Disordering International Law

By Michelle Staggs Kelsall*

Abstract

This article examines critical approaches to liberal internationalism in international law. It argues that despite ongoing disavowals of the liberal international legal order, most critical international lawyers are yet to let go of liberal vocabularies in order to re-imagine how order might be constituted anew. The article proposes a disordering critique of international law. Disordering international law comprises a process of reflective discernment. Through this process, norms, conventions and principles are determined with reference to a multiplicity of spatial and temporal orders and reframe any understanding of how legal order is constituted internationally. Drawing from the concept of non-duality proposed by Ratna Kapur and the writings of Justice Cançado Trindade, it then conceptualizes a disordering sensibility. Scholars embarking on international legal dis-ordering would ask: how do I understand the arrangement or disposition of people or things in relation to each other? How is 'order' determined as a result? What sequence, pattern or method am I imposing, and how does that affect any characterisation of 'legal' ordering? Whose knowledge is included, whose knowledge is excluded, and why? The analysis, however, does not stop there. The further and final questions to ask are: how does this change any conception of legal ordering that remains central to the practice of international law? And how might we begin to conceptualise that order and practice differently? The return to practice provides a path toward change, which the article argues is urgently needed. I commence some answers to these questions and hope to open a space for further dis-ordering, premised on a turning away from dominant liberal frames.

Key words: international legal order – liberalism – pluralism – critical approaches to international law

1. Critique and the Liberal International Legal Order

Since the start of the millennium, critical international law scholars have evinced a deep scepticism toward liberal internationalism and the neoliberal project that has intensified in its wake.[1] Although this has resulted in a sustained critique of liberalism, most critical

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[1]Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' 98 *Michigan Law Review* (2000) 1996; Gathii, 'The Neoliberal Turn in Regional Trade Agreements' 86 Washington Law Review (2011) 421; Simpson, 'Two Liberalisms' 12 *European Journal of International Law* (*EJIL*) (2001) 537; Koskenniemi, *The Politics of International*

international law scholars have not fully let go of the liberal international legal order, despite ongoing disavowals of the same.[2]

In this article, I analyse how international law scholars understand the liberal international legal order and advance critiques towards it. I then propose the concept of international legal *dis*-ordering. I argue that international legal disordering provides an avenue of inquiry beyond current critiques of the neoliberal project that moves the goal of critique beyond challenging convention, toward changing it. This seems imperative in light of recent attacks upon the liberal international order and the resort to international legality to respond to them.[3]

Critical international law scholarship occupies a vast terrain, so before proceeding further, it is important to define the forms of critique at which my analysis is directed. In this contribution, I consider critique in three registers: namely, the critique of international legal institutions; the critique of international legal subjects; and finally, the critique of international legal ontology. The critique of international legal institutions asserts that the liberal international legal order is unequal, unfair and unjust and seeks to expose the practices within that order that result in inequality, unfairness and injustice.[4] The critique of international legal subjects is levelled primarily at the state and the geopolitics of legal ordering, including how this affects the very 'international' character of international law.[5] The critique of international legal ontology asserts that the nature of reality on which the liberal international legal order is based is false. International law requires an ontological overhaul, in which the primacy of the state-making-international law narrative is dismantled and the confluence between international law, state and economic development exposed.[6]

Law (2011); Orford, 'Chapter 2: Situating the Turn to History in International Law' in *International Law and the Politics of History* (2021) 18-68.

[2]See *contra* Orford, 'Regional Orders, Geopolitics, and the Future of International Law' 74 *Current Legal Problems* (2021) 149, 151-2.

[3]See here, as an example: United Kingdom Foreign, Commonwealth and Development Office, 'UK leads call for ICC to investigate Russia's war crimes', 2 March 2022, available at https://www.gov.uk/government/news/uk-leads-call-for-icc-to-investigate-russias-war-crimes (Comprising the largest State Party referral in the history of the International Criminal Court). Note further: Romanova, 'Russia's Neo-revisionist Challenge to the Liberal International Order' 53 *Italian Journal of International Affairs* (2018) 76.

[4]See as examples, *infra*, notes 56-57 below.

[5]Roberts, *Is International Law International?* (2017); A. Roberts, P.B. Stephan, P. Verdier and M. Versteeg, *Comparative International Law* (2018).

[6]Eslava and Pahuja, 'The State and International Law: A Reading from the Global South' 11 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* (2020) 118. Note here, Parfit, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019).

I argue that none of these critiques depart fully from the liberal description of the international legal order. This is because although scholars adeptly expose the confines of that order and its focus on the state, they largely avoid detailing where they stand in relation to jettisoning it altogether. Instead, they largely rely upon a return to liberal vocabularies or liberal protocols in order to make sense of the world international law governs and conceptualize paths of change.

A focus on international legal disordering departs from liberal vocabularies in which institutions and state practice; the rule of law; and the universal, rational subject remain central to critique. International legal disordering is understood here as being a process of reflective discernment in which norms, conventions and principles determined with reference to a multiplicity of spatial and temporal orders reframe any understanding of international law.

Generating disorder does not solely comprise interrogating the manner in which international legal order is constituted. Rather, the aim is to interrogate the meaning behind legal ordering itself and to think beyond an indeterminacy critique. Scholars embarking on international legal dis-ordering would therefore ask: how do I understand the arrangement or disposition of people or things in relation to each other? How is 'order' determined as a result? What sequence, pattern or method am I imposing, and how does that affect any characterisation of 'legal' ordering? Whose knowledge is included, whose knowledge is excluded, and why? Up to this point, the analysis seems in keeping with critical legal scholarship to date. The analysis does not, however, stop there. The further and final questions to ask are: how does this change any conception of legal ordering that remains central to the practice of international law? And how might we begin to conceptualise that order and practice differently? This return to practice provides a path toward change, which I argue is urgently needed in the current international legal system. In this article I commence some answers to these questions and hope to open a space for further dis-ordering, premised on a turning away from dominant liberal frames.

A disordering sensibility attempts to break down the binary relationships central to liberal understandings of legal order (e.g. self/other; public/private; rights/obligations; domestic/international; masculine/feminine), drawing instead from what Ratna Kapur terms non-dualist subjectivity.[7] Non-dualist subjectivity is derived from the concept of *Advaita* (or: not two) in the work of Adi Śaṅkara, an 8th century philosopher. It centres on the unity and

[7]Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018), 4.

continuity of concepts and beings.[8] It rejects the idea of an either/or binary, instead pointing to the inseparability of these concepts, acknowledging 'that which is excluded is crucial to the formation of what is included'.[9] For Kapur, the logic of non-dualism can be applied to how the liberal tradition understands time, subjectivity and freedom.

Kapur rejects the unapologetically 'schematic, unilinear, progressive, Eurocentric history' of time understood in the liberal tradition.[10] Additionally, the liberal subject identified with 'the body, mind, intellect, memory, emotions, material objects, discourses and social labels' is conceived as one, a non-fragmented whole, rather than with reference to any individual label defining her.[11] For international law, this requires acknowledging the non-state within the state and that which preceded it (e.g. Indigenous understandings of the land now known as 'Australia', in addition to Australia).[12] Finally, freedom is not acquired through the dispensation of rights. Rather, it is focussed on a deeper inquiry that has the potential to bring about insights into the distinctions being made between 'self' and 'other'.[13] Although Kapur's analysis is applied to human rights, I argue that the concept of non-dualism has critical purchase for critiques of international law.[14] This is because it provides the opportunity for jurisgenerative pathways to emerge that move lawyers beyond the liberal framing of the international legal order.

To understand knowledge frames by adopting a disordering sensibility is not to succumb to chaos and illiberalism. Rather, it is to accept the limitations of Western legal knowledge understood through the liberal tradition and to begin the more challenging task of imagining a world in which that knowledge is not paramount. As any new form of ordering cannot yet amount to a unitary legal order, I argue that this endeavour is best framed for the time being as international law, disordered. In so doing, I resist the desire to frame any new, alternative grand narrative for international law or to claim to identify a New World Order.[15] Yet nor is a disordering sensibility merely a technical pursuit. Rather, international law, disordered, begins from the humble place of learning from non-liberal understandings of law

[8] *Ibid.*
[9] See here Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011), 32 (noting as 'law cuts into the world to create categories, it holds both possibilities together').
[10] Kapur, *supra*, note 7, at 218.
[11] Kapur, *supra*, note 7, at 221.
[12] Parfitt, *supra*, note 6, at 411-446.
[13] Kapur, *supra*, note 7, at 228-30.
[14] See also Pahuja, *supra*, note 9.
[15] Slaughter, *A New World Order* (2005). Note also *contra*: Chimni, *International Law and World Order* (2nd edn, 2017).

and the international. It does so, however, in order to begin a dialogue about how that knowledge might yet be understood as a *source* of international law, *in its own right* and *on its own terms*. [16]

International law, disordered, can be defined as: an attempt to integrate non-liberal and largely non-Western norms, conventions and principles, determined with reference to a multiplicity of spatial orders existing over time, into international law. This includes the norms, conventions and principles of communities that pre-dated international law and have thus far, remained largely outside any characterization of international legal order. The resulting critique 'arrests the epistemic freefall' caused by departing from liberalism by engaging with knowledge paradigms and metaphysical locations that, while distinct from 'traditional' understandings of law and the international, have been and were always there.[17] The argument proposed in this article is in favour of deepening our inquiry into these knowledges and hopes to provide a springboard for doing so.

