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The Postcoloniality of International Law

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How are we to understand the relationship between international law and imperialism? What bearing might that have on how we see contemporary international law? According to one view, international law is simply a "cloak of legality" thrown over the subjugation of colonized peoples by the imperial powers in a distortion of international law's true spirit.[1] According to this understanding, the contemporary task is to rid international law of the vestiges of that misappropriation. We must accept decolonization at face value and continue to broaden the scope and content of international law in a culturally sensitive way. Meeting the Symposium's stated goal of "envisioning new orders" would therefore require the rescue of international law from the corruption of power to make good international law's explicit promise of universality and sovereign equality.[2]

At the other end of the spectrum is the belief that international law has always been encompassed by and in the service to empire. At this pole, the very doctrines and institutions of international law are understood to have been molded by the powerful in order to serve their interests. Those who hold power in the contemporary setting maintain the capacity to create and deploy international law, in turn facilitating practices of (neo)colonialism.

However, most scholars engaged with the "postcolonial" in some form or other would hesitate to embrace either of these two polar positions. On the one hand, the perception of international law as an innocent victim waiting to be rescued from the corruptions of imperialism is untenable. On the other hand, the view that international law abjectly serves empire is equally unpopular with those so engaged. They are generally unwilling to accept such an encompassing frame and its attendant demand to abandon international law as a site of contestation, both historically and now. And thus there is an

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1. CHRISTOPHER WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 4 (2004). This is the mainstream view, if only because of colonialism's conspicuous absence from the dominant discourse.

2. For an exposition of this idea (not an espousal of the position), see John Strawson, Book Review, 5 MELB. U. L. REV. 513 (2004) (reviewing CHRISTOPHER WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW (2004)).

irresolution that disrupts any attempt to characterize international law neatly as either on the side of the angels or in devilish league with imperialism.

Rather than simply attributing this to the indeterminacy of language or to the formal nature of law, it is important to inquire into the quality of this irresolution and to ask whether it is *itself* significant.[3] Arguably there is something distinctive about the relation implied in the "postcolonial"—both a break from and a continuity with past forms of domination—and something particular about the capacity of law to be both appropriated to imperial ends and used as a force for liberation.[4]

I argue that the quality of this irresolution suggests that *international law is itself already postcolonial* in that it both sustains and contains within it what we might call the condition of the postcolonial. Succinctly stated, this can be understood not only as the circular self-constitution of self and Other, but also as the paradoxical inclusion of the excluded necessitated by the claim to universality of this constitution. This dynamic accounts for both international law's imperializing effect and its anti-imperial tendency. Crucially, whether or not this dynamic is in some way addressed would seem to indicate whether an approach to international law is likely to have any critical purchase or will instead be drawn back into the reproduction of colonial relations of power.

In the rest of this Article, I will outline the dimensions of this postcoloniality and its implications with reference to two examples. The first is the universalization of international law through decolonization, and the second is the limited success of recent attempts to "decolonize" human rights by refounding them on more "truly" universal grounds.

I. The Postcoloniality of International Law

Let us begin with the near truism of postcolonial literature: "that European or Western identity is constituted in opposition to an alterity that it has itself constructed."[5] In other words, the formation of the West depends on

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3. For an eloquent take on the ambivalences of international law in relation to Empire and its legacies, see Nathaniel Bermann, *In the Wake of Empire*, 14 Am. Univ. Int'l L. Rev. 1521 (1999).

4. *See generally* Peter Fitzpatrick, *"Gods Would be Needed . . ." American Empire and the Rule of (International) Law*, 16 Leiden J. Int'l L. 429 (2003); Peter Fitzpatrick, *Latin Roots: Imperialism and the Formation of Modern Law*, CLAVE: Counterdisciplinary Notes on Race, Nation and the State (forthcoming 2005) [hereinafter Fitzpatrick, *Latin Roots*] (manuscript on file with the Harvard International Law Journal).

