Beyond redemption? Problematising the critique of human rights in contemporary international legal thought

Ben Golder*

This article engages with the work of three international legal theorists (Kennedy, Orford and Mutua) on the question of human rights and argues that whilst each provides a critique, each also makes a redemptive return to human rights. The article maps and critiques this tendency in contemporary international legal thought.

I wish only to draw attention to the tension between (a) expanding the existing normative concepts of citizenship, recognition, and rights to accommodate and overcome contemporary impasses, and (b) the call for alternative vocabularies grounded in the conviction that the normative discourses derived from liberalism... are inadequate to the task of grasping both new subject formations and new forms of social and political antagonism.¹

* Senior Lecturer, Faculty of Law, University of New South Wales, Australia. Email: b.golder@unsw.edu.au. Versions of this article were first presented at the UNSW Law Staff Seminar Series and at the Second Annual Junior Faculty Forum for International Law at the University of Nottingham. I am grateful to the comments of audience members at both of those events, but in particular to the organisers of the latter (Dino Kritsiotis, Anne Orford and Joseph Weiler) and to the formal commentator on that occasion: Philip Allott. I would also like to thank Lyria Bennett Moses, Peter Fitzpatrick, Fleur Johns, Daniel Joyce, Lucas Lixinski, Daniel McLoughlin, Samuel Moyn, Sundhya Pahuja, Gabrielle Simm, Alecia Simmonds and Jessica Whyte for their generosity in reading and commenting on a previous draft of the article. I also benefited greatly from the two anonymous reviewers for the journal and for the serial provocations of students in my Politics of Human Rights course at the University of New South Wales over the last few years. All errors remain my own.

¹ J Butler, Frames of War: When is Life Grievable? (Verso, 2009) 146.
By the turn of the 21st century, if not well before, it had become axiomatic to observe that we live in an ‘age of human rights’. This is undoubtedly a rhetorically inflated claim. It cannot mean global acquiescence in the norms of international human rights law nor anything like their universal application in practice, as daily reports of human rights violations across the world depressingly attest. What such a claim does mean (and, more to the point, this is a reality it helps to constitute) is that the language of human rights has come to provide the dominant mode of expression for political claims today. In the words of one critical commentator, the malleable language of human rights is sufficiently capable not only of giving expression to the ‘political program of revolutionaries and dissidents’ but also of providing a potent justificatory resource for transnational corporations and the militaries of powerful states. Today the ostensibly universal language of human rights seeks not only to transcend such tired modernist fictions as Left and Right; it sets limits to the very intelligibility of the political as such. But what happens when we frame our political demands in the particular and putatively ‘post-political’ idioms of human rights? What other languages and other avenues for the pursuit of social justice or for resistance to the ravages of global capitalism become silenced and displaced when we speak human rights talk (or are ‘spoken by’ it)? And what role might diverse modalities of critique themselves play in the reproduction of human rights?

This apparent contemporary occupation of the political by human rights is the starting point in this article. I explore some of the discursive means whereby the language of human rights is continually reinstalled as the appropriate

---

2 The historical origins of human rights are fundamentally contested. As Philip Alston has recently, and perceptively, put it: ‘there is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy’. See P Alston, ‘Does the Past Matter? On the Origins of Human Rights’ 126 Harvard Law Review (2013) 2043, 2077. Much of the recent debate has been catalysed by the revisionist and genealogical work of the Columbia University historian Samuel Moyn. For his claim that human rights are discontinuous with earlier revolutionary natu


4 It is of course not the only such mode of expression. It is challenged by the contemporary discourse of security, for example, and by the discursive amalgam of ‘human security’: see FF Hoffmann, “Shooting into the Dark”: Toward a Pragmatic Theory of Human Rights (Activism)’ 41 Texas International Law Journal (2006) 403. But it is, I argue, still the most powerful mode of expression for (at least putatively) emancipatory claims.

vocabulary for addressing, as Judith Butler puts it in the above epigraph, the impasses of the contemporary political scene. My approach to this question is not, however, via official or mainstream liberal human rights discourse but rather from the more oblique angle of contemporary critiques of human rights. The spur for this article is my suspicion that critical approaches to human rights are themselves part of the reproduction (indeed, arguably, reformulation and thus expansion) of the human rights discourse rather than the source of its displacement or overcoming. That suspicion is enlivened by a particular tendency within much contemporary critical theorising about human rights, which I label the critical redemption of human rights.

When operating in this mode, much critical theorising about human rights actually ends up attempting to reimagine (and in doing so, reinforce) the human rights project itself. After having exposed its false claims to universality, its investment in and reproduction of a narrow liberal ontology, its propensity to circumscribe the field and possibility of politics, its inability to break with global capitalist ordering, its indebtedness to and repetition of colonial history, and a host of other related criticisms (in short: the critique of human rights as a particular form of Western political liberalism that gets exported globally with great violence), critical commentators on human rights nevertheless make a curious return to human rights. In this post-critical redemptive guise, human rights emerge in spite of their evident historical and political limitations as the site of reinvestment, reimagining and of futural possibilities. Another human rights, if not another world, is always possible. Something more than liberal, or neoliberal, orthodoxies can always be retrieved from the human rights canon. In this vein, critical work is expended on reworking and reinscribing the ideal of human rights (rather than, for example, displacing, overcoming or transcending it). In this article, I discuss some examples of this redemptive critical tendency in international legal thought and begin to problematise it—at least in

---


7 Of course, there are always avoidable exceptions, some of them notable—my concern here is to analyse a tendency and its effects, not to argue that there are no alternative or countervailing ones. See, e.g., in contemporary continental philosophy, A Badiou, Ethics: An Essay on the Understanding of Evil (Verso, 2002); G Agamben, ‘Beyond Human Rights’, in Means without Ends: Notes on Politics, trans. V Binetti & C Casarino (University of Minnesota Press, 2000) 14. In Anglo-American normative political theory, see S Bedi, Rejecting Rights (Cambridge UP, 2009).
part, through some countervailing tendencies in international legal thought itself.

In each of the next three sections I provide a brief reading of three exemplary and influential instances of contemporary human rights critique, as represented by three quite different international legal theorists: David Kennedy, Anne Orford and Makau Mutua. Each thinker, while proposing a salient critique of human rights, nevertheless ends up reinscribing the possibility of politics within the (reframed and re-imagined) framework of human rights itself. Each thinker approaches the discourse of human rights from a different theoretical angle. For Kennedy, it is via pragmatism; for Orford, it is via feminism, psychoanalysis and post-structuralism; and, finally, for Mutua, it is by way of post-colonialism, critical race theory and Third World Approaches to International Law (TWAIL). It is with their respective theoretical orientations (more so than with their disciplinary affiliations) that I am most concerned. Nevertheless, perhaps a few prefatory comments are in order regarding my reading of each thinker as a proponent of a particular theoretical approach, and my interpellation of them all as ‘(critical) international legal theorists’.

To address the first of those issues, doubtless the attribution of the particular theoretical labels I have adopted here to Kennedy, Orford and Mutua could be contested, broadened or pluralised. Kennedy, to take one example, could just as easily be read in relation to American legal realism (itself connected, of course, to classical pragmatism through figures like John Dewey), to critical legal studies, to Protestantism, to Newstream and so forth. And, moreover, it is clear that each thinker both inhabits but also departs from, develops and supplements the theoretical tradition through which I am reading them. My reading of them is hence intended to provide a certain perspective on their orientation towards human rights rather than to capture or exhaust their respective projects. Additionally, and to respond to the second issue raised above, it should be clear to the reader that I am addressing each of these international legal thinkers more through the lens of the theories they adopt in order critically to redeem human rights (that is, more as diverse theorists of the international and of its laws) rather than as representatives of some coherent and collegiate disciplinary enterprise called public international law who bring to bear a particular ‘international law’ approach in their work. Doubtless they are all trained international lawyers and their approaches are hence marked by a shared set of legal-disciplinary assumptions and textual techniques but this, in my view, does not suffice to establish a coherent subject position of ‘international lawyer’. If they are members of an ‘invisible college’ then it is a fissiparous and a methodologically diverse one (and eminently the better
for that). My approach in what follows is hence not to map and survey each of their respective contributions at the level of international legal theory, but rather to focus on a particular moment or orientation in selected texts, wherein there is discernible a critical return to human rights. To this end, I focus upon Kennedy’s *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Orford’s *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* and Mutua’s *Human Rights: A Political and Cultural Critique*. Finally, in the last section, I begin to problematise this tendency and to raise some questions for further work in the area. Here my reflections revolve around the themes of *contingency* and the *politics of legal form*.

**WHEN CRITIQUE REPEATS: DAVID KENNEDY AND THE (MUSCULAR) PRAGMATIC RECUPERATION OF HUMAN RIGHTS**

In this section, I focus on Kennedy’s work on human rights, humanitarianism and the law of/in warfare (or ‘lawfare’) and argue that he exemplifies a particular critical attitude towards human rights that I call *muscular pragmatism*. Whilst this critique exposes some of the shortcomings of the discourse and its political operation (critiques whose logic and force might well compel him to move *beyond* human rights, as indeed he does in places both implicitly and explicitly), his central critical position nevertheless ends up reinforcing human rights, becoming a vector for the recuperation and expansion of the discourse.

---


10 I have called Kennedy’s approach one of *muscular* pragmatism in order both to recall an important precursor in terms of human rights pragmatism—Michael Ignatieff’s putatively *minimalist* pragmatism—and thereby to distinguish their two versions of human rights pragmatism. I focus on Kennedy’s evocation of pragmatism in the present essay because it is styled as a critique of human rights which then folds back into the logic of human rights (whereas Ignatieff’s pragmatism appears from the outset as a sober-headed defence of human rights). See further M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton UP, 2001), and for a salient critique of his position which takes issue with its claimed ‘minimalism’, see W Brown, “‘The Most We Can Hope for’? Human Rights and the Politics of Fatalism” 103 *South Atlantic Quarterly* (2004) 451. I address the pragmatist turn in human rights theory at greater length in B Golder, ‘Theorising Human Rights’, in F Hoffmann & A Orford (eds), *Oxford Handbook of the Theory of International Law* (Oxford UP, forthcoming).
itself—a slide from pragmatism as critique to pragmatism as renewal and repetition.