This article proceeds as follows. Part 2 details the disordering sensibility, drawing from Kapur's analysis of non-dualist subjectivity and explaining its implications for international law. I will explain how a non-dualist subjectivity can begin to re-frame time, legal subjectivity and freedom in international law. In Part 3, I will draw from the writings of B.S. Chimni and Justice Cançado Trindade to show how a non-dualist concept of time may yet be applied to the critique of colonial temporality in international institutions. Specifically, I will show how Justice Trindade's conceptualisation of *opinio juris communis* can respond to Kapur's call to refrain from seeing time as unilinear. Drawing further from the principle of non-consent in international law which Justice Trindade also considers, I will show how this can be applied to break with the 'felicitous fiction' of standardised time in international law.[18]

In Part 4, drawing upon Anne Orford's recent work with regard to regional orders and Congyan Cai's characterisation of China as a new great power, I will consider how Chinese non-liberal understandings of 'rule by law' ('fazhi' (法 制)) and 'rule by man' ('renzhi'人治) might yet inform our understanding of how international law operates. I will consider whether

[16]Parfitt, *supra*, note 6; Gathii, 'Writing Race and Identity in a Global Context; What CRT and TWAIL Can Learn from Each Other' 67 *UCLA Law Review* (2021) 1610, 1632-37; and Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' 14 *Oregon Review of International Law* (2012) 131.
[17]Kapur, *supra* note 7, 234.
[18]Higgins, 'Time and the Law: International Perspectives on an Old Problem' 46 *International and Comparative Law Quarterly* (1997) 501. See also: Gordon, 'Imperial Standard Time' 29 *EJIL* (2018) 1197.

this provides for a novel appraisal of the constitution of administrative order and populist sentiment informing the practice of international law in our contemporary moment.

Finally, in Part 5, drawing upon the findings from Parts 3 and 4, I shall then illustrate how a disordering sensibility can build upon the imaginative possibilities of critique by further expanding international law's ontology. In Part 6, I shall conclude my argument by situating the significance of these findings in the context of the current 'war on the liberal order' and providing a final analysis of how non-liberal understandings of time, space and freedom may yet form part of our conceptualisation of the norms, conventions and principles that comprise international law.[19]

2. International Legal Disordering

A *The Concept of Legal Ordering*

International legal order remains fundamental to contemporary understandings of international law. Despite 'normative attacks on statism and ongoing empirical claims that states are no longer the primary international law-makers', statehood remains central to most international lawyers' understanding of how (and whom) international law governs.[20] The international legal order comprises an integrated hierarchy of norms, conventions and principles determined with reference to the spatial order of the state. The most obvious example of this remains international lawyers' ongoing allegiance to Article 38(1) of the Statute of the International Court of Justice to determine the sources of international law – itself a placeholder for states' consent to be governed by these sources over the past century.[21]

For over two decades, international law scholars critiquing the international legal order have largely centered on its framing as a liberal order.[22] The term 'liberal' here refers to an

[19]Barber, Foy and Barker, 'Vladmir Putin says liberalism has "become obsolete"' 28 June 2019, *Financial Times*, available at: https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36. Francis Fukuyama, 'Putin's war on the liberal order' 4 March 2022, *Financial Times*, available at: https://www.ft.com/content/d0331b51-5d0e-4132-9f97-c3f41c7d75b3. See also Schake, 'Putin Accidentally Revitalised the West's Liberal Order', 1 March 2022, *The Atlantic*, available online at: https://www.theatlantic.com/international/archive/2022/02/vladimir-putin-ukraine-invasion-liberal-order/622950/. (accessed 10 March 2022).
[20]Orford, *supra* note 2, at 150.
[21]Article 38(1), Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993; Article 38(1), Statute of the Permanent Court of International Justice, 16 December 1920, 6 LNTS 390.
[22]Koskenniemi, *From Apology to Utopia: The Structure of the Legal Argument* (3rd edn, 2005) 129-30. See more recently, Orford 'The Sir Elihu Lauterpacht International Law Lecture 2019: The Crisis of Liberal Internationalism and the Future of International Law' 38 *Australian Yearbook of International Law* (2020) 3, 7-13.

'inductive protocol' in which liberal theoretical structures are distilled from a canon of exemplary writings, enabling scholars to engage in explanatory analyses of the field's own constitution. Although heterodox in their approach, critiques have largely been framed in terms of the boundary work of delineating what counts as 'law' (and who gets to decide).[23] Liberalism in this guise has been understood as a governance project endorsing the foundational principles of rationality, emancipation and progress, drawing primarily from the 'Grotian' tradition in international legal thought and the Treaty of Westphalia. More recently, the liberal order has been embodied in writings of self-described liberal internationalists, arguing that international law supports liberal freedoms including equality, democracy and the rule of law.[24]

By operating as a liberal international legal order, critics argue, international law masks its sanctioning of hegemony,[25] its colonial predilections,[26] its allegiance to capitalism,[27] and its aversion toward gender non-conformity.[28] Allegiance to capital further gives rise to a neoliberal project, in which tacit acceptance of juridical sovereignty enables those engaged in international legal argument to sideline or justify the power at play within that order and its support of a *laissez faire* market economy.[29] This is achieved either by appealing to the formal equality of states or the 'universal' liberal values encompassed in appeals to justice.[30]

Despite ongoing claims that the liberal international legal order perpetuates the very injustices international law claims to alleviate, far less attention is paid to how that legal order might yet move beyond its current neoliberal confines. In keeping with a tradition of Critical

[23]Bell, 'What is Liberalism?' 43 *Political Theory* (2014) 682, 686.
[24]Notably, Slaughter, 'International Law in a World of Liberal States' 6 EJIL (1995) 503. See also: Ginsberg, 'Authoritarian International Law?' 114 *American Journal of International Law ('AJIL')* (2020) 221.
[25] Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16 EJIL (2005) 369; Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).
[26]Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); Chimni, 'Third World Approaches to International Law: A Manifesto' 8 International Community Law Review (2006) 3; Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011); Eslava, Fakhri and Nesiah, *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017).
[27]Chimni, *supra*, note 15; Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020); Fakhri, *Sugar and the Making of International Trade Law* (2014).
[28]D. Otto (ed), *Queering International Law: Possibilities, Alliances*, *Complicities, Risks* (2018).
[29]Brabazon (ed) *Neoliberal Legality: Understanding the role of Law in the Neoliberal Project* (2019); Özsu, 'Neoliberalism and the new international economic order: A history of 'contemporary legal thought'' in J. Desautels-Stein and C.L. Tomlins (eds) *Searching for Contemporary Legal Thought* (2017).
[30]Simpson, *supra*, note 25; Koskenniemi, *supra*, note 1.

Legal Studies, the primary goal of critique remains to expose what is wrong or lacking in the current legal order, rather than to suggest viable alternatives.[31] Additionally, while the 'invisible college' of international lawyers has more recently been re-inscribed as a divisible college, legal order remains framed by liberal notions of time, subjectivity and freedom.[32] Law's conceptual horizon remains tied to 'widely shared historical associates' in which international law's 'shared imagination' is utilised in order to build critique.[33] Yet international lawyers may yet need to confront the reality that any 'shared imagination' of a liberal international legal order was never really shared, and the subsequent imaginaries we actually share might as much be antagonistic as they are consent-based.

B *The concept of legal disordering*

I argue that a departure from this form of critique can be achieved by adopting a disordering sensibility. Dis-ordering here refers to an analytical frame in which binary modes of thinking (rights/obligations; public/private; religious/secular; North/South) are reconsidered by adopting a non-dualist perspective that collapses the either/or nature of these distinctions.[34] Kapur draws upon the work of Śaṅkara to apply non-dualism to re-thinking how time, freedom and subjectivity are understood in relation to human rights. This article draws upon Kapur's analysis to apply these concepts to international law and the international legal order.

1. Time

In the liberal tradition, time arranges or disposes of people or things in relation to each other through an 'unapologetic schematization of unilinear, progressive, teleological and Eurocentric history'.[35] Order in this history is based upon a hierarchical classification of the human, where cultural traits and traditions are assessed and allocated merit primarily in accordance with a liberal index of material and technical progress.[36] While critical international legal scholarship has to date adeptly exposed these classifications, much less has been written about how time

[31]Blalock, 'Neoliberalism and the Crisis of Legal Theory' 77 *Law and Contemporary Problems* (2014) 71, at 72.
[32]Roberts, *supra* note 5, at xii (citing Schachter, 'The Invisible College of International Lawyers' 72 *Northwestern University Law Review* (1977) 217).
[33]Koskenniemi, 'A History of International Law Histories' in B. Fassbender and A. Peters (eds) in *The Oxford Handbook of the History of International Law* (2012), 945.
[34]See here in particular Otto, *supra*, note 29 and Pahuja, *supra*, note 9.
[35]Kapur, *supra*, note 7, at 218.
[36]*Ibid.*

should be reimagined in order to depart from these indices.[37] If history does not solely consist of a linear movement of time, then the intersection between the imaginary liberal line of progress and other forms of historical understanding needs to be deeply interrogated.

