1

A jurisprudence of the limit

ANNE ORFORD*

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

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

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

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

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

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

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

[4] Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441.
[5] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London, 2004), p. 8.

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

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

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

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

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

[7] On the form of law which includes through exclusion, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998).
[8] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA, 1999), p. 208.
[9] *Ibid.*, p. 118. [10] *Ibid.*

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

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

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

[11] Marjorie Garber, *Academic Instincts* (Princeton, 2001), p. ix.
[12] David Kennedy, 'Law's Literature' in Marjorie Garber, Rebecca L. Walkowitz and Paul B. Franklin (eds.), *Field Work* (New York, 1996), pp. 207–13 at p. 212.
[13] Antony Anghie, 'On critique and the other', pp. 389–400 at p. 397 (reference omitted).

an errant philosopher. In the preface to *The Conflict of the Faculties*, Immanuel Kant cites a letter that he received from the King of Prussia, Friedrich Wilhelm, reproaching Kant for abusing his philosophy and deforming and debasing certain dogmas in his book, *Religion within the Limits of Reason Alone*. Wilhelm accused Kant of failing two responsibilities. The first was his 'inner responsibility and personal duty as a teacher of the young'. The second was his responsibility to 'the father of the land, to the sovereign, whose intentions are known to him and ought to define the law'.[14] Kant quoted from the letter as follows:

> You must recognize how irresponsibly you thus act against your duty as a teacher of the young and against our sovereign purposes, which you know well. Of you we require a most scrupulous account and expect, so as to avoid our highest displeasure, that in the future you will not fall into such error, but rather will, as befits your duty, put your reputation and talent to the better use of better realizing our sovereign purpose; failing this, you can expect unpleasant measures for your continuing obstinacy.[15]

Discussing this passage, Jacques Derrida comments:

> [T]he nostalgia that some of us may feel in the face of this situation perhaps derives from this value of responsibility: at least one could believe, at that time, that responsibility was to be taken – for something, and before some determinable someone. One could at least pretend to know whom one was addressing, and where to situate power; a debate on the topics of teaching, knowledge, and philosophy could at least be posed in terms of responsibility. The instances invoked – the State, the sovereign, the people, knowledge, action, truth, the university – held a place in discourse that was guaranteed, decidable, and in every sense of this word, 'representable' . . . Could we say as much today? Could we agree to debate together about the responsibility proper to the university?[16]

The institution of international law is intimately concerned with these notions of the State, the sovereign, the people, action and truth, and so repeatedly brings us up against the challenge which Derrida here articulates. These chapters explore the relations between the inside and the outside of the university, between the critic and the practitioner. They detail the hopes that generations of lawyers and scholars have had for their engagement with others – women, civilians, decision-makers, sovereigns,

[14] Jacques Derrida, 'Mochlos, or The Eyes of the Faculty' (trans. Richard Rand and Amy Wygant) in Jacques Derrida, *Eyes of the University* (Stanford, 2004), pp. 83–112 at p. 86.
[15] As quoted in *ibid.*, pp. 86–7 (translation notes omitted). [16] *Ibid.*, p. 87.

imperial administrators, indigenous peoples, savages, nature, power, history, masculinity and war. They detail the anxieties that lawyers have felt when their work seemed irrelevant to those outside the discipline or the academy. Throughout, they read the texts of international law as a concentrated and charged record of the ways in which scholars, bureaucrats, decision-makers and legal professionals write about relations to the other and about what happens at the limits of the spatial and temporal ordering upon which international law depends. The resulting exploration of the relation between critique, the other and responsibility offers a rich array of responses to the question of what it means to speak and write about international law in our time.