The text that best exemplifies this redemptive move is Kennedy’s 2004 book, The Dark Sides of Virtue: Reassessing International Humanitarianism, which is explicitly styled as a pragmatic ‘critical reflection’ upon the failings of human rights and the human rights movement. In his first chapter, ‘The International Human Rights Movement: Part of the Problem?’, Kennedy rehearses some familiar failings—from the way in which human rights discourse occupies the field of emancipatory possibility to the exclusion of other discourses, and the way in which human rights insulates forms of economic power from scrutiny, right through to the bureaucracy and legalism of otherwise well-meaning human rights institutions and practitioners, who marginalise and disenfranchise local political actors. Without specifying exactly what they are, Kennedy makes it clear that ‘some of these worries seem more plausible to [him] than others’. However, in subsequent work he has clarified that he is concerned with one of the central questions which animates my own discussion here:

I worry that the international human rights movement can occupy the field, crowding out other ways of pursuing social justice and other emancipatory vocabularies that may sometimes be more effective, such as religious vocabularies, local traditions, and tools focused more directly on economic justice or social solidarity. There are lots of ways to pursue social justice. Human rights is but one, and not always the most appropriate. I worry, moreover, that human rights, given its origins, its spokesmen, its preoccupations, has often been a vocabulary of the centre against the periphery. A vehicle for empire rather than an antidote to empire.

Kennedy here conjoins the literal and the metaphoric (or perhaps, better, the political and the epistemic) critiques of human rights as being an imperialist discourse. But if human rights is an imperial venture, for Kennedy it is an

---

imperialism that dares not speak its name, presenting itself as neutral, apolitical and external to networks of global governance. For his part, Kennedy rightly perceives human rights as a form of power itself and as a key modality of global governance.\(^{16}\) As such, and contrary to the discourse’s self-presentation, human rights are a key medium for the making of contestable, thoroughly political distributional choices—for creating winners and losers, prioritising some voices at the expense of others, and so forth. ‘To the extent that emancipatory projects must be expressed in the vocabulary of “rights” to be heard’, he argues, ‘good policies which are not framed that way go unattended . . . [which] also distorts the way projects are imagined and framed for international consideration’.\(^{17}\)

For example, he discusses the ways in which channelling environmental demands through the prism of a ‘human rights violation’ excludes the potential of more communitarian responses (a ‘right to a clean environment’ versus a ‘duty to work for the environment’) whereas, in the field of global poverty, efforts to codify and institutionalise a ‘right to development’ embroil many in ‘impossible legal quandaries’ whilst local and dissident political projects are sidelined and ‘neoliberal players . . . may find it easier to take over international economic policy’.\(^{18}\) On Kennedy’s analysis, human rights assuredly is a form of politics (although one which masquerades as an anti-politics),\(^{19}\) but it makes its distributional political choices behind a disabling and disingenuous veil of humanitarian virtue. It is disabling to the extent that the disavowed ‘dark sides’ of human rights work remain precisely in the dark, and hence inaccessible to a pragmatic reckoning and responsible engagement.\(^{20}\) It is disingenuous because, of course, these contentious distributional choices are being made and they are being made under the banner of humanity (which as Schmitt


\(^{19}\) For the historical claim that human rights first emerged as a moralistic form of anti-politics in the late 1970s, see Moyn (2010). For a critique of the kinds of anti-political subjectivities which human rights generates today, see Brown (2004).

reminds us is a kind of cheating). In sum, to follow this line of critique, human rights is a (neo-)liberal political discourse which launders political problems (often of its own making or to which it contributes) into the anti-political currency of the universal, hence eliding material problems and alienating us from their true causes and possible solutions.

If both Kennedy’s critique and solution to the problem of human rights are sponsored in some sense by Nietzsche (his critique of the virtuous humanitarian evokes the latter’s genealogy of the ascetic priestly class in *On the Genealogy of Morals* whilst his solution draws, among other sources, on Nietzsche’s infamous yet inchoate notion of the ‘will to power’), he is, nevertheless, not drawn in the spirit of Nietzsche towards an overcoming of human rights but rather to return to them for the purposes of ‘pragmatic renewal’. In what sense is Kennedy’s solution to the ills of humanitarian virtue a pragmatic one? And in what sense is this pragmatism, as I have intimated above, muscular?

Kennedy specifies his understanding of pragmatism early in the book. It comprises a ‘pragmatism of intentions’ and a ‘pragmatism of consequences’. The former he defines as ‘a clear-eyed focus on the purposes of our work and a relentless effort to avoid being blown off course as we seek to make our humanitarian impulses real’. This somewhat idiosyncratic articulation of pragmatism, perhaps better conceived of as a recalibrated idealism, proposes to subject means to the critique of ends and to substitute for the enchantment of tools the more purposeful realisation of ideals in the world. It does not subject the ultimate end of humanitarianism itself to critique but rather aims to ensure that humanitarian actors do not get distracted from the attainment of that overriding goal through ‘building the movement’ rather than ‘working on the problem’, through ‘pay[ing] more attention to compiling documents than developing solutions, to proclaiming rights than fashioning remedies’, and so forth. The latter sense of pragmatism is perhaps a more familiar one, involving as it does a focus on ‘outcomes rather than good intentions’. Kennedy writes: ‘When activists think in instrumental or functional terms about their


24 Ibid xx.

25 Ibid xxi.

26 Ibid xxii.
advocacy—when they make strategic choices about which rule or standard to invoke, which institution to engage—they focus on the consequences’ and coolly assess ‘who would win and who would lose from proposed government action’. In this more socially scientific vein, human rights practitioners are eminently more comfortable with making distributional choices and they identify themselves as partners in governance (which is where Kennedy would have them). As Hilary Charlesworth has noted, this understanding of pragmatism seems to take its meaning in constitutive opposition to the idolatrous, and is offered as a consequentialist corrective to a ‘naive, devotional approach to human rights’.28

All this is doubtless apt, and yet something more than pragmatism is needed on Kennedy’s view. If Kennedy’s ‘hard boiled’ pragmatism evokes Weber’s sociology of instrumental reason in modernity,29 then the dangerous supplement to this pragmatism takes him at once onto territory both more Schmittian and more Nietzschean. Kennedy argues that pragmatism itself produces problems for the human rights practitioner. It can too easily ossify into a ‘professional language and practice of humanitarianism’,30 at which point a further dark side of this more openly managerialist endeavour emerges: namely, that it occludes a very elusive and important experience, the distinct human pleasure of exercising discretionary power unconstrained by rule or certainty. Kennedy worries that pragmatic evaluation merely substitutes calculative rules for faux humanist absolutes, allowing human rights practitioners the better to see and to calculate, but not to feel and to be responsible for, the awesome exercise of their power. He hints at this problem in the conclusion to The Dark Sides of Virtue when he enjoins humanitarians not simply to calculate but to exercise their ‘will to power’31 and to do so in the dark:

Ruling, deciding for others when we do not know—there is a freedom which comes when we realize that we are in power but that our expertise no longer guides us. It is the freedom of discretion, of deciding in the exception—a human freedom of the will. It can be pleasurable—but it is also frightening. There is also a terrible responsibility—deciding for others, causing consequences which elude

27 Ibid.
29 Kennedy, ‘Reassessing International Humanitarianism’ (2006) 152: ‘Humanitarians have become partners in governance but have not been able to accept politics as our vocation’.
31 Ibid 346.
our knowledge but not our power. The darker sides of our nature and our world confronted, embraced, and accepted, rather than denied. I imagine this humanitarianism in the language of spirit and grace—at once uncomfortable and full of human promise.\textsuperscript{32}

The problematic is more fully explored in Kennedy’s subsequent work, Of War and Law, which discusses the merger of the humanitarian and military professions and their joint deployment of a shared legal vocabulary and expertise (‘lawfare’). There he writes in a more directly existential vein:

For all of us, recapturing a politics of war would mean feeling the weight and the lightness of killing or allowing to live. We must rekindle the sense that those who kill do ‘decide in the exception,’ to coin a phrase. As men and women, our military, political and legal experts are, in fact, free—free from the comfortable ethical and pragmatic analyses of expertise, but not from responsibility for the havoc they unleash... The challenge for all of us is to recapture the freedom and the responsibility of exercising discretion in this common tongue.\textsuperscript{33}

It should be evident, then, why I have styled Kennedy’s brand of pragmatism muscular. Whereas the human rights pragmatism of someone like Michael Ignatieff counsels us to suspend contentious metaphysical questions about the ‘human’ of human rights and in their place adopt a ‘minimalist’ politics of suffering-prevention that protects individual agency through guaranteeing ‘first wave’ civil and political rights (CPR),\textsuperscript{34} Kennedy proposes a much more explicit avowal of the world-making power of human rights and the civilising integration (or collapse) of human rights language and standards into the operational language of the world’s most powerful military.\textsuperscript{35} Humanitarians, on his account, need pragmatically (yet responsibly) to come out of the shadows and into the clear and powerful light of day.