5. Eve Darian-Smith & Peter Fitzpatrick, *Laws of the Postcolonial: An Insistent Introduction*, *in* Laws of the Postcolonial 1 (1999). As Kumar has observed, it is appropriate to eschew an identification of the inaugural moment of postcolonial theory. Although this insight about the relationship between colonialism and the production of occidental knowledge, particularly knowledge about the "Orient," is usually said to have been inaugurated by Edward Said, even Said would agree that the lineage stretches back further than himself "in light of his numerous (relatively less-prominent) precursors, which include, among others, Franz Fanon, C. L. R. James, Chinua Achebe, Anta Diop, W. E. B. Du Bois, Romila Thapar, Aime Cesaire, not to mention the spate of 'Commonwealth literature' authors writing in the 1960s and 1970s." Vidya S. A. Kumar, *A Propleptic Approach to Postcolonial Legal Studies? A Brief Look at the Relationship Between Legal Theory and Intellectual History*, 2 Law Soc. Just. & Global Dev. J. (2003), *at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_2/kumar/ (last modified Feb. 23, 2005) (last visited

the construction of an "Other" by reference to which the West defines itself. To this Other are attributed characteristics the West both rejects and ostensibly lacks—the Other is crucially what the West is *not*. This Other does not exist as such in that it is not a being with any quiddity before this circular self-constitution of the West. Nonetheless, the construction has real consequences and effects for those who people the construction, those who are variously understood to be "savages and barbarians, or even those of the West less occidental than they should be."[6] Significantly, this self-constitution forms identity in a "defining exclusion of certain existent peoples accorded characteristics ostensibly opposed to that identity."[7] The "defining exclusion" arises when the characteristics attributed to the Other are ostensibly driven out, but become essential to the identity of the West by the process of negative definition.

What is less frequently observed, and what could be said to "initiate the defining moment of postcolonialism" is that "the exclusion of these others is intrinsically antithetical to the West's arrogation of the universal to itself since this arrogation would require the inclusion within the West of those very Others excluded in its constitution."[8] In other words, the West claims to itself the character of the "universal." Its reason may be applied to the many. Its knowledge of the world is defining, and the world is made (one) within it. But for this claim to be true, for the values of the West to *be* universal, it would require what is excluded in the very act of self-constitution to be included. Those who populate the Other, those subjected in this process, are thus "torn between exclusion as something radically different to the West and the demand to join and become the same as it."[9]

This paradox—of the circular self-constitution of Other and self combined with the universal applicability of that claim—explains, at least in part, the impelling dynamic of international law and its puzzling containment of both liberatory promise and imperializing peril. Furthermore, it also explains why strategies that are based on producing "genuine" universality, or revalorizing the Other, or even projects that are directed at the revelation of the politics of international law in a non-specific way, are destined to reproduce the imperializing urge. Let us turn briefly to two examples to explore this idea further.

II. Decolonization as the "Universalization" of International Law

It is commonplace in standard texts of international law to observe that after decolonization took place, international law became truly universal and a real community of states came into being. This universality lay in the fact

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Apr. 21, 2005).

6. Darian-Smith & Fitzpatrick, *supra* note 5, at 1.
7. *Id.*
8. *Id.* at 1–2.
9. *Id.* at 2.

that those who had been excluded from the realm of sovereignty were now included and could participate in the international system on the footing of sovereign equals.[10]

It could be argued, though, that, given the fact international law had already become *universally applicable* during the period of colonization as the determinative system of law governing relations over the whole of the globe, this shift was not a shift toward universality as such, but instead from one universalism to another. This shift would then illustrate the postcoloniality of international law.

Wherever international law goes, it claims to already have the jurisdiction to act as the law and extend to everyone. At the same time as international law claims to extend to everyone, there is a formation of and differentiation between the self who is the subject of law and the Other who is encompassed by this speaking of the law but not able to claim subject-hood within it.

Indeed, from the very beginning international law had to posit, contain, and differentiate between selves and Others. As Antony Anghie has shown in relation to Francisco de Vitoria and his ostensible defense of the Indian, the law had to be universal in that it had to apply *to* the Indians. Nevertheless, Indians still had to be differentiated; otherwise how could their land justifiably be appropriated?[11]

When it comes to the subject proper of international law, the nation state, a similar constitution of law and subject exists. Indeed, as John Strawson has aptly observed, the Peace of Westphalia in 1648 can be understood as having "granted a monopoly of legal personality to the European powers," rather than as having established the doctrine of state sovereignty as such.[12] This unavoidable circularity is still apparent in international law's doctrinal relation to the nation state. For instance, it is evident in international law's tendency to oscillate (in)decisively between the recognition of a preexisting nation state and the declaration that a nascent state shall hereinafter exist, revealing a law that declares itself to be founded in the consent of states, the very juridical entities it defines.