Non-dualism suggests foregrounding that which is continuous and present, as opposed to that which is living and dying.[38] This requires a slow, deliberative reading of international law's temporal rationale and systematic reflection upon its underlying temporal purpose and rival temporalities.[39] I argue that non-dualism suggests foregrounding fundamental and common interests of humanity or what Judge Trindade has termed *opinio juris communis* – representing a 'universal conscience in order to inject progressive content into the international legal order'.[40] Unlike Judge Trindade, however, I argue that this concept cannot be based primarily in a Christian understanding of the same and tied to liberal order. I argue instead that the term 'conscience' here should be based on its Latin derivative *con-scientia*, meaning 'a joint knowledge of something, a knowing of a thing together with another person; consciousness, knowledge.'[41] Building upon the method of deliberative reason recently put forward by Chimni and drawing from the work of Kapur, I will expand further on how *opinio juris communis* can be utilised in critique, re-thinking both consent in international law and conceptualisations of time informing international legal *praxis*.

2. Subjectivity

The liberal subject focuses on the individual and by extension, the unitary form of the state. The state is a bounded entity with fixed markers (territory, population, government) but it is highly dependent for its existence on the recognition of other states. Sovereign recognition asks that international lawyers submit to the normative coercions of subject formation and the constitutive relationship which relies on 'othering' certain forms of legal personality (broadly termed 'non-state actors'). This othering then enables scholars to disavow the interdependency of peoples and beings and the interrelated and integrated roles embodied in different forms of legal personality.

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[37]Note however, Gordon, *supra* note 18 and Parfitt, *supra* note 6. See also: Rao, *Out of Time: The Queer Politics of Post-coloniality* (2020).
[38]Kapur, *supra* note 7, at 218-9.
[39]Gordon (EJIL), *supra*, note 19.
[40]Chimni, 'Customary International Law: A Third World Perspective' 112 *American Journal of International Law* 1, at 46.
[41]Online Etymology Dictionary, 'Conscience' available at: www.etymonline.com/word/conscience. See also: Stanford Encyclopedia of Philosophy, 'Conscience' available at: https://plato.stanford.edu/entries/conscience/.

While international legal critique has provided ample ground for re-thinking the state and its others, far less work has been undertaken to move beyond liberal categories and understandings of the formation of international legal personality.[42] In this article, I look specifically at the rise of China, characterised as a 'new great power', and Chinese courts' use of international law in legitimating this rise. Drawing from Chimni's method of deliberative reason and Kapur's understanding of non-dualist subjectivity, I will argue that the uses of international law by the Chinese courts can be understood in the context of a genealogy of sovereignty in China.[43] This situates international law within Chinese visions of a new world order rooted in the concepts of common destiny, harmony and all under Heaven (tianxia 天下), rather than with reference to the Westphalian order. Breaking with the teleology of the liberal order that places a primacy on the state, I further explore how Chinese conceptualisations of 'rule by law' and 'rule by man' might further enhance our understanding the role of law in the context of China's rise. I will expand further on this in my discussion of a disordering critique of international legal subjectivity in Part 4.

3. Freedom

Kapur argues that liberal freedom situates the individual at the centre of freedom projects and that freedom lies in the respectful and peaceful coexistence of a multitude of such individuals. However, according to Kapur, the liberal understanding of freedom goes much deeper, in that freedom is an external existential end-goal of governance: it exists as a particular embodiment or state of being which overlooks the way in which everyday life is lived. A non-dualist perspective, on the other hand, is not confined to the material embodiment of freedom through the acquisition of rights to, and freedom from, particular entitlements.[44]

From an international legal perspective, emancipation is as much freedom *from* governance as it is freedom *within* governmentality. The argument here, however, is not the same as that put by liberal theorists, like Isaiah Berlin.[45] 'Freedom' here is understood not only in liberal terms but further, in terms which would enable us to 'unlearn European systems of privilege'. [46] As Diane Otto has argued, 'repositioning the 'Other' of Europe means

[42]See here, however: A. Orford (ed) *International Law and Its Others* (2009).
[43]Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (2019).
[44]Kapur, note 7, at 228-9.
[45]Berlin, *Two Concepts of Liberty* (1958).
[46] Otto, 'Subalternity and International Law: The Problems of Global Community and the incommensurability of Difference' 5 *Social and Legal Studies* (1996) 337, at 358.

interrogating our individual participation in its construction'.[47] International law's ontological overhaul therefore needs to be mindful of that which should be free from law when looking to safeguard freedom within it. I will expand further on this in my discussion of a disordering critique of international legal ontology in Part 5.

3 Disordering Time

A. Beyond international law as a discipline of crisis

International law is both a discipline of crisis and ensconced in crises.[48] The interrelated financial, climate, food security, and refugee crises of recent years have given 'a new urgency to questions about the capacity of international law and institutions to respond to crises' and illuminated 'their potential role in contributing' toward them.[49] This has been exacerbated by the recent global pandemic, already giving rise to claims of vaccine apartheid.[50]

Despite being organised around crises, 'international law in its liberal guise' continues to be portrayed by many international lawyers as 'on the right side of history'.[51] The post-1989 'end of history' and the internationalism which has since flourished remains organised around the idea of progress through a liberal international legal order. This has been built and maintained in the modern period on the Charter of the United Nations – itself establishing a collective security regime based upon the liberal virtues of tolerance and non-interference, institutionalising an international legal system committed to 'promote…better standards of life in larger freedom'.[52]

Nevertheless, the crisis-ridden nature of the international legal order and attempts to invoke liberal triumphalism as its antidote have been exposed as both ahistorical and deeply flawed. In this regard, several critical international law scholars re-cast the analytical frame of legal order through radical historical critique, exposing the racialised and gendered terms upon

[47] *Ibid.*
[48] Charlesworth, 'International Law: a discipline of crisis' 65 *Modern Law Review* 377; Orford, 'The Crisis of Liberal Internationalism and the Future of International Law' 38 Australian Yearbook of International Law (2020) 3; Stark (ed) *International Law and Its Discontents: Confronting Crises* (2015); and M. Mbenge and J. D'Aspremont (eds) *Crisis Narratives in International Law* (2020).
[49] Orford, *supra* note 2, 7.
[50] Joseph and Dore, 'Vaccine Apartheid? A Human Rights Analysis of Covid-19 Vaccine Inequity' (30 June 2021) available at SSRN: http://dx.doi.org/10.2139/ssrn.3876848. (accessed 10 March 2022). See also: Mubangizi, 'Poor lives matter: Covid-19 and the plight of vulnerable groups with specific reference to poverty and inequality in South Africa' 65 Journal of African Law (2021) 237.
[51] Orford, *International Law and the Politics of History* (2021), 44.
[52] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, preamble, §1.

which liberal order is constituted.[53] Writing in the tradition of Third World Approaches to International Law (TWAIL) or as friends of TWAIL, this form of critique has simultaneously de-centred international law and situated it within histories of anticolonial solidarity and resistance.[54] In so doing, scholars push against the barriers determined by a liberal conception of time by exposing statehood as a relatively new temporal construct embedded in a much deeper world history of human (and non-human) existence.

Central to many of these arguments remains exposing how international law, in its fragmented state as international investment law,[55] international human rights law,[56] international environmental law[57] and international criminal law[58] has assumed 'universalist' timeless language. This has been undertaken while at the same time championing neoliberal

[53]On the historical turn see: Craven, Fitzmaurice and Vogiatzi (eds) *Time, History and International Law* (2007). On radical historical critique see *infra*, notes 27-28.

[54]TWAIL scholarship is itself, voluminous and can be split into two temporal periods or movements known as TWAIL I (loosely tied to the period of de-colonisation in the post-World War II period until 1989) and TWAIL II (generally associated with the period after 1989 and the so-called end of the Cold War). On TWAIL I see as classic examples: Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' 8 *Howard Law Journal* (1962) 95; Anand, 'Role of the 'New' Asian-African Countries in the Present International Legal Order' 56 *AJIL* (1962) 383; Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (1983) Bedjaoui, *Towards a New International Economic Order* (1979). On TWAIL II see supra, notes 20-21 and further: Rajagopal, *International Law from Below* (2003); Mutua, *Human Rights: A Political Cultural Critique* (2002); and Eslava, Fakhri and Nesiah, *supra*, at note 26. See also: Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network and a Tentative Bibliography 3 *Trade, Law and Development* (2011) 26.