\textsuperscript{32} Ibid 355.
\textsuperscript{34} See Ignatieff (2001) 54, and for a critique, see Brown (2004).
In closing, though, the dynamic that I want to emphasise from the foregoing is that of a critical redemption of human rights via the means of pragmatism (suitably ‘tempered’, in the end, with sovereign decisionism and gestures towards abyssal human freedom). In his important, partly autobiographical, essay, ‘When Renewal Repeats: Thinking Against the Box’, Kennedy—while at the same time expressing an ambivalence about the very concept of ‘the new’ and of disciplinary renewal—nevertheless frames his intellectual project as one of trying to produce extra-vernacular knowledge, knowledge which pits itself ‘against the [disciplinary] box’ of existing international law in the name of something other:

My own search for ‘new thinking’ in the field of international law arose from an intuition, a critical impulse, that the discipline’s routine efforts to renew itself had reinforced rather than eliminated blindness and bias. I felt a strong identification with the field of international law, with the promise and premise of international governance, with the perils and possibilities for cosmopolitan rationalism. But I wanted to think outside the professional lexicon, and I wanted to build the institutional and social conditions that could make doing so possible and enjoyable.36

In this vein, and in the conclusion to The Dark Sides of Virtue, Kennedy offers a set of speculative propositions to further the humanitarian project, of which the penultimate is ‘Humanitarianism as Critique’. ‘Humanitarians’, he writes, ‘have been self-critical... [but this has been merely in] the service of renewal’. He asks us to ‘[i]magine instead a humanitarianism whose end was criticism, whose knowledge was critique... [and] a human rights movement which... criticiz[ed] the pretenses of justice’. ‘Such a humanitarianism... contests with others the meaning and requirements of humanism... [and could possibly represent] an antiestablishment establishment, invigorating our political life for heterodoxy’.37

This formulation hints that critique might perform a potentially transformative role in relation to human rights—not an instrument that can be used for mastery or self-perfection but a more troublesome ethos that might put some of the founding ideas of the movement itself into question, and even perhaps displace human rights as a means for thinking about humanity. But for all the imaginative extra-vernacular ambitions of such a task—for all the danger of ‘raising critical voices [and thus] weakening important ventures’38—Kennedy’s pragmatist critique (and renewal) of human rights ultimately does understand critique in

38 Ibid xiv.
constrained, instrumentalist-renewalist terms. As such, the critical challenge he poses is too easily ‘interpolated back into the disciplinary vocabulary’\(^\text{39}\) of human rights and international law according to a logic he himself has so adeptly laid out. We are left with a human rights that is modified (and in some cases amplified) by pragmatism, not seriously disturbed by it.

Having demystified the apolitical claims of the discourse, exposed the ‘dark sides’ of human rights’ investment in the differential economic distribution of global suffering, and shown how human rights ethically evades responsibility for these problems, Kennedy could well have proceeded to a displacement of the discourse of human rights and the construction of a truly extra-vernacular political project. (Or, at any rate, the construction of a counter-project which might materially try to come to terms with some of these problems rather than inflecting human rights differently.) This is both an explicit intention of his work as a whole and an implicit trajectory of *The Dark Sides of Virtue* (as well as an outcome logically suggested by his own arguments). Yet it is a trajectory foreclosed by the resort to pragmatism.\(^\text{40}\) Instead of critically thinking beyond human rights, Kennedy critically reworks the existing idioms of human rights in a pragmatic voice and this rethinking of human rights, for all its muscularity, is ultimately a deflationary move which denies the potential of critique that he raises so evocatively.\(^\text{41}\) As Charlesworth

---

\(^{39}\) Kennedy (2000) 460.

\(^{40}\) In subsequent work Kennedy has argued that the human rights ‘moment’ was ‘a status quo project for a stable time’ and that ‘politics has moved on’. For him, ‘[h]uman rights is no longer the way forward—it focuses too longingly on the perfection of a politics already past its prime’. Here Kennedy definitely does gesture beyond human rights but the ‘beyond’ he invokes is the humanitarian decisionism which his own pragmatic interventions into human rights discourse have helped to usher in (and is hence on my reading not so much a getting ‘beyond’ but a pragmatic variation on a human rights theme). See D Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’, in R Dickinson et al. (eds), *Examining Critical Perspectives on Human Rights* (Cambridge UP, 2013) 19.

\(^{41}\) In an important sense, as Fleur Johns helpfully presses me, my critique of Kennedy elides an important element of his critical project. That element could be understood as the exhaustion and displacement of conventional disciplinary frameworks and understandings through their rotation: see, e.g., his D Kennedy, ‘A Rotation in Contemporary Legal Scholarship’, in C Joerges & D Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos Verlag, 1989) 353. On this view, the intent is not to realise through critique some project beyond human rights (indeed even the gesture to a beyond could be conceptualised as a routine move within a certain form of human rights scholarship) but rather to displace human rights from within. Hence Kennedy would doubtless refuse my description of his work as effecting a slide from pragmatism as critique to pragmatism as renewal or redemption (rather, for him, these moments would be collapsed). So perhaps my critique of him is better recast in light of this dimension of his work not as him failing to follow through on his own intentions to realise a truly extra-vernacular project (even though this is a distinct possibility raised by his analyses) or as some form of bad faith but rather, and more simply, as a critique of the limitations of a project which attempts to resignify human rights by returning to it in a spirit of pragmatism.
observes, ‘[p]ragmatism in this sense ... is far from being an extra-vernacular project or even one that would ruffle the feathers of most human rights activists’.42 If, then, we want to think beyond that muscularity and more thoroughly to put into question the ways in which human rights deploys and mobilises support for violence, we need to turn to the work of a very different thinker: Anne Orford.

**ANNE ORFORD AND THE RESIGNIFICATION OF HUMAN RIGHTS; OR, ORFORD CONTRA ORFORD?**

The work of the critical international lawyer Anne Orford spans public international law, trade law and human rights but here I focus only upon her critique of human rights. My argument is that whilst Orford develops a nuanced and incisive critique of the discourse of human rights based upon the ways in which it underwrites militaristic and monetary interventions into the global South, she nevertheless sustains a countervailing faith in its capacity to be reinterpreted against itself and to ‘mean differently’.43 In her critical reading, human rights—in spite of its evident limitations—nonetheless provides resources for a different future. In making my argument I shall focus largely upon Orford’s 2003 book, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, and a particular moment within the text—a temporally extended ‘moment’ methodologically prefigured in the beginning of the book but arriving in its final chapter, entitled ‘Dreams of Human Rights’.44 I will briefly retrace the context and argument of *Reading Humanitarian Intervention* before focusing in greater detail upon the particular, semiotically redemptive, moment in the text where human rights are made to mean differently against their dominant meanings.

*Reading Humanitarian Intervention* was published in response to post-Cold war debates about the limits and legality of collective security. These debates—over the legitimacy of doctrines of humanitarian intervention, over the use of force by the self-anointed ‘international community’ in putative protection of human rights and democracy, over the role of the Security


Council under Article 24 of the UN Charter, over unilateralism versus multilateralism—escalated in response to a series of genocidal, military and humanitarian disasters in the last decade of the 20th century (in Rwanda, in Kosovo, in East Timor). Orford’s text does not itself make a normative contribution to such debates (or at least not directly or in their own (juridical) terms) but instead proposes a critical analysis of the discursive conditions of possibility of the debates themselves.

Orford is particularly interested in the emergence of what she calls the ‘human rights warriors’ of the late 1990s (she cites Geoffrey Robertson and Human Rights Watch as exemplars), for whom Western inaction in the face of the Rwandan genocide is the catalyst for a turn to war. These militarist humanitarians rely heavily upon the power of mediated representations of suffering humanity in order to convoke and galvanise popular support for intervention. Reading Humanitarian Intervention is thus, as its title indicates, an attempt to read critically the narratives (of suffering, saviour, spectacle and redemption) that work to produce the ‘desire for intervention’ in the West. On Orford’s account, such neo-colonial narratives are crucial to sustaining the nomos of the newly emergent doctrine of humanitarian intervention. In making this argument, it is clear that she is motivated by a concern that the potentially revolutionary language of human rights has become ‘constrained’ in and by these particular narrations and that, in its historical shift from a discourse of

45 Orford is clearly opposed to militarised violence in the name of humanity but her book productively sets to one side the routine normative (juridical) questions which structure mainstream international law debates about the legitimacy and limits of humanitarian intervention in order to pose deeper questions of the discourse. The closest she comes in her work on humanitarian intervention to answering the question of ‘what then is to be done?’ in terms not of a rethinking or a critique of human rights but rather in terms which might register as a more concrete, policy-relevant ‘position’ is in her ‘Locating the International: Military and Monetary Interventions after the Cold War’ 38 Harvard International Law Journal (1997) 443, 481, where she advocates that ‘intellectuals and activists concerned about democratic and human rights issues should lobby their government representatives and directors to oppose this model of economic liberalisation and marketisation in Eastern Europe’ so as to prevent the conditions of crisis production in the first place. Orford continues this approach of suspending traditional normative frames of analysis to productive effect in her most recent book, International Authority and the Responsibility to Protect (Cambridge UP, 2011). On this point, see B Golder, ‘The Responsibility to Protect: Practice, Genealogy, Biopolitics’ 1 London Review of International Law (2013) 158 and A Orford, ‘In Praise of Description’ 25 Leiden Journal of International Law (2012) 609; cf. A Orford, ‘On International Legal Method’ 1 London Review of International Law (2013) 166 (where she does refer to her method as ‘juridical’ but this is in order to distinguish her historiographical method from the contextualist approach of Quentin Skinner).


48 Ibid 188.
rebellion to one of state legitimacy, human rights now provides the moral-juridical imprimatur for war. Moreover, it is also clear to Orford that the language of human rights does not simply function as a convenient ‘alibi’ for Western invasions but that it inaugurates and stabilises both military and monetary interventions. As we shall shortly see, for Orford, the language of human rights can yet do more than this, or be made to do more than this, but before explaining and analysing that excessive quality of human rights discourse, I want to focus upon the function of the narratives of intervention that are the central object of her critique.