Part I: Sovereignty otherwise

> [W]e were still awaiting a response, as if such a response would help us not only think otherwise but also to read what we thought we had already read . . .[17]

One way in which a sense of international law as a jurisprudence of the limit emerges is through exploring the centrality of the conception of the sovereign state to the discipline. The chapters in Part I challenge the well-rehearsed disciplinary history of sovereignty, one of progress from religious absolutism to secular rationalism. The moment of secularization in these narratives is usually figured by the Peace of Westphalia in 1648. In this account, Westphalia marks a clean break between the social formations of Christendom and their successors – the sovereign independent states of modern times. According to international law, one of the essential elements of statehood is territorial sovereignty – the idea that within its territory 'supreme authority is vested in the state'.[18]

The idea that the medieval international system was transformed at a particular point in history into a system of modern sovereign states, each with an effective government exercising exclusive and absolute control over territory and people, is difficult to sustain when we look to those decisions of international arbitrators and tribunals concerned with competing claims to sovereignty over territory. The archive of empire offered by international law suggests the implausibility of a version of history in which a stable and uniform mode of political organization named the

[17] Jacques Derrida, *The Work of Mourning* (ed. Pascale-Anne Brault and Michael Naas, Chicago, 2001), p. 206.
[18] I. A. Shearer, *Starke's International Law* (11th ed., London, 1994), p. 144.

modern State emerged in 1648. The cases that develop the norms governing traditional modes of acquisition of territory reiterate the notion that the effectiveness of occupation as a mode of acquisition depends not only upon making known in a public, clear and precise manner the intention to consider a particular piece of earth as the territory of a sovereign, but that this must be accompanied by an effective exercise of control. International law, in an oft-cited formulation, does not 'reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations'.[19] This phrasing has become iconic in international legal doctrine, raising the question of how we might account for this compulsion repeatedly to invoke such a vision of sovereignty. While the reiteration of effective control in such decisions operates to support the ideal-type of the sovereign as all-powerful, effectively controlling territory and potentially able to kill, starve, exploit, imprison and subordinate those within it, the image of the European sovereign that emerges if we look at the facts grounding successful claims to territory in the texts of international law is a far smaller, more absurd and ridiculous figure. Paying attention to the record of what counted as a 'concrete manifestation' of control over territory reveals that 'effective control' often meant very little in practice. Europeans had to provide only limited evidence of control, often in the form of some kind of writing or speech, in order to be recognized as sovereign over a territory.[20] The declaration of a French lieutenant on board a commercial vessel cruising past an island in the Pacific that the island was owned by France and the publication of this declaration in a Hawaiian journal,[21] the signing of a contract on the part of Dutch East India company officials,[22] and the passing of legislation in relation to a territory,[23] have all been treated as relevant evidence of effective occupation. Only a powerful fantasy could support the use of such concrete manifestations of sovereignty to demonstrate that the sovereign state is a form of political organization which in fact depends upon exclusive

[19] *Island of Palmas Case (Netherlands* v. *United States)* (1928) 2 RIAA 829 at 839 ('*Island of Palmas Case*').

[20] In contrast, non-Europeans were rarely able to satisfy the demand that they manifest sovereign control. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005).

[21] *Clipperton Island Arbitration (Mexico* v. *France)* (1931) 2 RIAA 1105; translation in (1932) 26 *American Journal of International Law* 390.

[22] *Island of Palmas Case.*

[23] *Legal Status of Eastern Greenland (Norway* v. *Denmark)* (1933) PCIJ Rep (Ser. A/B) No. 53 ('*Eastern Greenland Case*').

jurisdiction over fixed territory and effective control over the inhabitants of that territory.