[55]Sornarajah, *The International Law on Foreign Investment* (3rd edn, 2010); Linarelli, Salomon and Sornarajah *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018); Greenman, 'Protecting Foreign Investments n Revolution and Civil War: Critiquing the Contemporary Arbitral Practice' 9 *London Review of International Law* 293.

[56]Mutua, 'Savages, victims and saviors: the metaphor of human rights' (2001) 42 *Harvard Journal of International Law* 201; Okafor and Agbakwa, 'Re-Imagining International Human Rights Education in Our Time: Beyond Three Constructive Orthodoxies' 14 *Leiden Journal of International Law (LJIL)* (2001) 563; Okafor, 'Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective' 43 *Osgoode Hall Law Journal* (2005) 171; Okafor, 'Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy' 33 *Windsor Yearbook of Access to Justice* (2016) 1; Nesiah, 'Feminism as counter-terrorism: The seduction of power' in M.L. Sattherthwaite and J.C. Huckerby (eds) *Gender, National Security and Counter-Terrorism: Human Rights Perspectives* (2013), 137; Eslava, Fakhri and Nesiah, *supra* note 27.

[57]Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013); Rose, Wewerinke-Singh and Miranda 'Primal Scene to Anthropocene: Narrative and Myth in International Environmental Law' 66 *Netherlands International Law Review* (2019) 441 Gonzalez, 'Climate Lawyers as Movement Lawyers (and Vice Versa)' 115 *American Society of International Law Annual Proceedings* (2022) 207.

[58]Mutua, 'What is the Future of Transitional Justice?' 9 *International Journal of Transitional Justice* (2015) 1 and other authors in that volume; Krever, 'International Criminal Law: An Ideology Critique' 26 (2013) *LJIL* 701; Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court 13 *Journal of International Criminal Justice* 113; Schwöbel-Patel, 'The 'Ideal' Victim in International Criminal Law' 29 *EJIL* (2018) 3.

notions of progress, freedom and the rule of law operating in real time and through international institutions.

Here, the arguments of Obiora Chinedu Okafor are illustrative. Okafor has argued that the problem of an unjust global order is not that international law perpetuates the targeting of deviants. Rather, it is that this targeting assumes only one form of deviant exists and only some members of the international community can determine them. In Okafor's critique, international human rights law and lawyering should be recalibrated as a form of contemporary TWAIL *praxis* enabling a plurality of determinations from a multiplicity of sites. This ensures the liberal frame is never reified and remains contingent, invoking a temporality that acknowledges that the colonial encounter continues to animate international law.[59] *Praxis* here is defined by the united (or unification of) theory imbued action and action-imbued theory – action '"does not come at the end but is already present in the beginning of the theory"'.[60]

In this respect, *praxis* is cast as an ideational and institutional attempt to universalize human rights norms in a manner that is multidirectional, self-reflexive and temporally contingent.[61] As noted in his other writings, for Okafor, 'When the Chinese build factories or mine crude oil in parts of Africa, or Nigerian banks dominate much of the West African and East African markets', human rights are as much engaged as they are for liberals supporting democratic governance from North to South since the early part of this century.[62]

Like many of his contemporaries, Okafor's analysis insightfully re-frames international law as contingent, refusing to assume any state holds the trump card for administering human rights surveillance and intervention. Yet this ongoing commitment to a global order, operating in real time, does not take the shape of a new temporal normativity beyond that of the existing neoliberal paradigm. Instead, Okafor advocates for enmeshing all states and peoples in transnational networks which monitor, report on, and intervene in situations of gross human rights abuses. While this changes the directional flows of rights uptake, it still assumes both that these flows are linear and that they form part of a de-colonising project whose coordinates are situated in European narratives about time. As Fleur Johns has noted:

> International human rights law scholars and practitioners are…at pains to adapt to the rhythms of global supply chains and the lead-times of logistics…Increasingly,

[59]Okafor (2016), *supra* note 56, at 5.
[60]*Ibid*., at 6 (citing H. Marcuse, *Studies in Critical Philosophy* (1973), at 5).
[61]Okafor, 'The Bandung Ethic and Human Rights *Praxis*' in Eslava et al *supra* note 26, at 522.
[62]*Ibid*., at 528-9.

> effort is directed toward the insertion of tiny packets of human rights review along the length of a global supply or value chain.[63]

Occasionally, human rights events are set against the background temporalities of state and market, but the ordering of individuals, states and priorities, largely remains unchanged. While Okafor's approach goes some way toward acknowledging temporal rivalries and international law's coloniality, it does not fully reject the idea that plurality should be commensurable with a liberal understanding of progress over time. Order continues to be maintained through a measure of force and discipline in real time, albeit from a multiplicity of sites. As Geoff Gordon has noted, 'globally standardized time and transnational law, including international law, continue to affect one another on an ongoing basis, each contributing mutually to the reproduction of the other' albeit with periods of conflict in their interaction.[64]

B Time, consent and humanity

Two questions arise from this analysis. First, how might international lawyers conceive of an order in which many worlds and many temporalities can co-exist and which interrogates the notion of consent in international law? Second, when engaging with a critique of international legal *praxis*, how then might international lawyers begin to reconceptualise time in order to depart from the liberal indices of surveillance, intervention and linear progress? In order to answer these questions, the logic of temporal linearity that remains central to many de-colonising projects must be re-framed. The logic of *Advaita*, or non-dualism, provides one avenue in which to do so. It posits time very differently:

> In epistemic terms, it rejects the notion that history consists of linear movement involving the material transition of dark and primitive eras towards more progressive ones. In non-dualism, all dimensions of the subject's relationship with time, space and causality are equivalent and all require equal attention to be paid through the practice of deep and systematic reflection.[65]

Non-dualism asks that past, present and future are given equal and contemporaneous attention and treatment in analysis. In this respect, Chimni's recent discussions on customary international law, stressing deliberative reason to help identify, clarify and realize the common interests of humanity, provides one avenue to incorporate a disordering critique of time.[66]

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[63]Johns, 'The Temporal Rivalries of Human Rights', 23 *Indiana Journal of Global Legal Studies* (2016) 39, at 51.
[64]Gordon (EJIL), *supra* note 18, at 1201.
[65]Kapur, *supra* note 7, at 219.
[66]Chimni, *supra* note 40.

Chimni's analysis centres more on whose custom is included, rather than its temporality. However, in his analysis, Chimni draws from the concept of *opinio juris communis* developed by Justice Cançado Trindade at the International Court of Justice which I argue reframes the subject's relationship to time, as well as space.[67]

As Chimni notes, in his dissenting opinion in the *Obligations concerning the Negotiations relating to Cessation of the Nuclear Arms Race (Marshall Islands v India)*, Justice Trindade argues that the devastating effects upon life caused by nuclear weapons' detonations calls for an international response that transcends space and time. Judge Trindade argues that this response should be one which does not emanate from the inscrutable 'will' of States but rather, from human conscience.[68] In order for humanity to respond to the devastating and life-obliterating effects of nuclear weapons, Judge Trindade further asserts, international law should begin from the opposite premise of the classic postulate of positivism laid down in the *Lotus*[69] decision:

> In my understanding, it cannot be sustained, in a matter which concerns the future of humankind, that which is not expressly prohibited is thereby permitted (a classic postulate of positivism).
>
> …Nowadays, in the second decade of the twenty-first century, in an international legal order which purports to assert common superior values, amidst considerations of *ordre public*, and basic considerations of humanity, it is precisely the reverse logic which is to prevail: *that which is not permitted, is prohibited*.[70]

For Justice Trindade, therefore, consent in international law cannot and should not be presumed: to do so is to maintain international law in the service of the powerful. Justice Trindade's opposing principle provides an important basis upon which alternate temporal universalisms (the Aboriginal concept of Dreaming, for instance), and their co-existing knowledge systems, can be recognised and acknowledged.[71] Furthermore, the legitimacy of international law can be challenged upon grounds of non-consent.

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[67] *Obligations concerning the Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Jurisdiction of the Court and admissibility of the application, 5 October 2016, ICJ Reports (2016) 833, Dissenting Opinion of Judge Cançado Trindade 907.

[68] *Ibid*., 393.

[69] *The Case of the S.S. 'Lotus'* 1927 PCIJ Series A, No.10.

[70] Dissenting Opinion of Judge Trindade, *supra* note 67, at 981, §§191-2. [Emphasis in the original]. See also the Dissenting Opinion of Justice Loder, ibid., at 34.

[71] Kwaymullina, 'Aboriginal nations, the Australian nation state and Indigenous international legal traditions' in I. Watson (ed) *Indigenous Peoples as Subjects of International Law* (2017), 5.