How do these narratives of humanitarian intervention sponsor military violence (and monetary reconstruction)? According to the standard script, a local crisis emerges—where massive human rights violations are caused either by the reckless disregard or motiveless malignity of a dictator or, more systematically perhaps, by localised ethnic or religious violence—to which the international community needs urgently to respond in order to restore (or inaugurate) civilised values of human rights and democratic accountability. There is, on Orford’s account, a temporal dimension to such narratives that turns upon the modality of crisis. Put simply, the insistent ‘now’ of crisis elides any critical consideration of what produced the present crisis and what comes after it. And tellingly, for her, what comes both before and after the crisis are the institutional prerogatives of globalised capital. On Orford’s convincing account, the quotidian investment of the ‘international community’ in the serial crises it purports to ‘solve’ through military means comes to light in the ongoing work of international financial institutions such as the IMF and the World Bank. The structural adjustment and ‘shock therapy’ administered by these institutions precede, and in fact help to produce, the very conditions for what is then taken to be a humanitarian crisis that comes out of nowhere. For example, Orford locates the prehistory of the Bosnian crisis in the socially polarising effects of neoliberal economic restructuring pursued in the former

49 Here there are similarities between Orford’s work and that of Costas Douzinas. Like him, she perceives a radical possibility in human rights that has been foreclosed by the statist and militarist appropriations of the discourse but that can be reclaimed and rearticulated. See generally, Douzinas (2000).


51 See Orford (1997).


Yugoslavia under the auspices of the IMF in the 1970s and 1980s. Yet of course these profound monetary interventions continue after the military one subsides. On her (re)telling, the era of democratisation and post-conflict reconstruction is one conducted in a neoliberal key where security means security for foreign capital just as much as it does for local civilians—if not more. Orford quotes Wolfgang Petritsch, the former High Representative in Bosnia-Herzegovina who was charged with implementing the civilian aspects of the Dayton Peace Agreement, to telling effect: ‘investors, particularly those from abroad, look for security, the rule of law, and respect for human rights’. Or more pointedly, as Carla Del Ponte, former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia once put it in a speech to Goldman Sachs entitled ‘The Dividends of International Criminal Justice’: ‘our business is to help you make good business’. ‘Thinking’ in the key of crisis thus deflects critical attention from the international community’s formative role in producing the conditions of instability in the first place, and its post-conflict role in reconstructing a market society secure for foreign investment.

But there is, of course, not simply a temporal dimension to these operations but a spatial (and a racial) one too, whereby the narratives themselves rely upon and re-perform what the late thinker of colonialism, Edward Said, once memorably called an ‘imaginative geography’ of racial difference. According to this aspect of the stories told by humanitarian interveners, the non-West is figured as a space of irreducible violence and suffering, a barbarian spectacle out-there beyond the gates of the Occident, relayed ceaselessly through tropes of reason and non-reason, civility and savagery, inside and outside, etc. All of this ultimately coincides in the identity-producing function of these humanitarian origin myths which aims to produce and sustain a stable Western identity by localising and disavowing an abject non-Western ‘Other’, out there beckoningly beyond the Occident yet kept permanently in its (lesser) place. For Orford, these contemporary humanitarian scripts recall colonial-era narratives in their attempt to construct a rational Occidental

54 Orford (2003) 87–96; and further see Orford (1997).
58 For an excellent feminist analysis of humanitarian narratives as origin myths in line with Orford’s analysis, see R Buchanan & R Johnson, ‘The Unforgiven Sources of International Law: Nation-Building, Violence and Gender in the West(ern)’, in D Buss & A Manji (eds), International Law: Modern Feminist Approaches (Hart, 2005) 239.
subjectivity through the disavowal and abjection of a racialised other (‘Yugoslavs, Rwandans, Somalis and East Timorese [appear] as childlike, unable to govern themselves, barbaric and unruly’). Yet the construction of identity in narrative is neither a seamless nor a singular exercise. Rather, identities are constitutively unstable, fictive categories, and the narratives told to order and make sense of them need insistently to be retold so as to shore up the fundamental lack at the heart of that identity and to (re-)mark the racialised boundaries between self and other. There is a constituent and insistent irresolution at the core of the Western subject to which these narratives, compulsively and anxiously retold, give the lie.

There are, of course, several important discontinuities between the neo-colonial humanitarian narratives of the present and their colonial forebears, not least of which is the explicit invoking of the universal in the name of human rights. Whereas colonial powers could explicitly rely upon hierarchic taxonomies of racial difference in which the negative constitution of Occidental identity (as self-evidently incarnating universal values) could assume the form of a ‘simple’ disavowal of a racialised other whose obvious inferiority and difference called either for the infliction of untrammelled violence or, qua mission civilatrice, benevolent tutelage so as to raise the savage closer to an always unattainable state of universality, the advent of universal human rights complicated matters considerably. This particular discontinuity further compounds the ambivalence (and pleasure) of Western identification with the humanitarian script, and the particular figure who indexes this heightened ambivalence is the human rights victim. In Orford’s account, it is with the human rights victim that a certain productive tension is opened up and the possibility of a re-reading of human rights discourse emerges. Put simply, the human rights victim must be sufficiently like us in order to evoke our pity (or, better: mobilise us for war) but cannot, in her difference, be allowed to transgress figurative and material borders. It is in its attempting to mediate these irreducible demands of the universal and the particular, of sameness and

61 We can see that the narratives of humanitarian intervention perform both ideological and material functions—shoring up an Occidental identity (and implicit claim to the universal) as well as materialising distinctions between Western and other countries (as Orford writes, the intent of such stories is clearly ‘not to admit those suffering abuses as refugees’, which would propose an uncomfortable challenge to the political superiority and economic privilege of the Western countries, ‘but [rather] to intervene militarily and prevent exodus’). See Orford (2003) 125. For a related feminist post-colonial theorisation of the figure of the victim, see R Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ 15 Harvard Human Rights Journal (2002) 1.
difference, of proclaiming a universal humanity which must then be racially fractured, that the humanitarian narrative comes promisingly unstuck. Orford writes:

The figure of the victim of human rights abuses is a representative of the universal rights-holder. In this sense we recognise ourselves in this figure—our sense of ‘One-ness among the many’ is premised upon a shared identity which invokes our affection or compassion when confronted with the image of the suffering victim. . . . Yet . . . the fetishised nature of the human rights victim also potentially invokes difference—here is a subject that is alien, external, foreign and threatening. The dependence on this figure of the human rights victim about whom we feel so ambivalent gives the discourse of humanitarian intervention its productivity for those who identify with the heroic subject of the international community. 62

The figure of the human rights victim is similarly productive for Orford as she works to disrupt the identification mentioned above. In order to do so, she draws on the feminist psychoanalytic work of the Lacanian scholar, Jeanne Schroeder, who maps two different and opposed responses to loss. ‘We are “masculine” when we try to deny castration’, writes Schroeder, ‘and “feminine” when we accept castration’. 63 Whilst the masculine position entails the disavowal of loss and the need to exile the feminine because she represents a reminder of the masculine’s injured lack of wholeness, the feminine position entails an ‘accept[ance of] castration, loss and negativity . . . [which leads to] the understanding that we are no longer and can never again be self-sufficient, complete and whole by ourselves’. 64 Relating this analysis to the figure of the human rights victim installed in the narratives of humanitarian intervention, Orford argues that the masculine position is exemplified in the hostile response to the human rights victim as a memorialisation of difference and a reminder of trauma: ‘The hostile response targets human rights victims [for military intervention and then subsequent containment and denial of refugee status] because they are a reminder of the trauma of difference, and of the inherent

64 Ibid 1015. Orford notes that her use of Schroeder’s work is a departure from Schroeder in the sense that, for Schroeder, neither the masculine nor the feminine is to be valorised—whereas Orford is commending the latter: see Orford (2003) 214. In this I take Orford to be closer to the position of a theorist like Drucilla Cornell and her metaphorical advocacy of mastering the ‘art of losing’ in Transformations: Recollective Imagination and Sexual Difference (Routledge, 1993) 102.
vulnerability of the Western subject and the international community’. But the feminine position articulated by Schroeder provides Orford with another way of resuscitating human rights’ claimed universality and responsiveness to alterity. She writes:

I want to suggest that human rights discourse offers resources for attempting to create a universalist ethic that is not premised upon a denial of difference or a nostalgia for a lost, imagined wholeness. Human rights has the potential to found an international law that is not limited to supporting the fantasy life of nations and the international community through recreating the violent exclusion of the alien or the foreign.

From this feminine viewpoint, the human rights victim does not so much represent a threatening post-colonial difference which needs to be disavowed and excluded by the Western nation-state. Rather, the victim on this account actually provides a lesson about the necessary (and universal) incompleteness of all identity formation. Such a chastened and ethical response ‘requires us to be able to accept the “lack, gap and non-identity” which human rights memorializes’. In so doing, and instead of ‘exclud[ing] that which threatens our perceived political unity, we can recognize the “foreignness in ourselves”’ and hence ‘respond differently to the claims of law’s others’.

Orford’s (broadly speaking) deconstructive orientation in Reading Humanitarian Intervention means not only that any attempt to stabilise identitarian, cartographic or geopolitical boundaries in and through narrative is doomed to failure, but also that the texts of human rights contain the seeds of their own semantic overcoming, their own troubling excesses. She insists throughout both on the power of the hegemonic interpretations of human rights, dwelling at length on their material and discursive effects in the world, and on the fact that such narrations are only a temporary and contingent ‘containment’ of other possible meanings (and hence not exhaustive of the revolutionary potential of human rights). In arguing this way she hence

65 Orford (2003) 213. Here Orford’s work converges methodologically with some of the recent writing of Judith Butler, who has sought to derive from sites of mourning and loss a politics attuned to the inherent vulnerability (and ontological connectedness) of the human condition. See, e.g., Butler (2009), and also J Butler, Precarious Life: The Powers of Mourning and Violence (Verso, 2004).


67 Ibid 214.

68 I say ‘broadly speaking’ as Orford draws not only upon thinkers such as Derrida, but on psychoanalytic (Freud, Lacan) and postcolonial (Said, Bhabha, Spivak) thinkers also.

