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Reading Humanitarian Intervention

Human Rights and the Use of Force in International Law

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consolidate the power of European and later American states. In much the same way, legal narratives about intervention contribute to making the oppression and exploitation of peoples in Asia, Eastern Europe, Latin America or Africa appear natural, inevitable and desirable. Intervention stories are premised upon an assumption about the capacity of, and the need for, the international community to bring democracy and human rights to the rest of the world. The narratives of the new interventionism portray an image of international law and institutions as agents of freedom, order, democracy, liberalisation, transparency, humanitarianism and human rights, protectors of those living in failed states or in regions devastated by civil war and armed conflict. Military intervention is not only justifiable but morally required to rescue the victims of ethnic cleansing, attempted genocide, religious fundamentalism and massive human rights violations. Monetary intervention and supervision is necessary to restore the economic fundamentals of states that have proved unable to govern themselves prudently, and to bring greater freedom and prosperity to the people living in those states. Such stories ignore a history in which imperial powers announced and celebrated their superiority in similar language, with tragic consequences.

The promise of humanitarian intervention

Humanitarian intervention draws its powerful appeal from the revolutionary discourse of human rights, which promises liberation from tyranny and a future built on something other than militarised and technocratic state interests. At its best, as Costas Douzinas comments, human rights expresses 'concern for the unfinished person of the future for whom justice matters'.[108] Many human rights activists see humanitarian intervention as unquestioningly a good thing precisely because it appears to enact a commitment to the emancipatory ideals of freedom from oppression, respect for human dignity and valuing of human life. For my friends, this is the meaning that was made of intervention by the people marching in the streets calling for UN action in East Timor.

Yet there has been little analysis of what happens to the revolutionary potential of human rights when those rights are invoked by lawyers and diplomats from powerful states in the name of the people of a territory they intend to invade, bomb or administer. Legal texts justifying interventions in the name of human rights protection offer a narrative in

[108] Douzinas, *The End of Human Rights*, p. 15.

which the international community as heroic saviour rescues those passive victims who suffer at the hands of bullies and tyrants. According to this account of the current state of internationalism, the international community is motivated by the desire to promote and protect core values such as freedom, democracy and humanitarianism. It is international institutions, whether the Security Council or the IMF, the World Bank or NATO, who will operate to bring freedom and indeed salvation to the people of Africa, Asia, Eastern Europe and Latin America. Intervention by international institutions in the name of human rights and democracy provides a reason, or, as some have argued, an 'alibi,' for the presence of the international community in many parts of the world.

As Douzinas argues, rights undergo a significant shift when they 'are turned from a discourse of rebellion and dissent into that of state legitimacy'.[109] While on the one hand the appeal to human rights is used to undermine the legitimacy of 'rogue', 'failed' or target states in the context of intervention, that appeal also serves at the same time to authorise or legitimise the actions of those powerful states who collectively act as the 'international community'. Human rights discourse thus seems to contain forces moving in opposite directions in the debate about intervention. The language of rights still appears to promise the energy and moral authority of resistance to power, yet it is increasingly spoken by officials seeking to convince their audience that the resort to violence in a particular instance is justified. In the words of Robert Cover, the law's officials are able to constrain the meanings that can count as law – they 'characteristically do not create law, but kill it'.[110] Their role is to confront 'the luxuriant growth of a hundred legal traditions', and to 'assert that *this one* is law and destroy or try to destroy the rest'.[111] In other words, humanitarian intervention may seem to promise a world in which substantive democracy, dissent, social justice, human flourishing and the end of poverty are privileged over narrowly conceived national interests. Yet, as I argue throughout this book, attention to legal texts suggests that a far more circumscribed and conservative interpretation of the ends of intervention is being named as 'the law'. As human rights become at once part of the 'texts of resistance' and an apology for state

[109] *Ibid*., p. 7.
[110] Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4 at 53.
[111] *Ibid*. (Emphasis in original).

violence, the meaning of human rights and democracy is being radically circumscribed.[112]

