councils of People's Deputies, Declaration, “Declaration on Proclamation of the Nagorno-Karabakh Republic” (2 September 1991) online: Nagorno-Karabakh Republic Ministry of Foreign Affairs <<http://www.nkr.am/en/declaration/10/>> (whereby Nagorno-Karabakh pointed toward a “policy of apartheid and discrimination pursued in Azerbaijan”).

<sup>81</sup> Marc Weller, “Settling Self-Determination Conflicts: Recent Developments” (2009) 20:1 Eur J Intl L 111 at 111.

<sup>82</sup> See Sterio, *supra* note 71 at 139, 169. See also Caspersen, “From Kosovo to Karabakh”, *supra* note 50 at 64, 82.

<sup>83</sup> Dugard and Raič, *supra* note 57 at 109.

<sup>84</sup> See *ibid.* See also Crawford, *supra* note 45 at 131.

<sup>85</sup> See Ryngaert & Griffioen, *supra* note 18 at 583.

<sup>86</sup> *Ibid* at 577.

further doubts on South Ossetia's remedial secession claims.<sup>87</sup> More precisely, the Prosecutor of the ICC has found that there is a "reasonable basis" to believe that "war crimes" and "crimes against humanity" have been committed in the context of the five-day war that Georgia and Russia fought over South Ossetia in 2008.<sup>88</sup> Some of the alleged crimes, it seems, were committed as part of a campaign to expel ethnic Georgians from South Ossetia, whereby Georgian civilians were killed in a forcible displacement campaign operated by the South Ossetian de facto authorities.<sup>89</sup> This, coupled with the "intransigence [of Abkhazia and South Ossetia] at the negotiating table", further explains their failure to attain independence.<sup>90</sup>

On this point, the UN Security Council has long bemoaned the lack of progress in the area of status negotiations, indicating, for instance, that "a comprehensive political settlement, which must include a settlement of the political status of Abkhazia within the State of Georgia" should be achieved.<sup>91</sup> In Nagorno-Karabakh too, there is no solid basis for unilateral secession since the Armenian majority has not been exposed to egregious human rights violations or flagrant denials of the right to internal self-determination.<sup>92</sup> In the situations described here, secession does not appear as a good faith attempt to redress severe injustice. Transnistria, Borgen contends, is no different.<sup>93</sup> It also fails to meet any of the conditions for external self-determination, as there is no distinct Transnistrian people, no massive violations of human rights by Moldova, and other options short of unilateral secession are readily available to the leaders of the Transnistrian enclave.<sup>94</sup> The claims for remedial secession that de facto States have put forward are therefore nothing more than mere rhetoric. Their leaders have realized that arguments for independence based solely on the idea of national self-determination always lose out against the principle of State sovereignty. As a consequence, these aspiring States have adapted their discourse by adding remedial secession arguments.<sup>95</sup> Unfortunately for them, such arguments are unsubstantiated by the facts on the ground.

For the reasons exposed here, international responses toward de facto States have been characterized by constant support for the preservation of the territorial integrity of their respective parent States, firm rejection of their secessionist endeavours, and an invariable emphasis on the implementation of self-determination within the confines of the parent State. For instance, even though Nagorno-Karabakh considers itself a sovereign and independent State, the UN Security Council maintains that "the sovereignty and territorial integrity of the Azerbaijani Republic" must be guaranteed and, in this respect, highlights "the inadmissibility of the use of force for the acquisition of territory."<sup>96</sup> As a result, the countries that, for whatever reason, bestow formal recognition upon de facto States could be found in violation of the law of self-determination and the principle of non-intervention.<sup>97</sup> Consequently, if not entirely nonexistent, international recognition of de facto States is, at most, extremely scarce.<sup>98</sup> International policies toward places such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria are, by and large, guided by the principle of territorial integrity. Unsurprisingly then, their claims for external self-determination have always been dismissed as unsubstantiated.

<sup>87</sup> *Corrected Version of "Request for Authorisation of an Investigation Pursuant to Article 15"*, The Hague, Situation in Georgia (Office of the Prosecutor, ICC-01/15-4-Corr, 13 October 2015).

<sup>88</sup> *Ibid* at para 349.

<sup>89</sup> *Ibid* at paras 7, 10.

<sup>90</sup> Raič, *supra* note 20 at 385; See also Ryngaert & Griffioen, *supra* note 18 at 583.

<sup>91</sup> SC Res 1393, UNSCOR, 2002, 4464th Mtg, UN Doc S/RES/1393 (the suggestion that Abkhazia was "within the [S]tate of Georgia" prompted the de facto leaders of Abkhazia to refuse further negotiations) at 1.

<sup>92</sup> Heiko Krüger, "Nagorno-Karabakh" in Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov, eds, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014) 214 at 225.

<sup>93</sup> Borgen, "Imagining Sovereignty", *supra* note 22 at 501–506.

<sup>94</sup> See *ibid*.

<sup>95</sup> See Caspersen, "From Kosovo to Karabakh", *supra* note 50 at 61.

<sup>96</sup> SC Res 853, UNSCOR, 1993, UN Doc S/RES/853 at 1. Similarly, with respect to South Ossetia, see SC Res 896, UNSCOR 1994, UN Doc S/RES/896 at para 4 (whereby the UN Security Council stressed the importance of "respect[ing fully] the sovereignty and territorial integrity of the Republic of Georgia").

<sup>97</sup> See Ryngaert & Griffioen, *supra* note 18 at 579.

<sup>98</sup> To give just two examples, Abkhazia is recognized by six UN member States (Russia, Nicaragua, Venezuela, Nauru, Tuvalu and Vanuatu), whereas Transnistria is recognized by none.

## Concluding Remarks

The disintegrative processes described throughout this paper, whether successful or not, raise fundamental questions of international law and politics, without, however, giving any definitive answers. Clearly, the international community lacks the requisite structure that would enable it to appropriately deal with (external) self-determination claims. While we have seen strong doctrinal support for a qualified right to unilateral secession, it also remains true that State practice tends to either confuse, or weaken doctrinal theories. However, whether or not a right to remedial secession exists, it was contended here that independent statehood by means of unilateral secession can only be achieved if certain requisite criteria are present. Arguably, three pre-conditions must be met: (i) the group wanting to exercise its collective right to self-determination must qualify as a “people”; (ii) these people’s rights must be routinely oppressed by their parent State; and finally (iii) negotiations on the status of the break-away territory leads to no reasonable conclusion. To this, we believe, two more conditions that operate either alternatively or cumulatively should be added: (iv) widespread recognition by third States (v) and/or international involvement, in particular through the United Nations. In this respect, we have also seen that the rejection of the secessionist claims of de facto States may be explained on the basis of the law of selfdetermination. Indeed, international responses to de facto States actually serve in clarifying the rules of the independence game. What this practice highlights is that entities such as Abkhazia, South Ossetia, Nagorno-Karabakh, or Transnistria have failed in their quest for independent statehood not as a result of misfortune, but because they did not meet the conditions under which unilateral secession is permitted in international law. In other words, their secessions were unlawful, not remedial. However, just as in the case of Kosovo, it is nearly impossible to imagine a scenario short of forcible reincorporation whereby these contested statelets would somehow return to their parent State. Whether we like it or not, de facto States are here to stay, with potentially destabilizing effects for the regions where they are situated. This basic reality cannot be ignored. More fundamentally, at the risk of further destabilization, the international community must strive to elaborate a more coherent legal framework to address the issues posed by secessionist movements across the globe.