69 Orford (2003) 34.
refuses an ontological distinction between the pre-existing (juridical, institutional) reality of human rights and the rhetoric (whether instrumental or disingenuous) by which this reality is mediated. In place of such an understanding, she proposes an alternative and more complex conception of human rights as fundamentally bound up with narrative, as inescapably narratological. Yet as troubling as such a collapse may be from the perspective of mainstream positivist analytical jurisprudence, it is precisely in the collapse between nomos and narrative,70 between law and word (il n’ya pas de hors-texte . . . ) that the possibility of law’s rewording emerges. In an important sense, then, it is surely a mistake to read Orford (as I have done above) as having critiqued human rights and then recuperated or redeemed them for alternative emancipatory possibilities. Such a reading, strictly speaking, misconstrues the temporality at stake: according to such an understanding, human rights are always already different, there is always such a possibility installed in human rights from the very beginning (if indeed we can talk of origins). But here we have to pause to ask whether the figural possibilities disclosed by Orford within the beleaguered human rights canon, which ultimately lead her back to reinvest in the possibility of human rights in the final chapter of her book, ever manage to emerge fully from the margins of those texts to animate vibrant and dissonant political projects? Do they, as she argues, found a truly other-regarding human rights? Or do they in fact remain as unactualised textual possibilities, traces and memories, which solicit a certain faith in the human rights form—as endlessly capable of transcending its present instantiations? And how might we provide an account of the process by which that possibility is both sustained and yet never quite made real?

I want to suggest that this redemptive potential of human rights is something which in Orford’s account has not itself always been there (or perhaps not to the same degree). Importantly, in some of her other work (which both precedes and postdates the material I am discussing here), she omits or refuses to foreground the irreducible alterity (and incipient responsiveness) of human rights and insists much more forcefully upon the exclusions and circumscriptions of the human rights form, particularly as it functions within the context of a global capitalist economy To foreshadow a theme that I shall return to in greater depth in the conclusion, this ‘other’ Orford develops an account of the remainders of human rights language, focused more upon what it leaves out than what it might yet include. In her chapter, ‘Globalization and the Right to Development’, for example, she writes of her concerns that human rights discourse, as a matter of form, simply is not ‘designed or equipped’ to grapple with

---

globalised economic power and that the right to development in particular ‘risk[s] reproducing the legitimacy of developmentalism as a set of institutional practices, a framework for understanding the world and as an alibi for exploitation’. 71 In her chapter, ‘Biopolitics and the Tragic Subject of Human Rights’, she goes so far as to suggest that ‘human rights law in its liberal manifestation offers limited means for countering the administration of human life represented by biopolitics, and indeed in some ways supports this mode of governmental. 72 And in her article, ‘Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice’, Orford powerfully suggests that the form of human rights law is structured according to a sacrificial logic which forestalls attempts at democratic accountability or economic redistribution. 73 In these (and other) moments, Orford proposes a reckoning with the politics of the legal form that conditions the possibilities of human rights. These critical, countervailing moments in Orford’s work stand in some tension with the deconstructive opening to possibility I have just been tracing and it is with them, and with the possibility of continuing dissonant political projects outside the form and language of human rights that they suggest, that I shall be concerned in the final section of this article. But, I first address the arguments of one final thinker who, in a sense like (my first) Orford, perceives in human rights the latent possibility of universalisation.

RECONSTRUCTING THE UNIVERSAL: MAKAU MUTUA’S CROSS-CULTURAL CRITIQUE OF HUMAN RIGHTS

Whilst the seminal critiques of the Declaration of the Rights of Man and Citizen made by Marx, Bentham and Burke do not share an ideological orientation, they nevertheless converge upon an important methodological gesture—a critique of the abstract metaphysical claim to encapsulate humanity (whether through insufferable Gallic presumption or bourgeois sleight of hand) and to render its essence timelessly in and as right. This critique of the false universalism of rights discourse remains a cardinal element of contemporary critical engagements with human rights, yet today it is those working in the fields of

colonial, post-colonial and critical race theory, as well as TWAIL,\(^\text{74}\) who seek most forcefully to expose the particularism, the historical entailments, and the self-interested nature, of the universal claims of human rights discourse. The work of the last thinker whom I want to discuss, the Kenyan-born and American-based human rights and international law scholar, Makau Mutua, falls within this category.

Mutua has spent decades working within the human rights movement in a range of different capacities—in the non-governmental organisation (NGO) sector and in the academy, in both the global South and the metropolitan centres of the North—and yet (or arguably by virtue of this fact) he occupies a liminal, interstitial position in the field of human rights—an ‘insider-outsider’ as he once described it.\(^\text{75}\) This conflicted positionality helps to generate a deeply personal, polemical, yet incisive critique both of the theory and of the practice of contemporary human rights.\(^\text{76}\) Here I focus upon Mutua’s 2002 book, *Human Rights: A Political and Cultural Critique*, which collects much of his critical work on human rights. I argue that whilst Mutua provides a cogent critique of the human rights enterprise that exposes both its Western ideological origins and its ongoing investment in a neo-colonialist mentality of saving the victims (and redeeming the savagery) of the global South,\(^\text{77}\) he ends up returning to the form of human rights—albeit a human rights suitably reconstructed so as to lead to a genuine, dialogic and cross-cultural universality. On one level, such an idealistic conclusion is hardly surprising. The approach Mutua adopts is, after all, one that insists upon the possibility (contra the universal pretensions of an irreducibly particular, Occidental, human rights) of a real, cross-cultural universality. Yet, just as with Kennedy’s critical approach to human rights, the logic and force of which invited a move beyond or outside the idiom of human rights only to fold back into it, Mutua is ultimately led back to human rights as the proper modality in which his cross-cultural universality is to be realised. Human rights are hence redeemed not via resort to pragmatism but rather by

---


\(^{76}\) Mutua (2008) x.

the search for (another, truer) universality. I will briefly sketch the context and general argument of the text before focusing on how Mutua’s investment in genuine universality produces a return to human rights.

If the political situation to which Orford’s *Reading Humanitarian Intervention* spoke most directly were the discussions in the 1990s around the ethics and limits of collective security, then the political context out of which Mutua’s *Human Rights: A Political and Cultural Critique* emerges are the debates, also in the last decade of the 20th century, over non-Western cultural challenges to the human rights paradigm (that is, in the restrictive and polarised terms of these debates, between universalism and cultural relativism). Prominent non-Western challenges came from Africa and East Asia, as well as from Islam. In 1990, the Organisation of the Islamic Conference’s ‘Cairo Declaration on Human Rights and Islam’ articulated an Islamic understanding of the proper normative basis and juridical structure of human rights, whilst in 1993 the Ministers of Asian States adopted the ‘Bangkok Declaration’ on human rights—a declaration which, whilst affirming the universality of the human rights regime, nevertheless insisted on the importance of principles of sovereign equality and non-intervention, and of valuing economic and social rights over CPR. Yet neither Declaration *per se* has assumed a central place in the Western human rights imaginary—rather, that place has been occupied by certain *synecdoches* of victimhood, barbarism and savagery which have themselves come to stand in for the presumed conflict between values. In terms of African perspectives on human rights (read: the compatibility or otherwise of traditional cultural practices with concepts of human dignity and sex equality), it has been the practice of ‘female circumcision’ (or, in more polemic figurations, ‘female genital mutilation’) that has conditioned the debate, whilst in terms of the so-called ‘Asian Values’ debate (read: the debate over whether authoritarian models of economic development can be permitted to trump the protection of CPR) the names of Lee Kuan Yew and Mahathir bin Mohamad have come to index the tension between (the Western) universal and the (Asian, cultural) particular. Savage autocrats and the mutilated bodies of women are the figural means through which we attempt to access the cultural particularity of human rights.

Of course it is this very framing of the debates that Mutua seeks to challenge and he does so by intervening in the debates in order to first refuse and then reframe their terms. Unlike two of the contributors to the debate on East Asian challenges to human rights, for example, who assert that ‘the challenge for

---

78 For a helpful exploration and critique of the terms of the debate between so-called universalists and so-called cultural relativists, see D Otto, ‘Rethinking the “Universality” of Human Rights Law’ 29 *Columbia Human Rights Law Review* (1997) 1.
East Asians is to locate themselves in the discourse of universality, which many observers see as originating in and as largely shaped by Western experience. Mutua proposes a more direct and thoroughgoing challenge to the historical constitution of Western perspectives as universal. The problem for him is not the capaciousness or inclusiveness of an *a priori* Western model of human rights protection, and whether supplicatory subaltern subjects can successfully insert themselves into universal history, but rather the (continuing, colonial) conditions under which the West could arrogate the universal to itself. It is ‘now imperative’, he writes, ‘that probing inquiries about the philosophical and political raison d’etre of the human rights regime...be encouraged and welcomed’. Such inquiries are bound to reveal that the human rights movement is ‘at its core, and in many of its details, liberal and European’ and that, as such, it is indebted to a certain model of liberal political (and market) democracy.