In his discussion of the relationship between law and narrative, Cover argues: 'No set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.'[113] Law and narrative are, for Cover, inextricably intertwined – narrative supplies law with its 'history and destiny, beginning and end, explanation and purpose', while law supplies narrative with its moral.[114] As I explore in detail in Chapter 5, humanitarian intervention is located firmly within a familiar heroic narrative, in which international institutions are the bearers of progressive human rights and democratic values to local peoples in need of those rights and values in the post-Cold War era. The stories that explain and justify the new interventionism have increasingly become part of everyday language through media reports and political soundbites. As a result, these strategic accounts of a world of sovereign states and of authorised uses of high-tech violence become more and more a part of 'the stories that we are all inside, that we live daily.'[115] Legal texts about intervention create a powerful sense of self for those who identify with the hero of that story, be that the international community, the Security Council, the UN, NATO or the USA.[116] Law's intervention narratives thus operate not only, or even principally, in the field of state systems, rationality and facts, but also in the field of identification, imagination, subjectivity and emotion.

My discussions with friends who felt that intervention was necessary in the case of East Timor convinced me that there may be occasions where armed force is the only available option to deal with a security or humanitarian crisis, however that crisis has been reached. Their focus on solidarity, on standing with and beside the East Timorese, not as saviours but finally as comrades, helped me to see that there is more than one

[112] *Ibid*., 54 (discussing the 'texts of resistance' that appeal to 'those of us who would live by the law of their community', and the 'texts of jurisprudence' that are resorted to by those who would kill that community law).

[113] *Ibid*., 4–5. For a discussion of Cover's linking of law and narrative in the context of the Kosovo intervention, see Jules Lobel, 'The Benefits of Legal Restraint' (2000) 94 *American Society of International Law Proceedings* 304.

[114] Cover, 'Foreword', 5.

[115] Terry Threadgold, 'Introduction' in Terry Threadgold and Anne Cranny-Francis (eds.), *Feminine–Masculine and Representation* (Sydney, 1990), pp. 1–35 at p. 27.

[116] See further Orford, 'Muscular Humanitarianism'.

way to understand and narrate the meaning of intervention within a particular context. Yet my response to these conversations with my friends, and in particular my continued uneasiness about the implications of the official meanings made of humanitarian intervention, also reminded me that when we join our voices to the call for military intervention in a particular situation, we may find ourselves part of a different narrative. In this case, I remain concerned that the official narrative about intervention that was buttressed by the Security Council-authorised intervention in East Timor is a disturbing one. The challenge this book addresses is to understand the effects of that dominant narrative, and to find ways to ensure that 'humanitarian intervention' has a more radical meaning than simply support for a particular kind of state-based, capitalist and militaristic world order. The discussions I have recounted helped me to realise that this is a far more complicated question than simply being for or against intervention. It involves thinking through the nature of the dominant intervention narrative, the imperial and patriarchal fantasies that haunt this narrative and the effects of particular interventions. It involves a focus on the way in which meanings are made about intervention, and the way those meanings shut out potentially revolutionary ways of understanding what is at stake. These are the obsessions around which this book turns.

2 Misreading the texts of international law

When feminists deliberately and self-consciously read black letter law or critical legal scholars deliberately read judgments . . . in ways that such texts were generically and institutionally never meant to be read, they do it knowing that they are breaking the rules of the code, knowing that they are endeavouring to challenge those rules and to effect change by making the genres 'mean' differently (that is, making the genres tell a different story).[1]

My aim in this chapter is to explain why I have chosen in this book to read legal texts about intervention 'in ways that such texts were generically and institutionally never meant to be read'. The kind of productive misreading that I hope to develop here involves breaching some of the protocols that govern international legal scholarship, in order, as Threadgold suggests, to make these texts ' "mean" differently'. Much legal writing in the field of intervention aims either at doctrinal exegesis, the description, development and refining of legal rules, or at studying the relationship between legal rules and the situations in which they take effect. My intention is to show that focusing only on the distinctions that legal texts make between a lawful and an unlawful intervention is to miss much of the most interesting work that those texts do. In this chapter, I set out to explain the traditions that inform my critical reading of intervention narratives, and to address some of the criticisms that might be made of this reading by those who want to uphold the 'rules of the code' that govern the legal genre. My hope is that in so doing, I am able to persuade opponents of critical theory to join in the project of making legal texts 'mean differently' offered by this book, while seeking to locate the traditions which inform my approach for the kindly

[1] Terry Threadgold, 'Book Review: *Law and Literature: Revised and Enlarged Edition* by Richard Posner' (1999) 23 *Melbourne University Law Review* 830 at 838.

disposed reader who is already convinced of the utility of critical theory for reading law.