The circular inauguration of law and subject and the capture of legal personality by the nation state are accompanied by a universal claim of nation made in both spatial and temporal terms. The "modern" nation covers the earth. The terms of international "comity," then "society," and now "community," "effect a closure around nation [and] confirm[ ] its universal reach" because those terms are "secured in the pervasion of nation . . . leav[ing] no space that is not national space."[13]

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10. *See* Antony Anghie, Imperialism, Sovereignty and the Making of International Law 197 (2004).

11. *Id.* ch. 1.

12. Strawson, *supra* note 2, at 516.

13. *See* Sundhya Pahuja & Ruth Buchanan, *Law, Nation and (Imagined) International Communities*, 8 Law Text Culture 137 (2004). *See also* Peter Fitzpatrick, Modernism and the Grounds of Law 121 (2001); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century Inter-*

But the nation also makes a universal claim in the temporal dimension. It presents itself as the axiomatic form of "modern" social organization. Peoples who were not nations were not *yet* nations. Although they existed in the same moment in fact, they were organized conceptually as existing in the past. The present of the nation was the future of the non-nation. That is, for the nation to be universal, there had to be some way of securing this reality. Non-national forms of social and political organization had to be maintained in their particularity, or *non*-universality, both to enable their domination and maintain their inclusion as non-subjects within the realm of the law. And this was where that remarkable conceptual arsenal came into play, quilting around historicism—"the idea that to understand anything it has to be seen both as a unity and in its historical development."[14] Thus a distinction could be posited between the "civilized" and "uncivilized" parts of the world through which colonization and the appropriation of land were facilitated and justified.

Therefore the self-founding—of international law and its national subjects—entails what we might call a "cut" between self and Other. This cut has the effect of constituting both that which is brought into being—or founded—and its opposite, that which is not. But the constitution of and differentiation between that which is ostensibly being founded and what which is not—here the nation—must also make a claim to be universal. The paradoxical effect of this encompassing is to secure the fixity of the cut while erasing its occurrence and thereby rendering it authoritative and so seemingly universally true.[15]

To summarize briefly, it is the putative universality of the nation that made it open to appropriation by proto-national liberation movements. The non-nation is also peopled—and by people who cannot be constituted in a complete or finite way. This excess is evidenced by the fact that colonized nationalists opposed the "not yet" of the historicist response to the claim for national liberation with an insistent "now."[16] And so the "waiting room" version of history was challenged by those unwilling to accept that they were incapable of self-rule.[17]

For present purposes, it is significant that the struggles that were successful took the form of *national liberation* struggles and not struggles for decolonization in some other form. Although some have attributed this continuity to the subsumption by the decolonizing elites of imperial structures of rule or to the acceptance (often through education) of the colonizer's episteme,[18] in international legal terms, the only way to decolonize was through self-determination as a nation state.[19] Indeed, several mutually supportive

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national Law, 40 Harv. Int'l L.J. 1 (1999).

14. Dipesh Chakrabarty, Provincializing Europe 6 (2000).

15. This securing lasts only for an instant and so must constantly be reiterated.

16. Chakrabarty, *supra* note 14, at 9.

17. *Id.*

18. *See, e.g.*, Ranajit Guha, *On Some Aspects of the Historiography of Colonial India*, *in* Selected Subaltern Studies 37 (Ranajit Guha & Gayatri Chravorty Spivak eds., 1988).

19. *See, e.g.*, Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the*

doctrines of international law existed to ensure this. These included the rules surrounding statehood and the investiture of international legal personality exclusively in the nation state—reinforced by doctrines such as *uti possedetis*—which ensured not only that the nation state form was "the only way to enter the world beyond and be recognized as a rightful player in it,"[20] but also that the territorial definition of the new state remained the one bequeathed to it by the colonial powers.[21] Therefore, while the universal claim of nation contained the dangerously emancipatory possibility of universality—that is of applying to everyone—adopting the particular form of the nation state was the only way to become "someone" and to enter the community of nations. That is, the achievement of "self-determination" took place through a contradictory relationship to the categories of international law that became "truly" universal only by granting formal legal status to new subjects by rendering them commensurable with its forms.