On Mutua’s account, the human rights movement seeks to export this model throughout the globe in pursuit of ‘the transformation of non-Western cultures by Western cultures...the remaking of non-Europeans into little dark, brown and yellow Europeans—in effect, dumb copies of the original’. This agenda of regime change is of course something the staunchest proponents of global political liberalism take care to disavow (‘The human rights movement is not post-ideological, although its mantra of universal morality and timeless righteousness attempts to mask its deeply political character’). Accordingly, Mutua’s work is dedicated to unmasking both the ‘cultural arrogance of the European West’ and its hidden political agenda:

The adoption in 1948 by the United Nations of the Universal Declaration of Human Rights—the foundational document of the human rights movement—sought to give universal legitimacy to a doctrine that is fundamentally Eurocentric in its construction. Sanctimonious to a fault, the Universal Declaration underscored its arrogance by proclaiming itself the ‘common standard of achievement for all peoples and nations’. The fact that half a century later human rights have become a central norm of global civilization does not vindicate their universality. It is rather a telling testament to the
Mutua indicts not only the parochial normative basis of the mainstream human rights script (Western political liberalism) and its incommensurability with non-Western societies but also the racial hierarchies that are re-performed by the work of Western-based international human rights NGOs, and their governmental sponsors, who carry forward the 19th century’s civilising mission of ‘[w]hite men... saving brown women from brown men’. Such a political project not only blithely continues historical injuries but fails to come to terms with emerging ones. ‘The current official human rights corpus does not have the analytical or normative tools—or even the desire and gumption—to unpack the complex oppressions which globalisation now wreaks on individuals and communities. Constructed primarily as the moral guardian of global capitalism and liberal internationalism,’ Mutua concludes, ‘the human rights corpus is simply unable to confront structurally and in a meaningful way the deep-seated imbalances of power and privilege which bedevil our world’.

Mutua writes towards the end of his book that it ‘represents an attempt by a scholar from the Third World to respond—at the level of critique—to the human rights corpus’, and it is clear that he understands himself as posing ‘deeply unsettling’ questions about the ideological origins and continuing practices of the movement. Yet what manner of critique is this, and just how unsettling does it ultimately prove to be? Whilst Mutua disclaims any attempt to provide a ‘blueprint for a competing... human rights corpus’, he nevertheless understands his critique of Eurocentric universalism as the necessary preface for just such a project. That is, for Mutua, it is imperative to come to terms with the historical injustices and exclusions of the present human rights regime and its false attribution of universalism to a very particular (and violent) regime of political liberalism before commencing the project of constructing an alternative and more genuine universalism:

What typology of political society should the human rights corpus sanction, if any?... What understanding of the human being in

85 Ibid 154.
88 Ibid 156.
89 Ibid 10.
90 Ibid 156.
relation to society should the corpus develop? ... I believe that the current human rights corpus has no answers to these questions. It does not have the tools to deal with these deeply embedded questions. That will only be possible, I believe, if we re-open debate on the entire normative scheme of the human rights corpus and reconstruct it from the ground up. The participation of all societies and cultural milieus must be required if the corpus is to claim genuine universality.

Mutua hastens to add that his project does not amount to a ‘wholesale rejection’ of human rights and that it is in fact an attempt to salvage from the imperial remnants of human rights the possibility of a ‘true universalization’. Whilst mounting a radical critique of the human rights regime, Mutua is both reconstructive in orientation and committed not only to the notion that a genuine universality is possible but also to the idea that the extant forms of the human rights regime, if cleansed of substantive Eurocentric bias, can yet still serve as the modality for a future universalism. He refers to this process as the ‘multiculturalization of the human rights corpus’ and in adopting this position he draws upon the influential work of the Islamic scholar of human rights and proponent of cross-cultural approaches to human rights, Abdullahi Ahmed An-Na’im. For the latter, the importance of a cross-cultural approach to human rights resides in the fact that the normative legitimacy of the international human rights regime depends upon individuals throughout the world, all of whom inevitably live within distinct yet internally contested cultures, believing the precepts of the human rights regime to be ‘sanctioned by their own cultural traditions’. For An-Na’im, this ‘broaden[ing] and deepen[ing of the] universal consensus on the formulation and implementation of human rights’ takes place first within a given cultural formation and then across and beyond it, through processes of cross-cultural dialogue and exchange which seek to inform those within one culture of the normative bases adduced for human rights in other cultures and, in the process, to alter and expand those understandings.

The intent is hence not to construct a minimalist ‘lowest common

91 Ibid xi.
92 Ibid 13, 3.
93 Ibid xi.
94 Ibid 4.
96 Ibid 21.
denominator’ settlement of human rights but rather, through the generative process of dialogue, to ‘expand the area and quality of agreement among the cultural traditions of the world… [in order to achieve the] universal cultural legitimacy of human rights’.97

Whilst Mutua for his part insists that ‘[t]here needs to be a realization that the movement is young and that its youth gives it an experimental status, not a final truth,’ and that any claim to the universal is situated, tendentious and interested, he is nevertheless clearly committed—through a deliberative procedural model based upon dialogue, mutual respect and inclusiveness—to the notion of reaching just such a final, genuine truth. ‘The idea’, he writes in a 2007 piece entitled ‘Change in the Human Rights Universe’, ‘is to construct a truly universal project’.98 Such an understanding carries him some conceptual distance from the more contingent, post-structural invocation of universalisation commended by Orford—in which any concrete claim to occupy the space of the universal is revealed to produce remainders which then return to haunt and displace it (in the direction of another universal which precisely never arrives). Rather, Mutua remains committed to just such an arrival. For him, locally and culturally delimited truths can indeed become universal: ‘the question is how one gets there’.99 We can see, then, that in spite of his damning critiques not just of the Eurocentrism but of the neo-colonialist ambitions of the present human rights regime, Mutua is ultimately led back to human rights as the means of realising true universality. Whilst he is attentive to the way in which European cultural and political traditions mark the content of human rights law and principles, what remains curiously unmarked (even unremarked) in his own account is the figure of cross-cultural dialogue itself and the forms through which this Habermasian process is sought to be effected. How, given the ongoing political and economic conditions to which Mutua is well alive—the massive imbalances in wealth and influence between the countries of the North and South, the colonising mandate of the international financial institutions and the architecture of global trade law and policy, the systematic deprivation of peoples of the global South and the evisceration of meaningful representative or democratic structures, the mediated spectacle of global suffering (especially in Africa)—would such a dialogue take place? What form would it take in order to alleviate, respond to, counteract and rise above the inevitable disjunctions created by the material conditions just mentioned?

97 Ibid.
How in such a situation might the deliberative conditions of an unforced consensus take place? And, more importantly, why is it assumed that human rights represents the best medium through which to commence such a dialogue, given its historic legacy and present investment in these conditions? In short, Mutua’s critique of human rights unearths a genealogy of imperialism but then proceeds to reinvest faith in the ability of human rights to take its leave of that history, without ever explaining how or why this is possible (or, indeed, normatively desirable).100

**BEYOND REDEMPTION: A CRITIQUE OF THE CRITIQUE OF HUMAN RIGHTS?**101

I have shown in the foregoing analysis that there is a tendency, operative in the work of the three thinkers I have discussed (although shared more widely) to critique human rights but then to propose (a new) human rights as the solution to the (same old) problems of human rights. These critical thinkers advance what seem like damning critiques of human rights only to recommend not its displacement in favour of some alternative political project or imaginary which might grapple better with those problems but rather a rethinking of human rights in order to draw out a latent (radical) possibility or to formulate a different kind of human rights: a pragmatic human rights, a deconstructed human rights, a cross-culturally dialogic and truly universal human rights. I have sought at the same time to sketch how the remedy of a critical rejuvenation of human rights (albeit formulated differently in each case) either fails to come to terms with the nature or the scale of the problem as they have conceived it, or

---

100 In this respect Mutua’s work is susceptible to a criticism made by BS Chimni of the first generation of TWAIL (that is, in the years immediately following decolonisation) which on the latter’s account ‘conceptualized the framework of international law as being neutral . . . [and akin to] an empty vessel which could be filled with any content . . . [an approach which ultimately] did not pay sufficient attention to the technology of international legal process’; see BS Chimni, ‘Towards a Radical Third World Approach to International Law’ 5(2) ICCLP Review (2002) 14, 17 (emphasis in original). For a more recent invocation of ‘dialogue’ as a means critically to reconstruct human rights from a ‘Third World’ and decolonial perspective, see JM Barreto, ‘Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto’ 3 Transnational Legal Theory (2012) 1.

101 I draw the title for this section from the title of an essay by Alberto Toscano: ‘Beyond Abstraction: Marx and the Critique of the Critique of Religion’ 18 Historical Materialism (2010) 3. In this article Toscano discusses the early Marx’s critique of the Young Hegelian atheistic critique of religion (in Bruno Bauer and Ludwig Feuerbach, for example) as being insufficiently attuned to the material conditions of religious thought and to ‘how,’ in Toscano’s words, ‘these conditions might themselves be transformed’ (ibid 10). I by no means claim to have made out such a critique here (namely a ‘critique’ in the dual sense of an analysis of the conditions of possibility of the redemptive mode of human rights critique and a more radical pushing beyond it) but have merely tried to sketch the beginning and the outlines of such a project.
else confronts or engenders different kinds of problems. With Kennedy we saw how the crucial limitations of the human rights movement were to be addressed not by an embrace of those other projects of social or economic justice but rather by a reconciliation of the human rights movement with its own, disavowed, governmental power: a disenchanted pragmatism supercharged with evocations of decisionistic responsibility. But despite addressing the ‘will to marginality’ and apolitical disingenuousness of human rights this pragmatic recuperation left unaddressed the ways in which human rights, coincident in crucial respects with neoliberal discourse, displaced more promising local and radical projects and functioned within the logic of global capitalism. With Orford we saw how the statist and militaristic capture of the narratives of humanitarian intervention and the ways in which this capture legitimated imperial and monetary interventions could be countered by another reading of human rights which emphasised an opening to alterity and the inscription within human rights discourse of a different, ethical relation to the other. But on the account given in Reading Humanitarian Intervention we are left to wonder how and under what conditions these new, properly other-regarding, narratives of human rights could take hold and establish themselves as a legible alternative to the dominant, bellicose narratives of intervention. And how effective could they be in countering the demands and seductions of the mainstream discourse? With Mutua we saw how a critique of the Eurocentric discourse of universality, which historically underpinned human rights, led him to advocate a more genuine universalism. This was to be achieved not via some other modality, breaking radically from that imperial history and the forms it has bequeathed to political modernity, but rather from within the discourse of human rights itself—by reconstructing it according to principles of proceduralism, dialogue and cross-cultural interaction. But this faith in the infinite perfectibility of the human rights form did not suggest how such a dialogue might take place under conditions structured by neo-colonial power relations or indeed whether the form of human rights might itself be marked in more profound ways by that very colonial history.