This chapter outlines some of the key theoretical concerns and debates that inform my approach to reading humanitarian intervention. The first part explores what it means to read and write legal theory after colonialism, and the demands this makes of international lawyers. I suggest that much of the existing literature on humanitarian intervention involves forgetting law's imperial history. I argue instead for an approach that pays careful attention to 'the great shifting currents of global imperialism',[2] rather than adopting the teleological narrative of Western progress and civilising missions as an ordering principle of a reading of international law. The second part of the chapter develops this further to think through how feminism comes to international law in the aftermath of colonial occupation. It explores 'gender's limits, where does it work, and where does it not work' as a category in attempting to think ethically about developing a new politics of reading humanitarian intervention.[3] I attempt in that part to develop a feminist methodology for reading international law that avoids the deployment of 'the axiomatics of imperialism for crucial textual functions'.[4] The third part of the chapter locates my reading of humanitarian intervention within a critical legal tradition which questions the dominant representation of power in the texts of international law. I argue there that, despite its 'repeated gesture against sovereignty', much international legal scholarship continues to be 'obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend'.[5] The suggestion that law works through the creation of subjectivity and identity, rather than purely through the constitution of sovereign states and international institutions, is treated as an exercise in 'illusory radicalism, rhetorically colourful but programmatically vacuous' by the defenders of traditional legal method.[6] I suggest in contrast that it is helpful to understand power as operating beyond a 'juridical' or

[2] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: toward a History of the Vanishing Present* (Cambridge, 1999), p. 89.

[3] Rey Chow, 'Violence in the Other Country: China as Crisis, Spectacle, and Woman' in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds.), *Third World Women and the Politics of Feminism* (Bloomington, 1991), pp. 81–100 at p. 82.

[4] Spivak, *A Critique*, p. 133.

[5] David Kennedy, 'The International Style in Postwar Law and Policy' (1994) 1 *Utah Law Review* 7 at 13, 14.

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

prohibitive model in order to think about the power relations involved in, and enabled by, the performance of humanitarian intervention.[7] In each part, I attempt to develop ways of reading directed at thinking through the cultural and economic effects of militarised internationalism, and the relationship of these effects to the texts of law.

Legal theory and postcolonialism

What does it mean to read and write legal theory after colonialism? Much international legal scholarship, particularly that written about humanitarian intervention, treats that question quite literally: that is, international law is understood to be operating today as if it were no longer part of a colonial or imperial project. Let me sketch briefly how that plays out in two apparently opposing positions that structure the international legal debate regarding humanitarian intervention.

First, there is a group of international lawyers who argue that the best interpretation of international legal doctrine allows for the right, and indeed the duty, of humanitarian intervention. These advocates of humanitarian intervention tend not to see any necessary relation between such intervention and imperialism, treating international law as an agent of liberation from domination by corrupt Third World elites or the violence of religious or ethnic groups within such states.[8] The liberal legal explanation of the increasing acceptability of humanitarian intervention distances law from imperialism through a narrative in which human rights law has gradually evolved from a regime based upon soft, unenforceable norms to a regime which is enforceable by the international community.[9] According to this account, the advances offered by the new world of global communications and media technology make it possible for audiences in all parts of the world to witness unmediated visual images of horror and suffering in other places. As a result, people have started to demand from their liberal democratic governments in Europe, the USA, Australia, New Zealand and Canada some commitment to humanitarian action in the form of military intervention to save those innocents who are suffering elsewhere.[10]

[7] For the discussion of the departure from the 'juridical' model of power in the work of Michel Foucault, see further 'The Power of International Law' below.