Yet as Chimni notes, in determining the novel principle of humaneness upon which *opinio juris communis* should be based, Justice Trindade fails to explicitly decolonise international law or to foreground or re-position that which has remained peripheral. Instead, he returns to international law's 'founding fathers' (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, H. Pufendorf, C. Wolff), claiming that they provide the key to developing a theory of humaneness. [72] This seems misplaced, in that it denies the very inhumane actions justified by the same theorists' writings and the racialised, Christian assumptions that remain implicit in the doctrines of natural law they espoused.[73]

Chimni suggests deliberative reason and a more discursive focus will enable a robust, intellectually rigorous, historically grounded *opinio juris communis* to emerge. Specifically, Chimni focusses our attention on the resolutions of international organisations and civil society practice as possible new avenues to consider the emergence of rules of customary international law.[74] I would argue that while it is important to do so, this too, continues to ground custom in the practice of the existing temporalities of liberal institutions which rely heavily upon liberal notions of progress. I would argue instead that 'conscience' as understood through any emerging principle of *opinio juris communis* could be tied to the notion of *con-scientia*, the original Latin term from which conscience is derived. This provides the meaning 'a joint knowledge of something, a knowing of a thing together with another person; consciousness, knowledge', enabling us to explore other forms of knowledge-generation in our analysis.

Applying this reasoning to the prohibition against nuclear weapons, a disordering critique of international law would begin by asking: how would international lawyers conceptualize an international legal obligation regarding this prohibition, were they to take into account a non-linear approach to time? This requires a consideration of sources outside of the state-centred international legal system and will require a deliberative assessment of sources doctrine in light of concurrent temporalities evident in non-Western knowledge systems. In this respect, in addition to the sources of international law that Judge Trindade recognises in his dissenting opinion (primarily comprising General Assembly and Security Council Resolutions), a disordering critique would ask further:[75] how should I consider and incorporate the knowledge of those communities who often remain subordinate to the state in international law scholarship - such as Indigenous Persons most affected by nuclear proliferation? How do

[72]*Supra* note 67, at 154, §225.
[73]See here Anghie, *supra* note 26, 16-31.
[74]Chimni, *supra*, note 40, at 41-46.
[75]See here, *supra* note 67, at §§31-63.

these communities understand time, and its relationship to the arrangement of people and things? And how might this affect my understanding of ordering in international law?

As Hiroshi Fukurai has argued, when the perspective of nations and peoples is placed at 'the centre of the geopolitical analysis of worldly affairs, as opposed to that of the state, a fundamentally different interpretation of international law emerges'.[76] For Fukurai, these communities can be understood as 'original nations' who have been relegated subordinate status by international law, which is more accurately described as inter-*state* law, given its inability to recognise the rights, rules and constitution of nations distinct from the state.[77]

For Fukurai, the political and economic subordination of the nation by the state has meant that in the majority of cases, indigenous nations and peoples primarily living in Asia, Australia, and North and South America have disproportionately suffered the devastating, multi-generational impacts of deadly environmental contaminants in their communities.[78] This includes effects resulting from the mining of uranium, utilised to make nuclear weapons, and the testing of nuclear weapons. Despite being able to be found nearly everywhere on earth, 'nearly seventy per cent of uranium resources are located in the lands inhabited by indigenous nations…'.[79] For instance, the ancestral homeland to the Western Shoshone nation in today's state of Nevada 'became the site of nearly one thousand nuclear detonations' as part of state-initiated security programs. This has meant the Western Shoshone nation, and not Japan, 'is the most "nuclear-bombed" nation in the world'.[80]

Indigenous people have been resisting efforts at their subordination, and the subordination of the Earth, for several centuries. Most recently, this has resulted in an emerging 'Raw Law' being identified, which centres upon law that is 'raw' and 'naked', beneath the layers of invasion, displacement, destruction of culture, and acts of genocide experienced by Aboriginal Australians and Indigenous Persons globally. Raw Law comprises understanding the legality and impact of colonisation from the viewpoint of Aboriginal (or Indigenous) law, rather than from the dominant Western legal tradition.[81] Raw Law's central focal point is understanding law's ontology beyond a colonial mindset of invasion, retrieving in so doing an

[76]Fukurai, 'Original Nation Approaches to "International" Law (ONAIL): Decoupling of the Nation and the State and the Search for New Legal Orders' 26 (2019) *Indiana Journal of Global Legal Studies* 199, at 200.
[77]*Ibid.*, at 208-9. See also Fukurai and Krooth *Original Nation Approaches to International Law: The Quest for the Rights of Indigenous Peoples and Nature in the Age of Anthropocene* (2021).
[78]Fukurai, *supra* note 76, at 241.
[79]*Ibid.*
[80]Fukurai, *supra* note 76, at 237.
[81]Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2014).

ethos focussed on relationality – between people and land, between humans and other species, between communities.

Taking as its starting-point a non-dualist approach to time, a disordering critique of international law would consider Raw Law as a source of international law. International law's temporality is ruptured, because doing so does not assume that the law pertaining to communities that pre-dated the state should be rendered subordinate to the state-centred international legal system. Understanding Raw Law as an additional source of international law requires us to further interrogate the 'liberal' understanding of temporal progress embedded in the existing international legal order, because we cannot assume that the temporal and territorial boundaries of the state (and by extension, liberal understandings of proprietary rights and interests) should remain paramount in our analysis of what counts as a source of international law.[82] To recognise Raw Law as a source of international law in its own right cannot be simply to recognise this law insofar as it accords with state power in the present moment: rather, it is to document the language of relationality that is central to Indigenous Persons' way of being, and to understand that language as a source of international law. According to Irene Watson:

> While First Nations' lives and territories are occupied by colonial states, we have our international law systems which, in our ways, *are not just of the past but are models for our future survival*….Our ancient legal systems challenge the narratives of domination, and our ways continue to bring a focus to the language of relationality, enabling us to stand in the face of the ongoing discourse and acts of coloniality. Relationality was and remains our core way of being, our mainstream way of life.[83]

Understanding Raw Law as a source of international law requires re-thinking existing sources doctrine and further examining the implications of how this body of law might yet be understood as such. In this respect, I agree with Chimni that re-thinking customary international law doctrine may be a good place to begin to conceptualise an alternative doctrine of sources. Whether Raw Law can be understood as a form of custom requires the expansion of custom to include the practice of nations (in addition to state practice) and *opinio juris communis* (in addition to *opinio juris*). This could include further analysis to determine whether

[82]Koskenniemi, *supra* note 22, 74-94. Note however, *contra*, Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (2021) (relegating the significance of liberalism largely to one page, at 783-4). On liberal proprietary interests see Dagan *A Liberal Theory of Property* (2021).
[83]Watson, 'Chapter 5: First Nations, Indigenous Peoples: our laws have always been here' in I. Watson *supra* note 71, at 104 [Emphasis added].

jus gentium, as traditionally understood by international jurists, might yet be able to integrate the law of original nations which is now, and was always, there, but has largely been ignored, considered 'uncivilised' or rendered irrelevant.[84] 'Integration' would need to be approached carefully and mindful of seeing Raw Law from the perspective of those who embody it and not from the confines of a teleological progress narrative 'which encourages us to view the emergence and expansion of the sovereign state as a necessary, inevitable and national process'.[85] In this respect what counts as law should be determined with reference to what that community takes for granted as law (and not what international lawyers deem is law).[86]

Seen from this perspective, the contemporary international legal order would not comprise solely a hierarchy of norms, conventions and principles determined with reference to the spatial order of the state in our contemporary moment. Rather, legal order would be reframed as an integrated series of norms, conventions and principles determined with reference to a multiplicity of spatial orders existing over time, including the orders of communities that have thus far, remained largely outside international law.[87] The sources of international law would still remain embodied in norms, conventions and principles, but would rely upon doctrine developed with its roots 'in a de-colonised, self-determined and plural cultural and political international order in which deliberative reason plays a central role.'[88] I would argue further that this should not assume that international institutions and regional and domestic courts remain paramount in our analysis, but would endeavour to incorporate into our analysis competing knowledge systems and ways of thinking of law through the international. This requires further considering novel understandings of subjectivity and legal ontology. I will now turn in Parts 4 and 5 to consider how we might yet do this.

4 Disordering Space: Beyond Statehood and the Geopolitics of the 'International'

As already noted, the liberal legal subject focuses on the individual and by extension, the unitary form of the state. In the absence of a supranational world government, this has meant

[84]Anghie, *supra* note 26, 1-30; Parfitt, *supra* note 6.
[85]Parfitt, *supra* note 6, at 15.
[86]See here Tamanaha, 'Legal pluralism across the global South: colonial origins and contemporary consequences' 53 *The Journal of Legal Pluralism and Unofficial Law* (2021) 168.
[87]See here Parfitt, *supra* note 6, 411-446; Gathii, 'Writing Race and Identity in a Global Context; What CRT and TWAIL Can Learn from Each Other' 67 *UCLA Law Review* (2021) 1610, 1632-37; and Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' 14 *Oregon Review of International Law* (2012) 131.
[88]Chimni, *supra* note 40, at 46.

international law scholarship has, for over two centuries, been 'derided as deifying its own object of study'.[89] More recently, critical international law scholars have argued that this results in international law's discursive indeterminacy.[90] International law can only be justified by virtue of the will of states or appeals to natural law.