But this containment within was not the end of the story, because although (almost) all of the newly decolonized territories received formal legal recognition as nation states sooner or later, they could still not overcome their particularity. Just because the newly independent states had rejected the historicist injunction that they were not ready for independence, that did not mean the West had wholly accepted that rejection and abandoned historicist assumptions or understandings of the world. Indeed, in some ways, this responsive adaptation of international law to national liberation struggles brought the savage Other into an even more proximate relation with the West, necessitating a new form of containment. Even as the promise of universality was captured to the extent of the ascription of the juridical form of nation to these entities, other conceptual mechanisms were engendered to effect the ongoing containment of the savage Other whilst its endless transformation into the modern, or universal, nation was continually re-enacted.

Thus, it is no coincidence that the notions of "development" and "underdevelopment" were born at the same moment that decolonization was underway.[22] According to this deeply historicist account, the non-universality of the newly formed nations was understood in contradistinction to the universal (Western) nations and was maintained once again through the idea that non-modern forms of social organization existed in the historical past and that the present Western nations were exemplars of the future for those non-modern nations. Thus, instead of different kinds of entities, potentially both national and non-national and existing heteronomously side by side, the

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Incommensurability of Difference, 5 SOC. & LEGAL STUD. 337, 339 (1996).

20. FITZPATRICK, *supra* note 13, at 127.

21. *Uti Possedetis Jure:* "you will have sovereignty over those territories you possess as of law." On this point and whether it is a rule of customary international law, a general principle of law, or a "simple practice," see ANTONIO CASSESE, INTERNATIONAL LAW 57 (2001).

22. *See* ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995); Gustavo Esteva, *Development*, *in* THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 6 (Wolfgang Sachs ed., 1992).

modern nation existed in "homogenous empty time."[23] As Chatterjee puts it,

> [B]y imagining . . . modernity . . . as an attribute of time itself, this view succeeds not only in branding the resistances to it as archaic and backward, but also in securing for capital and modernity their ultimate triumph, regardless of what some people may believe or hope, because after all, time does not stand still.[24]

This understanding of the world authorized—indeed necessitated—ongoing interventions to make the Third World "modern." From the Trusteeship and Mandate system[25] to the contemporary interventions of the International Monetary Fund and World Bank, as well as countless other development institutions and aid organizations, the savage, primitive, backward, and finally underdeveloped peoples of the world were re-constituted as Other to the West. The notion of the comity of (civilized) nations was replaced by an international community founded on "universal values." These values provided the ground upon which interventions took place, based on the notion that these values are, and should be, universally acknowledged. Such putative grounding permits the notion of international community to contain and cohere a scalar progression of nations "from the most 'advanced' liberal democracies to barely coherent nations always about to slip into the abyss of an ultimate savage alterity that still remains . . . and has to be transcended to achieve fullness as a nation."[26] These "universal values" become a sort of generative matrix out of which we can see the production of a particular sort of (universal) nation.[27] Not only is "nation" produced by this matrix, but the international community is generated as well. In many documents justifying interventions of various kinds,[28] the international community is imagined as being composed of the aggregate of particular nations, but is also posited at the same time as the source of "universal" values on which international institutions draw to justify their characterization of these particular values as universal.[29] Thus, there is a circular relation of nation and international community in which each reinforces the Other's claim to universality. At the same time though, the ma-

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23. Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (1983).

24. Partha Chatterjee, The Politics of the Governed 5 (2004).

25. *See, e.g.*, Anghie, *supra* note 10, ch. 3; Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance ch. 3 (2003).

26. Fitzpatrick, *supra* note 13, at 127–28.

27. *See* Sundhya Pahuja & Ruth Buchanan, Difference without Plurality: Nation-building and the Imperializing Logic of International Law, International Law and Imperialism, Paper Presented at the Second Joint Workshop of Birkbeck and the Foundation for New Research in International Law, London (May 11, 2004).

28. *See, e.g.*, World Commission on the Social Dimension of Globalization, A Fair Globalization: Creating Opportunities for All (2004), *available at* http://www.ilo.org/public/english/wcsdg/docs/report.pdf (last visited Apr. 21, 2005).

29. *See* Pahuja & Buchanan, *supra* note 13.

trix of possibility excludes those kinds of nations that fail to meet the test of a particular kind of universalized nation.