[8] See, for example, Fernando R Tésón, 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 323.

[9] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (Ringwood, 1999), p. 450.

[10] *Ibid*., p. 438.

The proponents of intervention accept that there is a threat that law used in this way could become a tool of imperialism in the future. So, for example, the UN Secretary-General Kofi Annan suggests in his 1999 Annual Report to the General Assembly that while the interventions in Kosovo and East Timor should be welcomed, there is a danger 'of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for *future* interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances'.[11] There is no question for Annan that the effects of intervention to date might be part of an ongoing imperial enterprise.

Conservative international lawyers have responded by questioning the existence of humanitarian intervention as an exception to the prohibition on the use of force, and have argued that respect for the norms that are central to the UN Charter-based legal order represent the best hope for decolonised states and their peoples. Those norms include the right to self-determination, respect for sovereign equality of states and non-intervention in the internal affairs of states.[12] For legal scholars who oppose resort to humanitarian intervention on the basis that it undermines an 'international rule of law', it is the progressive development of these legal norms that offers the best protection of the interests of the weak by constraining the powerful.[13] Humanitarian intervention should be rejected because it can provide 'a broad-ranging legal license for external intervention in the affairs of weak states'.[14] The future of these decolonised states is best served by their acceptance of international law, enabling their progress towards achieving the economic and political strength of 'Western' states. In this view, states are by definition autonomous, and intervention involves only overt acts involving the use of force or economic coercion.

There is an interesting footnote to most of the texts of those traditionalists who argue against the emergence of a legal norm in favour of intervention. Writing in 1991, Oscar Schachter commented:

[11] UN, *Secretary-General Presents his Annual Report to General Assembly*, UN Press Release SG/SM/7136 GA/9596, 20 September 1999 (emphasis added).

[12] Articles 1 and 2 of the Charter of the United Nations (UN Charter), San Francisco, 26 June 1945, in force 24 October 1945.

[13] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, 2001), pp. 232–6.

[14] Roth, 'Governmental Illegitimacy', 2060.

Even in the absence of such prior approval [by the Security Council], a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.[15]

Similarly, Jonathon Charney argues that the NATO action in Kosovo was clearly illegal. Any suggestion that it 'stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights law are being committed ... leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law'.[16] It is international law, particularly UN Charter law, that remains the best guarantor we have of peace and security, order, and the protection of human rights.[17] For Charney, humanitarian intervention, no matter how 'well-intentioned', poses a threat to the stability and promise of the international legal order.[18] Yet in an apologetic moment mirrored in other examinations of humanitarian intervention, Charney notes that powerful states can and do intervene in contravention of international law, and may want to retain 'their power to take actions for political reasons notwithstanding the law'.[19] The best, albeit not perfect, solution for 'weak states' lies in maintaining a formal legal prohibition against such intervention, so that powerful states are required 'to break the law in extreme circumstances' if they want to take military action.[20] To take one further example, Simon Chesterman reaches the same conclusion in his analysis of the illegality of humanitarian intervention, arguing that:

In the event of an intervention alleged to be on humanitarian grounds, the better view is that such an intervention is illegal, but that the international community may, in extreme circumstances, tolerate the delict. In judicial terms this might translate to a finding of illegality but the imposition of only a nominal penalty ... Moreover, by affirming the prohibition of the use of force, recourse to military intervention is maintained as an extreme, and last, resort.[21]

[15] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, 1991), p. 126.
[16] Jonathon I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 *American Journal of International Law* 834 at 841.
[17] *Ibid*., 835. [18] *Ibid*. [19] *Ibid*., 838. [20] *Ibid*.
[21] Chesterman, *Just War*, pp. 231–2.