The indeterminacy critique has brought into sharp relief the ends international law serves and the manner in which those ends are justified. In this respect, the novel field of comparative international law re-frames the question asked as one in which the question of international law's *internationality*, as opposed to its legality, is scrutinized.[91] Scholars engaging in comparative international law undertake cross-national studies that have multiple potential 'units' of analysis including: states as unitary actors, domestic state institutions (such as courts, legislatures and executives) and non-state actors (such as academics, non-governmental organizations, and social and political movements).[92] The field is distinguished from comparative constitutional law, in that it seeks to understand primarily how different actors in varying jurisdictions consider international law (not public law). It does so, relying on distinct taxonomies, based on functional, formal and normative distinctions between jurisdictions.[93]

While not explicitly a critical international legal project, I argue that comparative international law has significant critical purchase, as the authors themselves acknowledge.[94] This is because the comparative project seeks to identify, analyze and explain differences in the interpretation and application of, as well as approaches to, international law.[95] It is in conversation with TWAIL scholarship, despite remaining 'intellectually eclectic'.[96] This eclecticism provides the potential to move international law beyond the statist assumptions of the liberal international order, toward more fulsome understandings of sovereignty and inter-sovereign relations as understood in and through other knowledge traditions.

A. Subjectivity, Sovereignty and the Rule of Law: China as a New Great Power

[89]D'Aspremont, 'Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperative Handicap of the International Legal System' (29 January 2012), available at: in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995041 .
[90]Koskenniemi, *supra*, note 22.
[91]Roberts, *supra* note 6.
[92]A. Roberts, P.B. Stephan, P. Verdier and M. Versteeg (eds), *supra* note 6, 7.
[93]*Ibid*., 8-9.
[94]*Ibid.*
[95]*Ibid*.
[96]*Ibid.*

In this respect, comparative international law provides one avenue through which statehood, as a form of subjectivity and spatial order, can be further interrogated and disordered.[97] Here, Congyan Cai's analysis of the use of international law in Chinese courts provides an important counterpoint to the traditional 'Great Power' narrative associated with European and U.S. expansionism.[98] According to Cai, Chinese courts in the contemporary period utilize the vocabulary of international law to safeguard the vernacular interests of the Chinese state, as well as its interests as a defender of a 'harmonious world' – both at home and abroad.[99] For Cai, an analysis of recent case law shows that, as China rises to power as a 'New Great Power', courts have been willing not only to stress the application of international law governing commercial relationships, but further, 'to adjust its traditional judicial policy in order to protect its expanding overseas interests and exhibit its growing status as a power'.[100]

According to Cai's analysis, Chinese courts continue to apply international law most frequently to matters of private international law, in keeping with China's long-standing commitment to absolute state immunity and the principle of non-intervention. [101] More recently, however, following China's decision to sign the *State Immunity Convention* in 2005, the courts appear to be more ready to apply international law to protect the private interests of Chinese nationals against foreign states.[102] This includes exercising jurisdiction over disputes regarding Japan's treatment of the Chinese during World War II and to defend against

[97]See in particular: Yanagihara,'"Shioki (Control)", "Fuyo (Dependency)" and Sovereignty: The Status of the Ryukyu Kingdom in Early Modern Times' in A. Roberts, P.B. Stephan, P. Verdier and M. Versteeg (eds), *supra* note 6, 141; Mbengue & Schacherer 'Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code' in A. Roberts, P.B. Stephan, P. Verdier and M. Versteeg (eds), *supra* note 6, 547; and Cai, 'International Law in Chinese Courts during the Rise of China' (2016) 110 AJIL 269, reproduced A. Roberts, P.B. Stephan, P. Verdier and M. Versteeg (eds), *supra* note 6, 295.

[98]Cai, *ibid*. See also Cai, 'New Great Powers and International Law in the 21st Century' 24 EJIL (2013) 755.

[99]On China's promotion of a harmonious world and the creation of an international community characterized as a 'community of common destiny', see: Xi Xinping, 'Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind' UNGA, 28 September 2015. See also: Zeng, 'Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny' 15 *Chinese Journal of International Law (CJIL)* (2016) 517; Zhang, 'The Concept of 'Community as Common Destiny' in China's Diplomacy: Meaning, Motives and Implications' 5 *Asia and the Pacific Policy Studies* (*APPS*)(2018) 196; Ahl, 'Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind and the Future of International Law' 9 *The Chinese Journal of Comparative Law* (*C J Comp. Law*) (2021) 304.

[100] Cai, *supra* note 98, at 317.

[101]Cai, *supra* note 98, at 316-317. See also Honglei, 'Report on the Judicial Review of International Arbitration in Chinese Courts' 9 *Wuhan University International Law Review* (2009) 304, 311 (cited by the author).

[102]GA Res/59/38, annex, United Nations Convention on Jurisdictional Immunities of States and their Property 2004, 2 December 2004. (Not yet in force).

piracy.[103] Although courts continue to remain reluctant to apply international law granting rights to individuals vis-à-vis the Chinese state, they have increasingly shown a willingness to do so vis-à-vis other states where it provides for the expansion of executive authority.[104]

Cai argues that the categories of international law applied by the Chinese courts are closely related to China's economic and geopolitical rise:

> The basic approach to achieve this policy goal is the Beijing Consensus, which has two core elements: an emphasis on economic growth over political freedom and social justice; and the maintenance of an authoritarian regime with unfettered executive authority….China thus illustrates how a state re-orients its judicial policy toward international law as it changes its identity.[105]

Cai's conclusion is that the courts' application of international law evidences the changing status of the Chinese state's attitude toward that law. In the final analysis, Cai largely fits China's rise to power into a liberal template in which the state's adherence to the international rule of law largely follows in the footsteps of other great powers.[106] International law is largely being utilised to justify the expansionist tendencies of the Chinese state *as a state* and both the legal significance and moral purchase of international law increases as China seeks to expand its presence and influence in the international community.

I argue instead that this expansion may further reflect a conceptualisation of the rule of international law that could be informed by Chinese conceptualisations of spatial ordering and the role of law, rather than exclusively being situated in a return to liberal ordering with states at its centre. Hence, while Cai's analysis provides a starting point for reconsidering the role of law in the Chinese judiciary as China increasingly attains new geopolitical status, it need not be the endpoint of such analysis. In particular, what role Chinese sovereigns and scholars have given to law can be further interrogated and juxtaposed against these developments, to provide a different analysis of the role international law might yet play in how China understands its role as both a regional and international power.

As discussed in further detail below, rather than assuming that China's rise should be framed through a statist legal order, it can also be further conceptualised in relation to a

[103]Cai, *supra* note 98, 316.
[104]Cai, *supra* note 98, 309-311.
[105]Cai, *supra* note 98, 318.
[106]Cai, *supra* note 98, in particular 317-318.

normative account based on regional ordering, in which China is asserting an alliance with the Third World and resisting Western hegemonic interpretations of international law.[107] In this respect, the Chinese concept of the 'community of common destiny', which has remained central to President Xi Jinping's foreign policy over the last decade and to the Chinese Communist's Party's (CCP) public statements on international law, can be understood as embodying a distinct set of underlying values in the international legal order.[108] In particular, President Jinping has stressed greater leeway in the implementation of international obligations, but also drawn greater focus toward peaceful relations, the interdependence of international power, common interests and sustainable development, including by building 'an ecosystem that puts mother nature and green development first'.[109] Although not as yet understood by the CCP to include nuclear non-proliferation, the concept has been further interpreted by Chinese scholars to include as norms of *jus cogens* the non-proliferation of nuclear weapons and limitations on nuclear testing.[110] As I detail further in the sections which follow, this suggests that any interpretation of the role of international law in China's rise to power might yet be considered outside of the spatial order of the state. Instead, it can be considered through assessments of different kinds of inter-sovereign relations, as well as through re-thinking the role of law in China's rise.

B Non-dualist subjectivity: Regional order, China and the role of law

Kapur argues that non-dualism provides an avenue through which to understand the layered nature of the subject and subject formation.[111] Drawing upon the work of Judith Butler, she argues that clusters of norms that pre-date the existence of a subject are already circulating within the world and in existence before impressing themselves upon that subject.[112] For international law, this would require us considering the norms that attach to the state that pre-date statehood, in addition to rival subjectivities to statehood in the present moment.

In the case of the state and state-formation, non-dualism asks international lawyers to recognise the normative coercions of subject formation. As has already been noted, because statehood is a constitutive relationship which relies on 'othering' certain forms of legal personality, it disavows the interdependency of peoples and beings and the interrelated and

[107]See here Orford, *supra* note 2, at 186-7.
[108]Zeng (CJIL), Zhang (APPS), and Ahl (C J Comp. Law), all *supra* note 99.
[109]Cited in Zhang (APPS), *supra* note 99, at 198.
[110]Ahl, *supra*, note 99, at 312.
[111]Kapur, *supra* note 7, at 221-224.
[112]*Ibid*, 224-6.

integrated roles embodied in different legal forms.[113] It also renders all other forms of recognition and ordering as secondary in international legal analysis.