Recent accounts in political theory have also begun to complicate the history of modern politics as one in which the sovereign state emerged in Europe in the seventeenth century as a stable entity exercising control over territory and people.[24] Similarly, philosophers have begun to ask whether and how sovereignty makes sense as a concept across time and space, and whether there are alternative ways of imagining sovereignty that may have been lost in the rush to celebrate or bemoan the omnipotent sovereign of liberal imagination. The chapters in Part I draw on these contemporary developments in philosophy, legal history and political theory in order to think sovereignty otherwise. They put into play relations between sovereignty, speech, performance and flesh. For these authors, the critical project involves the strategic rewriting of histories of sovereignty. They put historical knowledge to work 'not to refute, but to eliminate and render impossible' particular theoretical and political strategies.[25] In so doing, each attempts to shift the focus 'on to something else which [offers us] more options, more places to go'.[26]

Costas Douzinas explores whether and how sovereignty – in its modern form as indivisible, unconditional and absolute – continues to make sense and take effect in the world. For Douzinas, this political form of sovereignty is under attack, an attack that is rather more to be feared than to be welcomed. His concern about the political effects of the retreat of sovereignty derives from an understanding of the ways in which sovereignty as a metaphysical concept relates to contemporary forms of political organization. Like Carl Schmitt, Douzinas sees the modern political form of sovereignty as a secularized version of a theological concept. However, unlike Schmitt, Douzinas understands this theological form of sovereignty as uncertain, and it is here that he finds room for optimism. This sense of the uncertain nature of theological sovereignty derives from a rigorous jurisprudential analysis of the foundations of that sovereign form. For Douzinas, sovereignty is the name given to the event of coming together or self-constitution of a community in and through jurisdiction,

[24] For example Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of International Relations* (London, 2004); Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extra-Territorial Violence in Early Modern Europe* (Princeton, 1994).

[25] Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France* (trans. David Macey, London, 2003), p. 98.

[26] Jacqueline Rose, *On Not Being Able to Sleep: Psychoanalysis and the Modern World* (London, 2004), p. 29.

the speaking of law. In the form of bare sovereignty, this coming together is a potentially infinite process. It involves a spatial ordering, a proper name, an institutional ordering and, in its democratic mode, a mutual address. This bare sovereignty is transformed into theological sovereignty through the inauguration of law through words. The law must be spoken in order to exist, and it is because this is so, 'because the law must have a mouth and a body', that the unique individuals and the great legislators 'enter the stage'.[27] Yet, while these legislators (or dictators) speak the law, they do so in the name of some 'silent partner for whom they speak, God, King, the People or Law'.[28] The particular and the universal are brought together through the saying of law. Here we see emerging the 'theologico-political form of sovereignty', the transformation of bare sovereignty into 'the definite figure of a Sovereign'.[29] This is the modern all-powerful sovereign feared or celebrated in much modern political philosophy, the sovereign who decides the exception, goes to war, abandons his subjects and annihilates his enemies. The secularization of sovereignty in modern democracies does nothing to render this figure any less terrible. While the One and Only God is no longer imagined as the source of sovereignty, the place of power does not remain empty – instead the 'people' are 'but one further link in the chain of substitutions of the metaphysical principle of the One'.[30] However, it is the space between the particular and the universal, bare and theological sovereignty, which for Douzinas offers hope, as it renders the 'particular claim to state a universal law . . . always an uncertain claim'.[31] It is because this claim can fail, because the particular and the universal can be seen as two moments which are not necessarily connected, that both violence and critique are possible.[32] Thus Douzinas might agree with Schmitt that 'whether the extreme exception can be banished from the world is not a juristic question',[33] and indeed both Douzinas and Schmitt seem to suggest that the modern constitutional attempt to eliminate the sovereign in this sense is doomed to failure. Yet Douzinas insists that this is not necessarily bad news – the bounded and uncertain claims of sovereignty are to be preferred to a politics of humanity with 'no foundation and no ends'.[34] He leaves us with the possibility of a political theology which gives some hope for the future. While the vision

[27] Costas Douzinas, 'Speaking law: on bare theological and cosmopolitan sovereignty', pp. 35–56 at pp. 43–4.
[28] *Ibid.*, p. 46. [29] *Ibid.*, p. 47. [30] *Ibid.*, p. 48. [31] *Ibid.*, p. 52. [32] *Ibid.*
[33] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab, Cambridge, MA, 1988), p. 7.
[34] Douzinas, 'Speaking law', p. 55.