In these three examples, the international legal order is represented as coexisting with abuses of power without condoning such abuses. By maintaining a separation between law and power, law retains its purity of purpose. International law ends at the point where 'politics' and coercion begins. Yet those 'outlaws' who are favoured by the international legal order need not fear its wrath.[22] As Christine Chinkin notes in her commentary on the role of the 'West' in scripting the Kosovo intervention, 'it is hard to envisage that other states would be able to undertake such a campaign, either unilaterally or together, against the wishes of permanent members of the Security Council and without being challenged by them'.[23]

Nonetheless, the conservative argument in favour of preserving the 'contemporary sovereign state system' assumes that this system is the best available. Brad Roth describes the bleak choice facing international lawyers as one between supporting a potentially imperialistic 'new norm that would open the door to "prodemocratic" intervention', or favouring 'the right to be ruled by one's own thugs'.[24] Implicit in this position is the view that, because international law and international institutions operate on the basis of formal respect for the sovereignty of all states, international law is free of the desire for empire. The problem of powerful states exploiting or dominating the peoples and resources of decolonised states is limited to the question of overt coercion, whether military or economic. Colonisation and imperialism occurred in the past and were properly resisted (with the assistance of international law). The project of the development of international law is one to which the 'Third World' has been able to contribute since 1945.[25] The resulting international legal order thus represents a formal commitment to decolonisation, to self-determination and to the protection of human rights. For example, Brad Roth sees the driving, revolutionary force of both human rights and anti-colonial nationalism as reasons to preserve and conserve the existing state-based system. The energies of these movements for change are reflected in the creation of postcolonial states, and of international legal rules which grant those states formal equality, so that to use human rights or anti-colonial arguments to critique

[22] Gerry Simpson, 'Out of Law' in *International Legal Challenges for the Twenty-First Century: Proceedings of a Joint Meeting of the Australian and New Zealand Society of International Law and the American Society of International Law* (Canberra, 2000), p. 307.

[23] Christine M. Chinkin, 'Kosovo: a "Good" or "Bad" War?' (1999) 93 *American Journal of International Law* 841 at 847.

[24] Roth, 'Governmental Illegitimacy', 2060, 2064.

[25] *Ibid*.

that order is to betray those movements.[26] This posits international law and postcolonial nation states as the end of anti-colonial struggles, and ignores a history in which the granting of formal political sovereignty to decolonised states coincided with new techniques of international institutional control premised on limiting the economic sovereignty of those new entities.[27]

A number of scholars adopt positions somewhere between the two poles I have described so far. Many are uneasy about the recognition of a new norm allowing for unilateral humanitarian intervention because of its potential for abuse, yet want to allow for situations in which collective action without Security Council authorisation is permissible, particularly in light of the Kosovo precedent. Thus they adopt a natural law argument, suggesting that there are situations in which the international community must act outside *positive* law, in ways that are nevertheless legitimate because of the demands of morality and justice. This is the approach adopted by Michael Glennon. While acknowledging that the NATO air strikes against Serbia were not 'technically legal under the old regime', Glennon suggests that the 'death of the restrictive old rules on peacekeeping and peacemaking . . . should not be mourned'.[28] According to Glennon, 'in Kosovo, justice (as it is now understood) and the UN Charter seemed to collide'.[29] Similarly, for Bruno Simma the NATO intervention was required in order to promote justice and morality, despite the illegality of such intervention. 'The lesson which can be drawn from [the use of force by NATO] is that unfortunately there do occur "hard cases" in which terrible dilemmas must be faced, and imperative political and moral considerations may appear to leave no choice but to act outside the law.'[30]

Louis Henkin has also argued that in the case of Kosovo, the law was caught between needing to uphold the international legal order based on respect for state sovereignty as a protection against the dangers of unilateral intervention by powerful states, while making space for the development of 'bona fide, responsible, collective intervention' to

[26] *Ibid*., 2064–5.

[27] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243.

[28] Michael J. Glennon, 'The New Interventionism: the Search for a Just International Law' (1999) 78(3) *Foreign Affairs* 2.

[29] *Ibid*.