In the case of China's rise as a 'new great power', a disordering critique interrogates the basis upon which that assertion is being made, outside of the spatial order of statehood. Here, Anne Orford's recent work on regional orders is instructive. For Orford, China's rise to power can be understood in the context of a longer history of resisting aggression and imperialist invasion.[114] Drawing from the international law scholarship of several Chinese jurists, Orford then argues that China's traditional attachment to the principle of sovereign equality and non-intervention can be explained with reference to 'a history of oppression stretching from the first Opium War through the century of unequal treaties, foreign concessions, extra-territoriality, and other related privileges exercised by colonial powers'.[115] Its formal commitment, together with India, to the Five Principles of Peaceful Co-existence, have continued to shape China's perspective on international law in the aftermath of the Korean War. The incorporation of those principles in the closing declaration of the Bandung Conference further evidences China's emergence as a leader in Africa and Asia and of the Third World.[116]

Seen from this perspective, China's approach to international law 'is represented as flowing from a history of good neighbourliness' with 'its peaceful approach to international relations traced to the traditional notion of *tian xia* (all under Heaven)'.[117] As several Chinese international lawyers have argued, China's Belt and Road initiative can be normatively framed as embodying the idea of a regional 'community of common destiny' and the idea of a co-operative international law.[118] This departs from liberal understandings of Great Powers acting primarily in their own self-interest and through colonial forms of authority. This is not to assume that China's rise to power will be entirely benign, that Chinese assertions of soft power are not in some senses performative, or that criticism of Beijing's policies is necessarily unfounded.[119] Rather, it is to re-frame China's rise within a longer historical narrative that seeks to acknowledge the combination of Confucian culture, international communism,

[113]See *infra*, Part 2.
[114]Orford, *supra* note 2, at 182.
[115]*Ibid.*
[116]See here also Carrai, *supra* note 43, at 152-181.
[117] Orford, *supra* note 2, at183.
[118]Orford, *supra* note 2, at 185.
[119]See here: Ginsberg, 'How Authoritarians Use International Law' 31 *Journal of Democracy* (2020) 44; Ginsberg, *supra* note 24; and Chen, '"Authoritarian International Law" in Action? Tribal Politics in the Human Rights Council' 54 *Vanderbilt Journal of Transnational Law* (2021)1203.

Western philosophy and Third World representation that may be elements informing a Chinese understanding of the international law and international legal *praxis*.[120] Hence, as a regional ordering scheme, the Belt and Road initiative cannot be understood solely as designed by Beijing and imposed on others but will depend upon networks, alliances and negotiations formulated over centuries and taking into account the histories of negotiations already at play.[121]

I would argue further, that China's understanding of the role of law generally and of international law in particular can be further foregrounded in that order to depart fully from liberal understandings of the same. Here, a non-dualist approach to international legal subjectivity would enable us to frame law in terms of how China, not only in contemporary terms as a state, but also as a tributary system under the Qing dynasty, and as an emerging republic in the early part of last century, has understood and does understand 'law'. Characteristics of that understanding may form part of an emerging *opinio juris communis* in that it can help us to determine how to conceptualise current and future Chinese practice, based on knowledge systems derived from Confucian concepts and situated in Chinese understandings of time. These competing analyses can then help us to situate how China understands its actions on the world stage. Yet further, it can also enable us to consider the implications of this understanding of law for any novel characterisation of the sources of international law generally and for international legal order in particular.

C Rule of law, rule by law, rule by man

An example of how a disordering critique in this form might be applied can be taken from a reading of CCP's recent pronouncements on the rule of law. In its 'Plan on Building the Rule of Law in China (2020-2025)' (the 2020-25 Plan), the National People's Congress of the CCP sets out an ambitious agenda for implementing 'socialist rule of law with Chinese characteristics' which should 'basically take shape' by 2035.[122] One chapter of this plan is devoted to 'the outside world' and specifically the international rule of law (or: promoting the

[120]See in particular Orford, *supra* note 2, at 188-89.
[121] Ibid.

[122]Moritz, 'Xi Xin Ping Thought on the Rule of Law: New Substance in the Conflict of Systems with China' (2021) Deutsches Institute fur Internationale Politik und Sicherheit, 2-3 available online at https://doi.org/10.18449/2021C28. See also: Ginsberg, *supra* note 24, and Waldron 'Rule *by* law: A Much Maligned Preposition' *NYU School of Law, Public Law Research Paper No.19-19* (June 2019), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167

Chinese concept of the 'rule of law' internationally). The term 'rule of law' here, however (translated as 'fazhi' (法 制)) corresponds more readily to the term 'rule by law', often conceived by Western commentators as a justification for Chinese authoritarian rule.[123]

Writings from commentators during the early republican era in China however, suggest we may yet understand this term otherwise. In particular, the writings of Liang Qichao, Du Yaquan and Wu Guanyin counterpose the distinction between measures advocating for 'rule by law' ('fazhi' (法 制)) with that of advocating for 'rule by man' ('renzhi'人治) in this period.[124] Leigh Jenco argues that, for these commentators disagreements about the distinction between the two did not fall along a simple binary of security and predictability (in law) and tyrannical rule (by man):

> Rather, its participants elaborate a series of complex relationships along different registers entirely – man and law, it turns out, track the tensions between moral and legal authority, but also between personal and institutional efficacy and between actions taken in society and those taken in political spaces….[t]he binary helped reformers think creatively not only about state legitimacy and justice, but also, about the sources of social change available at a time when state power was deeply fragmented.[125]

A strong sense of the requirement of virtuous leadership is present in the writings of those authors advocating for 'rule by man', as is the need to place faith in literature and sources outside of the political realm in order to ensure China's political transformation.[126] 'Rule by man' here is not understood as populist dictatorship by force, but as securing the will of the people through non-political means. Conversely, those authors placing faith in institutions argue instead for the political structure to be in place prior to any such social reforms to take place.[127] While these authors are influenced by their education in the West and their encounter with liberal notions of law and justice, they provide an important counterpoint to our understanding of contemporary Chinese thought on the role of law in international society.

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[123] Ginsberg, *supra* note 24.

[124]See here: Jenco, '"Rule by Man" and "Rule by Law" in Early Republican China: Contributions to a Theoretical Debate' 69 *The Journal of Asian Studies* (2010) 181. See also: Xiaobing Tang, *Globalist Space and the Nationalist Discourse of Modernity: The Historical Thinking of Liang Qichao* (1996).

[125]*Ibid*., Jenco at 183.

[126] *Ibid*., Jenco at 192. Citing Huang in *Zhang Shizhao Quanji* (3: 614-15) (Chow Tse-tsung's translation).

[127]*Ibid*., citing Zhang. Note also the discussion between the replacement on the intellectual scene of the *Tiger* magazine with Chen Duxiu's *New Youth* (suggesting a shift toward social reform embedded in rule by man).

This is because the debates situate liberalism within Confucian understandings of rule, and of law, rather than beginning from the premises that those understandings need necessarily to fit into Western notions of the rule of law.[128]

The CCP's understanding of building 'a socialist rule of law with Chinese characteristics' cannot, of course, be understood as drawing explicitly from the writings of this period. Yet the distinction between 'rule by law' and 'rule by man', and the manner in which they are assessed in these writings, provides one conceptual pathway toward re-thinking contemporary debates regarding Chinese and Western understandings of the role of law in the international system.

Departing from liberal notions of the 'rule of law' in which the sources of law remain tied to state practice (primarily through the legislature, the judiciary and executive), the concept of 'rule by man' ('renzhi'人治) may provide further insights with regard to how publications in the media and in literature give effect to populist leadership. This may in turn be analysed with regard to how this would inform our understanding of state practice or indeed, legal *praxis* in international institutions. Questions that would arise from this disordering critique might include: how do sentiments expressed by world leaders in media outlets (including social media outlets) constitute 'renzhi'人治, and how can we begin to incorporate this into our analysis of novel sources of customary international law? How do such sources give effect to 'rule by man', and how might we begin to conceptualise of patterns within such media as a source attributable to a particular sovereign? How should we reconceptualise 'consent' in terms of new forms of custom forming in this regard (e.g. how would we conceive of a new practice emerging on Twitter – such as the 'cancelling' of diplomats or statespersons by other dignitaries) and what would the effect of this be for our treatment of this as a source? Conversely, what level of credibility or validity to be given to sources of 'rule by man' ('renzhi' 人治) as opposed to sources of 'rule by law' ('fazhi' (法 制))? And how might we be guided in so doing by an understanding of *con-scientia* – conceiving of how different knowledge traditions place emphasis on oral vs written traditions, for example?