So far, I have simply sought to illustrate this tendency within contemporary critical approaches to human rights but I now want to spend some time discussing its ramifications and, more specifically, to begin to problematise it. But I should perhaps first venture some reasons as to why this redemptive return to human rights manifests itself in the work of each of the three thinkers (themselves emblematic of a particular methodological approach and representative of a range of

102 For an argument that human rights are inescapably European, see A Pagden, ‘Human Rights, Natural Rights, and Europe’s Imperial Legacy’ 31(2) Political Theory (2003) 171.
other scholars who make this same move). This is not so much a difficult as a speculative task given that the redemptive turn is not something explicitly thematised by Kennedy, Orford or Mutua. Nevertheless, in my view, there is both something about the investments of contemporary critique (as variously practised by the three) and about human rights itself as a legal-political formation (that is, the object of their critiques) which tend to produce, or at the very least to open the possibility for, the kind of redemptive reading I have traced in the preceding sections. To start with the question of contemporary modes of critique, and appreciating that each of these thinkers are subtly different, we might broadly capture their critical orientation towards human rights with the term genealogical. ‘It is a feature of our contemporary condition’, writes the political theorist David Owen helpfully, ‘that we are aware that our moral and political values, and our ways of thinking about them, are the product of a historical process that could, in various ways, have been different’. This genealogical (and hence anti-essentialist and anti-necessitarian) awareness of the historicity and contingency of human rights is shared by each of the thinkers I have addressed here. For them, human rights is a thoroughly contingent political artefact that lacks a unitary and essential meaning and hence a telos. Indeed, other meanings both exist within the dominant discourse of human rights and impinge upon it from outside, and it is because of this contingency and plurality of perspectives that human rights can be made to mean otherwise by recalling these historic meanings or by mobilising these other possibilities. We see this most explicitly in Orford’s attempt to destabilise the dominant meaning of intervention narratives and in Mutua’s attempt to reinvest the (neo-)colonial form of human rights with cross-cultural meaning and legitimacy. But we also sense it in Kennedy’s assertion at the beginning of The Dark

103 There are numerous contemporary examples of the kind of critically redemptive critique I have been analysing in this essay. In a recent and helpful survey of the field Mégret describes critical approaches to human rights as being ‘not a project of hostility to human rights . . . [but] standing in a productive dialectical tension with [them]’. See Mégret (2012) 5. In terms of more specific examples, the work of Costas Douzinas (both in The End of Human Rights and more recently in Human Rights and Empire: The Political Philosophy of Cosmopolitanism (Routledge, 2007) arguably falls into this category as it attempts to retrieve a more resistant and revolutionary understanding of human rights (via the philosophies of Emmanuel Levinas and Ernst Bloch) against the liberal occupation of the discourse. For a critique of this project, see S Motha & T Zartaloudis, ‘Law, Ethics and the Utopian End of Human Rights’ 12 Social & Legal Studies (2003) 243. Another example is the work of Shelley Wright, especially her International Human Rights, Decolonisation and Globalisation: Becoming Human (Routledge, 2001). For a critique of the problematic of re-founding human rights exemplified in this book, see S Pahuja, ‘This is the World: Have Faith’ 15 European Journal of International Law (2004) 381.


Sides of Virtue that ‘[w]hatever the history of human rights, we do not know its future’.\(^{106}\) Indeed, it is in this explicit linking of the past and the future that the affirmative dimension of this genealogical approach to human rights is brought to light.\(^{107}\) Simply, because the history of human rights (and hence its present composition) is neither necessary nor determined, its future remains open and subject to political contestation. I do not want to overstate the connection between the genealogical thinking of contingency and the turn to redemption (there is nothing necessary about it, I hasten to add). But critique in this genealogical mode (be it Nietzschean, Foucaultian, or some other kind of historicising or epistemologically constructivist theory) does concern itself with exposing the hidden margins of possibility within the present, unearthing the fractures and lines of flight disclosed by the seemingly impenetrable political forces of the day. It hence frequently results in attempts to retrieve from the existing political or legal mechanisms new (or forgotten) possibilities—and often, and this is of course something which is most explicit in Kennedy’s writings, to work pragmatically within the horizon of existent mechanisms in order to modify or renovate them, to work tactically with the tools at hand (especially when those tools, like human rights, are so powerful and hegemonically entrenched). So, to hazard a possible diagnosis of why the turn to redemption manifests itself in these three thinkers, we could say that they each partake of this (broadly conceived) genealogical impulse so dominant in contemporary critical engagements with law and politics and that one of the symptoms of this is an affirmative turning back (a redemption, as I have called it) to the tradition under critique in order to retrieve something new from the old, something other from the same.

But there is something to be said in addition about human rights as a particular object of critique, which solicits such types of redemptive engagement, and it is, rather obviously, its much-vaunted universality. The normative attraction to universality is, again, at its strongest in the work of both Orford and Mutua. The universal is figured very differently in each of their engagements. Orford’s universalist ethic is a more mobile, contingent and post-structural evocation of the universal—one which never quite arrives but which still operates as an impossible horizon, whereas Mutua’s universal is figured very much as a destination at which the global human rights community will arrive if it only adopts the requisite deliberative, dialogic, cross-culturally valid procedures. There is obviously a strong normative attraction to the possibility of

---


\(^{107}\) I explore the affirmative dimension of genealogy in the thought of Michel Foucault in *Foucault and the Politics of Rights* (unpublished book manuscript, copy on file with the author) and have found the work of DC Hoy, *Critical Resistance: From Poststructuralism to Post-Critique* (MIT Press, 2005) very helpful in doing so.
universalisation that human rights, even in its critically disabused forms, still holds out. (In terms of international law more broadly doubtless the clearest example of this is to be found in the work of Martti Koskenniemi, whose critique of the ‘kitsch’ universalism of European public international law leads him, via the work of Laclau and Mouffe, to recommend the contingent universality of a ‘culture of formalism’. 108) Both the generalisability of ‘right’ and the universality of the human serve to index this possibility and hence solicit the kind of redemptive engagement with human rights that I have traced here—more so, I would suggest, than the operative concepts of other legal or regulatory regimes (such as labour law or anti-discrimination legislation, for example) which are not so obviously oriented towards the universal.

So we might say that with critical genealogies of human rights there is a particular pull towards the redemptive which none of the thinkers I have discussed has quite managed to avoid. But having proposed some reasons as to why the redemptive logic plays out in the way that it does, I want, in the remainder of this article, to problematise it, along two lines: the limits of contingency and the politics of legal form. These are distinct yet implicated lines of analysis but I shall deal with them here in sequence. What I want to do in each case is to sketch the outlines of the analysis, to show how it might relate to the critiques I have discussed here, and to conclude by raising some questions for future scholarship in the area. In so doing I shall make use of the work of two international legal theorists—one of whom, Anne Orford, I have already discussed at length (albeit in a different guise). I chose the three thinkers with whom I engaged in the preceding sections of this article because they represented with some clarity and theoretical sophistication a certain form of redemptive engagement with human rights, albeit in methodologically diverse ways. I was at pains to say that the particular engagement I was emphasising could not be taken to represent the entirety of their political engagement with human rights or with international law. And indeed in Orford, as I will show, we find post-9/11, a counter-tendency which, in my view, is useful in problematising the redemptive return to human rights in her earlier work. 109


109 Another way to understand, or to mark, this difference between Orford, Kennedy and Mutua might be to do so historically—and here the salient dimension is in the response of each thinker to the millennial experience of war and terror, and what this means for human rights. Each of the central texts I have examined in the pages above were completed prior to the Iraq War of 2003 and the related intensification of the ‘Global War on Terror’. Orford’s response in work subsequent to this has arguably been to withdraw from engaging with human rights directly—whereas Mutua has continued to indicate faith in the universal character of human rights and Kennedy has continued...
The second international legal theorist I wish to consider is Susan Marks who, in recent writings, has begun to reflect upon the critical purchase of the concept of contingency in the context of contemporary analyses of politics. Taking her cue from Marx’s famous dictum in *The Eighteenth Brumaire of Louis Bonaparte*, namely that ‘[men] make their own history, but they do not make it just as they please in circumstances they choose for themselves; rather they make it in present circumstances, given and inherited’, Marks identifies a ‘problematic tendency’ in contemporary critical theory.110 This tendency, she argues, is simply to forget the second half of Marx’s equation—that the horizons for human history-making are not boundless but very much bounded:

To be clear at the outset, I believe it is quite right to hammer the point that history is a social product, not given but made ... [and that being made] it can be remade differently. This ... cardinal principle of all progressive thought is as urgent as it is endless. ... [H]owever, we may be undertaking this work in a way which causes us to neglect the equally important progressive point that possibilities are framed by circumstances. While current arrangements can be changed, change

the trajectory of his thought, and indeed arguably intensified it, in terms of marrying the discourses of human rights/humanitarianism and of warfare. See Mutua (2007) and Kennedy, *Of War and Law* (2006), for example. Arguably the inability of human rights discourses to restrain war, or—worse—their normative cooption for war and state terror (see T Kochi, ‘Terror in the Name of Human Rights’ *Melbourne Journal of International Law* (2006) 127), has led Orford amongst the three thinkers subsequently to revise her views. This question deserves greater discussion than I can provide in this note but let me briefly sketch the outlines of my position. Clearly Orford’s work on human rights and the narratives of humanitarian intervention is (of the three thinkers discussed here) most sensitively attuned to the ways in which different meanings of human rights are generated and deployed. The post-Iraq War context to which I am referring is one in which global relations were predominantly understood in terms of a civilisational conflict between terrorists who threatened ‘our’ liberal democratic, human rights-protective societies (to which preventive war and the restriction of rights was frequently the claimed solution). In this context, as many commentators observed at the time and since, the language of human rights was all too easily co-opted in the service of a bellicose liberal humanitarianism (of precisely the sort Orford had critiqued in *Reading Humanitarian Intervention*). It is noticeable that in published work subsequent to this point Orford not only refuses to make the critically redemptive argument that I have myself critiqued here but also engages much less with human rights and indeed relinquishes them as a frame of analysis. For example, in Orford’s most recent book on the Responsibility to Protect (R2P) concept under international law, references to human rights are conspicuous by their absence and she reads the R2P through histories of UN executive rule in the post-WWII developing world. We might compare this analytic approach to the orthodox one which would perceive in the R2P a greater global respect for human rights and attendant restriction of state sovereignty; cf. Orford (2011) and A Peters, ‘Humanity as the A and Ω of Sovereignty’ *European Journal of International Law* (2009) 513.