[30] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1 at 22.

protect against human rights abuses.[31] Henkin resolves this dilemma by arguing that Kosovo represents the movement towards a new norm of international law, according to which states engaging in humanitarian intervention will act without Security Council authorisation, and then challenge the Security Council to pass a resolution terminating the action. Such a resolution would reverse the burden of the veto, because 'a permanent member favouring the intervention could frustrate the adoption of such a resolution'.[32] For Henkin, the Kosovo intervention can be interpreted as 'a step toward a change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council'.[33] This could be done without formal amendment of the UN Charter, on the basis of 'a "gentleman's agreement" among the Permanent Members'.[34]

In this narrative, the international order, which represents values such as humanitarianism and justice, is threatened by states and leaders who have no commitment to human rights or peace.[35] The legitimacy of military actions taken in response is established on this argument through reference to norms of justice or morality. These 'outlaw' interventions are guided by the transparency of motive required of multilateralism, the good faith required of politics, and the wisdom or bona fides of the states engaging in intervention. In the case of Kosovo, the international community may have been acting outside of the law, but such action was not taken in the name of self-interest or old-fashioned imperialist aggression, but for the collective good.

Central to each of the positions on humanitarian intervention I have sketched is an approach to international law that involves forgetting its imperial history. Each is suspicious that the alternatives may betray the liberatory promises of international law. Those broadly opposed to intervention argue that the emergence of a right of humanitarian intervention may allow increased interference by the powerful into the affairs of the weak, while those broadly in favour of intervention suggest that to advocate the protection of state sovereignty over human rights protection is to betray the universal principles of human rights protection and humanitarianism that underpin the UN system.[36] Each sees our era as one in which decolonisation has successfully taken place, in which international law and the international community are essentially

[31] Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824 at 825.
[32] *Ibid*., 827. [33] *Ibid*., 828. [34] *Ibid*. [35] Glennon, 'The New Interventionism', 4.
[36] Roth, 'Governmental Illegitimacy'.

anti-colonial, and in which the only real debate is over how international law can best end human suffering, while not falling prey to abuse by powerful states. In the words of Brad Roth, 'colonialism is a legal aberration',[37] rather than, as James Gatthi has argued, 'ingrained in international law as we know it today'.[38] Roth suggests that 'characterizing contemporary international law as essentially continuous with patterns of past Western domination' is not useful politically and belittles 'the hard-won achievements of anticolonialist struggles'.[39]

Roth's comments illustrate a tendency that Nathaniel Berman has criticised in international lawyers, the readiness to draw a line between imperialism and law. As Berman has argued, the orthodox faith in the capacity of international law to renew itself in the wake of its involvement in many of the horrors of the past three centuries, empire being the most obvious, involves the belief that 'eliminating a particular kind of political domination will cleanse law of imperial taint, [just as] controlling a particular kind of sexual desire will cleanse pragmatism of colonial fantasies'.[40] Leela Gandhi has argued that the 'colonial aftermath' more generally is marked by the belief that we can 'successfully imagine and execute a decisive departure from the colonial past'.[41] The 'triumphant subjects' of postcolonialism, whether former colonists or the former colonised, 'inevitably underestimate the psychologically tenacious hold of the colonial past on the postcolonial present'.[42] Gandhi quotes Albert Memmi's response to this delusion, 'and the day oppression ceases, the new man is supposed to emerge before our eyes immediately. Now, I do not like to say so, but I must, since decolonisation has demonstrated it: this is not the way it happens.'[43]

Both this delusion, and the failure to realise it, shape international law. International legal texts embody the faith that a renewed law emerged with the creation of the United Nations and the birth of the era of decolonisation. In contrast, this book follows legal theorists such as Anghie, Berman and Gatthi in reading texts about humanitarian intervention as intimately connected with, rather than as a decisive

[37] *Ibid*., 2065.
[38] James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996 at 2020.
[39] Roth, 'Governmental Illegitimacy', 2065.
[40] Nathaniel Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1521 at 1551.
[41] Leela Gandhi, *Postcolonial Theory: a Critical Introduction* (St Leonards, 1998), p. 6.
[42] *Ibid*. [43] *Ibid*.

departure from, colonialism. To read international law after colonialism is to try to remember its imperial past, and to become familiar with the spectres of colonialism that haunt the law today.[44] I want now to sketch some of the key ideas from postcolonial theory that are relevant to the international legal moment I explore in this book.