Therefore, the universalization of international law after decolonization can be seen on the one hand to mark a capture by the newly decolonized peoples of the promise of a generally applicable law, and on the other had to show the way this promise could only be made good through the adoption of legal forms already commensurable with international law. This demand for commensurability is produced by the way in which universalization is a definite process that requires a specific form to *be* universalized but which depends on the paradoxical claim that what is being universalized is *already* universal. And so the process secures its occurrence. This dynamic is also visible in the instance of human rights, where contemporary attempts to render those rights "truly" universal can be seen as almost an inverse example of the foregoing. Indeed, as if to intensify the echo, some have even referred to this process as the "decolonization" of human rights.[30]

III. Refounding Human Rights

Amongst postcolonial approaches to international law, there have been several attempts to move toward a new human rights, one that is more concordant with the times. Such approaches laudably attempt to bring different perspectives to bear on human rights, or to incorporate different voices amongst those who speak the law. Scholars working in this vein acknowledge that it is no longer possible to deny the cultural specificity of the human rights regime and that it is increasingly untenable to embrace a vision of human rights that ignores the colonial origins of international law. They draw on a persuasive array of examples of the exclusionary effects of contemporary human rights, especially in relation to indigenous peoples.[31] In such work, there is also sometimes a useful emphasis on the ways in which the hierarchization of civil and political rights on the one hand and economic, social, and cultural rights on the other perpetuates the continuation of colonial structures of oppression.[32] This is exacerbated by the concomitant privileging of the individual over the collective.[33]

Often these approaches draw a connection between the limitations of human rights and their putative universality. Universality is taken to have been temporarily appropriated by the "Euro-American meaning of universality" that "it is necessary to give up" "[i]f international human rights are to continue to have universal relevance."[34] When the problem is cast this way, what seems necessary is the production of more inclusive standards of behavior that

30. *See, e.g.*, Shelly Wright, International Human Rights, Decolonization and Globalization: Becoming Human (2001).

31. *Id.*

32. *See, e.g.*, *id.* at 190.

33. *See, e.g.*, *id.* at 67.

34. *Id.* at 131.

cut across different cultures, to find values that are shared and that transform a culturally specific universality into a real universality.

Approaches in this vein are following in the footsteps of radical Third World international lawyers who tried to take advantage of the universalization of international law through decolonization and refound international law on more genuinely universal grounds, both through mechanisms such as the voting power acquired in the U.N. General Assembly and in scholarship and writing.[35] Such a universalizing process would require that "many more universal perspectives drawn from all the world's cultural traditions can and must be fed into [international law] as it develops to suit the needs of the twenty-first century."[36] In a more self-consciously postcolonial vein, human rights law scholars reveal the hidden sources of positive value in the ostensibly occidental universal values by acknowledging the exchange of values between colonized and colonizer.[37] In other words, such approaches justify the universality of international law and/or human rights on the grounds that non-European cultural values are equally entitled to inform universal values, or indeed, already have shaped universal values through colonial exchange.

This of course brings us back to the universal, for if the argument is that human rights would be better if they were genuinely universal, truly "applicable to everyone," then arguably it is necessary to explore the relationship between the concept of universality itself and the "byzantine reinforcements of colonial power and knowledge,"[38] not to mention its relationship to Christianity.[39] Similarly, the project of re-founding human rights in different or other cultures leaves unexamined the way in which modern law marks its authority precisely through originary gestures.[40] Arguably, no matter what a system's normative content or philosophical foundations, the search for foundations is itself a search for authority. It is an act of "discovering" and narrating an origin that draws a limit by saying "this is our beginning," and it is from here that we exist and have meaning. The effect is thus authoritative and authorizing. By founding authority, the narrative of origin erases the possibility of

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35. Examples include the attempt to establish a new international economic order, as well as the establishment of the U.N. Conference on Trade and Development. For a very useful background to these developments, see PETER KÖRNER ET AL., THE IMF AND THE DEBT CRISIS, 5–73, 128–61 (Paul Knight trans., 1986).

36. WEERAMANTRY, *supra* note 1, at 2–3.

37. *See, e.g.*, WRIGHT, *supra* note 30.

38. NICHOLAS B. DIRKS, CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA 10 (2001).

39. One entry for "universality" in *The Oxford English Dictionary* defines it as Roman Catholicism's "extension to the whole world . . . ." 19 THE OXFORD ENGLISH DICTIONARY 85 (2d ed. 1989). Indeed, the Christian origins of human rights law as well as the replacement of sacred by secular orthodoxies for the foundations and ongoing project of human rights is a closely related and under-explored project in international law. *See generally* Jennifer Beard, *Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology*, 18 AUSTL. FEMINIST L.J. 27 (2003) (discussing the Christian origins of international law).