unfolds within a context that includes systematic constraints and pressures... [T]hings can be, and frequently are, contingent without being random, accidental or arbitrary.111

Marks, in homage to Roberto Unger, names the tendency she describes in the above passage ‘false contingency’. If, following Unger, himself following in the wake of critical thinkers from Marx to Foucault, ‘false necessity’ names the condition of turning the contingent into the supposedly necessary (to which everything from historical materialism to genealogy can serve as a useful critical antidote), then ‘false contingency’ names the reverse condition: thinking that things can too easily be made anew, simply because they are not necessary but rather have been socially and politically constructed. As the above quotation makes clear, the critical work of exposing the contingent nature of these institutions and practices is not strictly speaking false or misguided but rather something which, valuable as it is, needs to be conducted within certain limits and with an appreciation of the determining (often overwhelming) force of historical circumstances. The emphasis on the contingency of human rights and the availability of different futures within the discourse animates each of the different critical approaches I have discussed, and it inclines them towards critical approaches which seek within human rights the possibility of its being otherwise. But, following Marks’s critical corrective of ‘false contingency’, must we not also begin to question the limits of such an approach? Are any and all possible meanings of ‘the human’ available within contemporary human rights discourse or is it structured so as to exclude certain figures of the human, certain ways of being or of performing that humanity? Is there a limit to the contingency (and hence future possibilities) of human rights and, if so, where and how is the limit drawn (and redrawn)? And under what conditions might a critical diagnosis of the contingent actually contribute to the reformation of the discourse rather than its exposure? What are the relevant contexts, with their ‘systematic constraints and pressures’ (in Marks’s words), that go to condition the contingent, and how does this conditioning take place?

These contexts are doubtless multiple and overlapping, but here the most obvious (and one of the most pointed, in terms of human well-being) must surely be that of the expanse of neo-liberal capitalist relations across the globe. On many accounts, human rights as a political project seeks not to break with or contest the logic of capitalism but instead to ameliorate or to ‘civilise’ it.112


How to think about this particular political-economic ‘context’ in terms of the rationing of contingency, and of the ways in which what look like available possibilities become quickly foreclosed? Well, we might understand Cold War-era ideological contests between the proponents of CPR and the proponents of economic, social and cultural rights (ESCR) as a contest over the very meaning of the ‘human’ of human rights. Are human rights to be limited to a certain 19th-century understanding in which the subject’s liberty, property and security are the only qualities of human being worth protecting? Or are entitlements to health, welfare, education and so forth to be seen as an essential constituent of what it means to be, or to flourish, as a human? In answering this question we might well conclude that the historical updating of the human rights canon—from negative to positive rights, from CPR to ESCR—vindicates the contingent promise of human rights and its ability to generate new meanings from within the discourse. Human rights are now so much more than they once were; new content, new understandings of the human, have been incorporated into the evolving narrative. And yet the deeply unsatisfying record of socio-economic rights jurisprudence in terms of securing the minimal entitlements to government assistance that they purport to guarantee compels us to return to the set of questions raised by Marks’s analysis of ‘false contingency’. Why is it that the supposed openness of human rights discourse (to political contest over what attaches to human dignity, to historical updating in light of changed circumstances, to new figurations of the human and new ways of being) can so comfortably subsist with a very predictable and quite rigid outcome: the prioritised protection of a familiar set of rights functional to the operation of market exchange. Is it a failure of political will to translate the more fulsome (yet marginal) visions of human rights discourse into material reality? Or might that failure properly be comprehended as a function of human rights themselves? An alternative way to understand the relation is that the context of global capitalism sets a limit to the contingency of human rights such that any dissident vision of what it means to be human that seriously challenges the

113 Such a progressive history is frequently taken to dispose, for example, of the classic Marxist critique of the individualism of rights discourse. See, e.g., S Brown, ‘The Problem with Marx on Rights’ 2 Journal of Human Rights (2003) 517, but here the problem is actually not with Marx but with the curious temporality that assumes the historically limited (and hence anachronistic) nature of the latter’s critique of the Rights of Man as opposed to the transcendent ability of rights to change over time—all of which assumes that the Marxist critique has not itself migrated, developed, been transposed and translated and adapted, that there is no Marxist critique of embedded liberalism and the welfare state, and so forth.

114 The literature on the insufficiency of economic, social and cultural rights to respond adequately to problems caused by global capitalism is vast. For one illuminating example written in the South African context, see M Pieterse, ‘Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited’ 29 Human Rights Quarterly (2007) 796.
operation of market systems appears simply unintelligible or unrealisable. A human right collectively to control the means of production is simply unintelligible under these conditions: or, capital presents a material limit to the contingency of human rights. In other words, human rights might look like an open political discourse wherein different understandings of humanity can be inscribed, but its claimed openness is conditional upon any vision of humanity not seriously challenging reigning economic orthodoxy.

One related way of thinking this question is through the distinction between form and content. We could frame the matter thus: every attempt to redescribe the substantive human of human rights (as, for example, more ethically responsive or more multiculturally diverse) is mortgaged to the particular form of human right. One can have any human one likes as long as it can be a rights holder, which, it turns out, means a particular thing; form here sets the limits of intelligibility for substance. And, of course, the human rights form is still an abidingly liberal one: the human rights holder emerges as an abstract, formally equal juridical subject confronting a state which is envisioned simultaneously as the guarantor and most likely infringer of those rights. As such, human rights discourse is, as Orford has written, almost incapable in this form of comprehending the kinds of violence perpetrated today not by states or citizens under their control but, laterally, as it were, by the market itself. And it is precisely in a reflection on the capacity of human rights law to ‘counter the demands of the market’, that Orford has proposed an attention to the politics of the forms of law operative in the human rights context (by which she means, more broadly, the ‘pattern of relations and subject positions to which...laws attempt to give shape’). Her analysis concludes that human rights law replicates the particular form of law found in the adjudication of trade disputes under the World Trade Organisation—namely one of sacrifice in which collective democratic interests are subordinated to the dictates of the market and in which a particular form of subject is configured and produced, namely a ‘responsible subject of capitalist economics’. Her analysis points to the ways in which the form of human rights law not only ‘reinforces’ market

115 Marks’s essay on ‘false contingency’ is written on behalf of, if not Marxism per se, nevertheless an ‘anti-anti-Marxism’; see Marks (2009) 21. It is surely from within the Marxist tradition that the problem of juridical ‘form’ has been problematised most thoroughly—from Marx through Pashukanis and beyond.


118 Ibid 180.

logic but also actually ‘intensifies [the] subjection’ it wreaks. 120 “The forms of law’, she reminds us, ‘are not apolitical and neutral’ but rather work to inscribe particular possibilities and to foreclose others. 121 From a vantage point internal to the discourse of human rights and committed to the leveraging of its immanent possibilities this is doubtless a disheartening conclusion, yet I want to conclude on a countervailing note of optimism. Two notes, in fact. Orford again:

I want to think about whether economic law and human rights law somehow are complicit in creating a sense of despair, a sense that there are no political alternatives available, that we really have in some meaningful way reached that much-vaunted end of history. In trying to see whether there is some deep complicity between the forms of law, I want also to try to hold on to the idea that there is nonetheless something that escapes those forms of law, which might lead critique somewhere. 122

The ‘somewhere’ to which Orford’s critical instincts are led is a space (or, rather, spaces) beyond the form of human rights. I have not attempted to delineate these spaces in any detail here but clearly, in order to be properly incongruent to the official discourse of human rights, such spaces must refuse the language of human rights. That does not mean they are themselves free of compromise—they are political, and hence impure and messy spaces. Orford, once more:

[I]t was this figure of the other woman who haunted our discussions at the Gender and Transitional Justice workshop . . . . This other, who puts us into question, is the victim who refuses to be saved, the subject who will not speak her suffering in the time and place and languages offered to her by the mechanisms of transitional justice. 123

Here she invokes a figure who returns to haunt the exclusionary certitude of official human rights narratives but who refuses to speak its language and in so doing to reform it or make it more inclusive. This figure evokes a modality of critique that does not approach human rights as a text to be rewritten but as a language not to be spoken. This type of critique might well acknowledge the contingency and the possible margins of change within human rights but refuse

120 Ibid 210, 211.
121 Ibid 180.
122 Ibid 187.
all the same to orientate its efforts towards that end, worrying that the form of human rights works to circumscribe and to recuperate those efforts. This type of critique might not want to relinquish universality, or universalisation, as an orienting principle yet still conclude human rights is not the only or the best means to attain it. This type of critique might conclude that the investment in making human rights mean something different takes place at the imaginative cost of creating new forms and new political vehicles and affiliations for the realisation of that universality, or justice or freedom however conceived. The possibilities are multiple and perhaps the gesture of refusing human rights as the starting (and critically redemptive end) point of such critical ventures actually adds to, rather than detracts from, those possibilities.