First, postcolonial theory encourages attention to the possibility that imperialism, as a 'largely economic rather than largely territorial enterprise',[45] survived the era of decolonisation. It is true that we do not today see reprised that form of imperialism premised upon the claiming of sovereignty over invaded or occupied territory by a foreign, colonial power. Yet a 'largely economic' enterprise of imperialism continues, in the form of the exploitation of the colonised, their land and resources. Intervention has been preceded in places such as Bosnia-Herzegovina and Rwanda, and accompanied in Haiti, Kosovo and East Timor, by the facilitation of this imperial enterprise. One of the overt aims of pre-conflict 'aid' programmes, and post-conflict reconstruction, has been the establishment of the necessary conditions to make foreign investment secure and profitable. As I argue in Chapter 4, postwar reconstruction guarantees that the peoples and territories of Asia, Africa, Latin America and Eastern Europe continue to produce the wealth of Europe and North America, while images of the suffering peoples of the Third World, and of our benevolence in responding to them, are used to provide spiritual enrichment to audiences in those wealthy countries. Thus rather than narrate a history in which humanitarian intervention facilitates progress from a world of irrational, tribal, premodern, failed states to one of free, democratic, developing states, humanitarian intervention is read in this book as part of a history of global imperialism.

Second, intervention narratives also mirror imperial culture by providing 'the possibility of the cultural self-representation of the "First World"'.[46] The literature on humanitarian intervention treats those who lead or inhabit target states as the 'other' of the 'international community': as disordered, chaotic, tribal, primitive, pre-capitalist, violent, exclusionary and child-like.[47] These texts treat as a given that we,

[44] See the brief discussion in Lacanian terms of the repudiation of the trauma of colonialism and the return of this repressed past as phantasmic memories in Gandhi, *Postcolonial Theory*, p. 10.

[45] Spivak, *A Critique*, p. 3.

[46] Gayatri Chakravorty Spivak, *The Postcolonial Critic: Interviews, Strategies, Dialogues* (ed. Sarah Harasym, New York, 1990), p. 96.

[47] See further Chapters 3–5 below.

international lawyers and our audiences, can 'know' these primitive societies – we adopt Sartre's 'imperial conviction' that 'there is always some way of understanding an idiot, a child, a primitive man or a foreigner *if one has sufficient information*'.[48] Legal texts pay meticulous attention to establishing the specificity of the international legal tradition – the words of founding fathers are treated with reverence, the distinctions made within doctrine are awarded grave consideration, the relationship of each text to that tradition is established with care. Yet within the same texts no name or voice is given to the people of the states who are the objects of intervention – their suffering is inscribed in these texts merely as 'material evidence once again establishing the Northwestern European subject as "the same"'.[49] The narrative that founds these texts locates the causes of the violence of intervention with those who inhabit target states. Through the meanings created in these texts, the self of the 'international community' is created by defining that community against its others. Of necessity, as I show in Chapters 3 and 4, this involves ignoring the complicity between those local or national communities to be targeted by intervention, and the international community that is constituted by that intervention.

In making such a claim, this book takes a position on the question of the place of narration and the centrality of texts in the practice of imperialism. For Edward Said, the construction of knowledge about the colonised was central to enabling the kind of European culture that could make imperialism possible.[50] In his study of 'Orientalism' as a discourse, Said explores the extent to which academic, imaginative and bureaucratic European texts came to constitute 'the corporate institution for dealing with the Orient – dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it'.[51] For Said, in order to understand European domination of the territory that Europe imagined as 'the Orient', it is vital to understand how 'European culture was able to manage – and even produce – the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period … European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self.'[52]

[48] Jean-Paul Sartre, *Existentialism and Humanism*, (trans. Philip Mairet, New York, 1948), pp. 46–7, cited in Spivak, *A Critique*, p. 171 (emphasis in original).
[49] Spivak, *A Critique*, p. 113.
[50] Edward W. Said, *Culture and Imperialism* (London, 1993).
[51] Edward W. Said, *Orientalism* (London, 1978), p. 3. [52] *Ibid*.