40. FITZPATRICK, *supra* note 13. *See also* SPECIAL ISSUE, DIVINING THE SOURCE: LAW'S FOUNDATION AND THE QUESTION OF AUTHORITY, 19 AUSTL. FEMINIST L.J. (Jennifer Beard & Sundhya Pahuja eds., 2003).

being otherwise. Moreover, it prevents the subject of narration from being more than the origin allows. The subject is fixed: it is always that which is born of its origin. Theories and narrations of self-determination and sovereignty are inextricably bound up with narratives of law's authority, as well as that of the state and its claim to legitimate power and violence.[41]

It is therefore doubtful whether refounding human rights, even on unacknowledged and richly diverse sources, would ultimately be capable of escaping the originary violence of the creation of the subject of law, and therefore of the Other—even if now the self is recast. Indeed such refounding may play into international law's imperializing urges, this time powerfully delineating what it means to be human.

Thus, in effect, projects directed at refounding seem to grant too solid an existence to the Other by attempting, for instance, to revalorize cultures that have been devalorized. In this there is a subtle underlying acceptance of certain essences or fixable identities and a concomitant slippage into certain of the "anthropological vision[s] that conferred cultural explanations on the colonized world."[42] For while it is indeed central to analyze practices of knowledge creation such that an Other to Europe was constructed, it is crucial to explore the construction of the Other in terms of its necessity for the construction of the self. This exploration could entail a consideration of the need for the self to be "whole,"[43] or to have an identity that can be fixed. Such an interpretation would stand in contrast to understanding that construction as revealing facts about the Other as a being.

Rather than feeling the angst that many contemporary human rights scholars bear toward the familiar conundrum of the seeming choice, we must decide between the myth of universality and the nihilism of cultural relativism; the oscillation should be understood and embraced as symptomatic of the postcolonial quality of law and the radical impossibility of closure it generates. In an attempt to "decolonize" human rights, it is important to recognize that the split between self and Other is not so much "*within* the foundations of Enlightenment civilisation,"[44] as it *is* the foundation itself. It is the "cut" that makes the categories that are the foundation of such thought. A recognition of the same might bring us to a more relational understanding in which we are forced to take account of the impossibility of fixed and determinate being—both for our selves and for our Others—in ways that open up, rather than broaden, reor-

41. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority," in* ACTS OF RELIGION 231 (Gil Anidjar ed., 2002). *See also* BARRY HINDESS, DISCOURSES OF POWER: FROM HOBBES TO FOUCAULT (1996).

42. DIRKS, *supra* note 38, at 303.

43. *See* JENNIFER BEARD, THE POLITICAL ECONOMY OF DESIRE: LAW, DEVELOPMENT AND THE NATION STATE (forthcoming 2005); Jennifer Beard, *Representations of the Liberal State in the Art of Development*, 10 GRIFFITH L. REV. 6 (2002).

44. WRIGHT, *supra* note 30, at 186.

ganize, or even revalorize, the categorizations on which colonialism and imperialism depended, and arguably on which human rights still depend.[45]

IV. Conclusion

The "post" in postcolonial designates a state neither clearly beyond nor after the colonial. Instead it denotes a "continuation of colonialism in the consciousness of the formerly colonized people, and in the institutions which were imposed in the process of colonization."[46] Key amongst those institutions is international law, which in some senses was formed out of the exigencies of imperialism. But if international law was the child of imperialism "it is not only . . . a dutiful child but also . . . a child with oedipal inclinations."[47] And although international law is susceptible to power, it also maintains an oppositional relation to power. This irresolution can be understood as symptomatic of the "postcoloniality" of international law. This postcoloniality, in part, describes the way in which international law must continually effect a cut between "self" and "Other," rendering that which is excluded crucial to the formation of the included, but it also makes a claim to universality antithetical to this exclusion and which in its encompassing brings this productive instability to the heart of international law.

45. This idea of thinking through relationality is inspired by my readings of Jean-Luc Nancy. *See* Jean-Luc Nancy, The Inoperative Community (1991); Jean-Luc Nancy, Sense of the World (1997); Jean-Luc Nancy, *Finite History in* The Birth to Presence 143 (1993). These provocations do not come in any way close to indicating Nancy's argument, but provoke the reader to explore them further.

46. Margaret Davies, Asking the Law Question 278 (2d ed. 2002).

47. Fitzpatrick, *Latin Roots*, *supra* note 4, at 3.