Further interrogating the Chinese conceptualizations of 'rule by law' and 'rule by man', bearing in mind the gendered implications of the latter, might yet provide new pathways toward understanding China's transition in the current period. Yet it may also further assist us in understanding how to reconceive of multiple spatial orders and systems of rule, situating 'law'

[128]Regarding the tensions between nationalist and liberal thought in Liang Qichao's writings see here Tang, *supra* note 123, at 21-26.

not through the traditional liberal framings of legislature, executive and judiciary but instead through a much larger range of sources.

'Rule by law' and its relationship to 'rule by man' may therefore have explanatory value for the manner in which international law is currently understood in other legal systems. As Maria Adele Carrai points out, this requires analysis which conceives of China, past and present, 'as a legitimate shaper and breaker of international norms and concepts'[129] in its own right. Understanding how better to shape a disordering critique of subjectivity that learns from Chinese experience and history might further assist a turn away from the 'Orientalist ethic' Teemu Ruskola has argued defined much legal scholarship on the same until very recently.[130] It may also help us to conceive of sources of law that exist beyond the liberal frame, in a plurality of forms recognised as they are and for what they are, rather than with reference to liberal notions of the state.

5 In Search of Freedom – New Ontologies in International Law

As can be seen from the analysis in Parts 3 and 4 of this article, a disordering critique requires re-examining what gets to exist in international law and which (or: whose) knowledge systems are framing international legal argument and analysis. In Part 3, I argued this required reconsidering the temporal parameters of the international legal order. I argued for jettisoning liberal notions of progress and the neoliberal project of 'real time' governance in favour of a sensibility based upon *opinio juris communis*, in which consent is not assumed and competing temporalities might yet be acknowledged. I further considered how this might be tied to the notion of *con-scientia* or co-constituting human knowledge. Building on a disordering critique of time, I then argued in Part 4 for breaking with the teleology of the liberal order that places a primacy on the Western understanding of statehood and the rule of law. Drawing upon comparative international law and the example of China's emergence as a new great power, I then considered how early republican scholars in China understood the role of law in determining sovereignty, and how this may yet change our understanding of custom formation in the contemporary moment.

This final section argues that at the heart of the problem is the very terms of what gets to exist in international law itself. In this respect, critiques regarding the ontology of international law have to date, come closest to jettisoning the liberal international legal order altogether. As I have already noted, the critique of international legal ontology asserts that

[129]Carrai, *supra* note 43, 8.
[130]Ruskola, 'Legal Orientalism'101 *Michigan Law Review* 179; Ruskola, *Legal Orientalism* (2013).

international law requires an overhaul. How might this ontological overhaul take place, and what are its implications for legal order?

A. Freedom from the State: On being in, and existing for, international law

In their recent re-writing of the relationship between international law and the state, Sundhya Pahuja and Luis Eslava re-cast the problem of international law's ontology as one in which international law must be de-coupled entirely from the idea of the international legal order.[131] For Eslava and Pahuja, statehood can be considered as *both* a vehicle for emancipation and a prison of international law's own making. This is because the fiction proposed by juridical sovereignty could not be engaged by Third World societies in the post WWII period without their agreement to the terms set upon such agreement. Namely: the world-making power of international law and the institutions defining the parameters of the state itself. Statehood, therefore, does not pre-date international law but is, in fact, a creation of that law. The state is made and re-made by international law to enable particular worlds to be maintained, and particular ends to be achieved globally.[132]

For Eslava and Pahuja, the history of international law should be re-written as a history of the state, international law and the (economic) development project intertwined.[133] This re-casts the idea of the 'international community' as grounded in the human and natural fabric of the world, rather than assuming it must be constitutionalised through the legality of the international order ('constituting order' being a central preoccupation of international lawyers since at least the 17th century).[134]

By re-describing the practices and technologies of state-making, Eslava and Pahuja re-cast both statecraft and of international law, inviting us to re-think the ways in which both have shaped and pathologized the 'global South' and increasingly, parts of the 'global North' as well.[135] Here, we see the advocation for a new critical stability not based on (re-)stabilizing the terms of international law to which international lawyers have become accustomed (consent, sources, jurisdiction) but instead by creating an ever-present normativity of dissent within our understanding of these terms. To interrogate how consent is framed and what ends it serves; to re-cast sources doctrine in light of its ability to queer; and to re-imagine jurisdiction as an

[131]Eslava and Pahuja, *supra* note 6.
[132]Eslava and Pahuja, *supra* note 6, 118-9.
[133]Eslava and Pahuja, *supra* note 6, 122-7.
[134]Eslava and Pahuja, *supra* note 6, 130. See also: Orford, 'Constituting Order' in J. Crawford and M. Koskenniemi (eds) *The Cambridge Companion to International Law* (2012), 272.
[135]Eslava and Pahuja, *supra* note 6, 124-5.

encounter, rather than based on markers of territory, nationality, and personality conceived in the Western legal sense.

Rather than pointing to temporal antagonisms, or sticking to the story of the rise of Great Powers, Eslava and Pahuja are careful to delineate the cultural and social particularities of both Western and non-Western societies. The writing illuminates the slow but steady cuts and erasures made, by international law, to delineate non-Western societies as subordinate to the West (during the Cold War proper) and ultimately, to enable both to perform in the service of the fluidities of neoliberal markets (in the aftermath of 1989).[136]

In other words, international law as understood here, is the language used to describe competing vernaculars that enable that law's vocabulary to be formed and changed over time. This is not characterised by a 'sentimental attachment to the field's constitutive rhetoric and traditions'[137] but instead, an agnostic ethical commitment to the field's capacity to truly explain the world it constitutes *as it is*. This replaces the view of the international lawyer as advocate or technocrat, with the lawyer willing to refrain from practicing and acting. In other words, to permit and enable the space for lawlessness, rather than to search for law and regulation, filling gaps at every turn.[138] To acknowledge that we might not yet know what it is we *should be looking for* (utopia) nor what it is we *are looking at* (apology).

Pahuja and Eslava, therefore, gesture toward building new possibilities for theorizing international law holistically. Yet thus far, this project has been more about unmasking the European nature and form of modern thought upon which international lawyers continue to rely than it has raising the possibility of any alternative legal order or alternative form of international law. A core part of the critical international law project over the past two decades, which Pahuja and Eslava evidence in their critique, has been to jettison any universalist aspiration based on a values-oriented conception of international law in support of critical re-description of that law *writ large*. Yet this critical re-description too, is somewhat 'othering' in its preoccupation: it cannot but otherwise be, because for transgression to work, it must be played out against some form of *status quo*. In this sense, like many others, the critique implicitly assumes the Western liberal legal order and its sanctioning of capital is to blame for the vast majority of today's ills. While this enables scholars to theorize different epistemological points of knowing and different ontological ways of being from which new

[136]Eslava and Pahuja, *supra* note 6, 119-125.
[137]Koskenniemi, *The Politics of International Law* (2011), 35.
[138] Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 *European Journal of Legal Studies* (2007) 8.

alternatives may be imagined, it does not provide a basis for theorizing holistically in international law toward a conception of an agreed sensibility. As Martti Koskenniemi has argued:

> I am doubtful about the existence of a single 'tradition' of international law that would have passed through history as an instrument of European predominance and could be indicted as responsible for today's injustice. There is as much reason to be sceptical of that proposition as of histories that used to depict international law as a carrier of liberal and humanitarian progress, a 'Grotian tradition'. The relations between law and international power are much more complex and involve contradictory ideas about what 'international law' or even 'law' is and how it can be used.[139]

How then, might a non-dualist, disordering sensibility respond to the challenge of theorizing holistically while remaining cognizant of these complexities?

B. Freedom from, and freedom within international law: norm constitution as worlds collide

One problem associated with grounding international law in the human and natural fabric of the world is: what remains free from ordering? Conversely, how do we conceptualize of freedom within an international legal order, once departing from narratives grounded in ideational and institutional significance of the state – as both arbiter and violator of liberal freedoms? In short, and to return to my original questions: how does this change any conception of legal ordering that remains central to the current practice of international law? And how should international law be conceptualised as a result? I have begun some preliminary answers to these questions in this article, which, due to the limitations of its scope, will need to be further developed elsewhere.

Drawing from Kapur's understanding of non-dualist freedom and Chimni's method of deliberative reason, I have argued that disordering international law enables us to reconstitute norms, conventions and principles determined with reference to a multiplicity of spatial orders existing over time, including the orders of communities whose knowledge has thus far, remained largely outside international law. If we take as our starting point that freedom should be de-linked from the state, this provides for a basis upon which to consider how norms, conventions and principles in a multiplicity of communities have developed, including those

[139]Koskenniemi, 'What Should International Legal History Become?' in S. Kadelbach, T Kleinlein and D. Rothsigkeit (eds) *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (2017) 381, at 385. Cited in *EJIL* 31 (2020), 1569.

of Indigenous communities whose systems of law are fundamentally distinct from liberal notions of order.

As Rose Sydney Parfitt points out, this could include conceptualizations of 'law' that reframe our understanding the subject/object dichotomy that the term traditionally produces. For Parfitt, this dichotomy fails to consider that for some communities the object (e.g. land or 'Djang') is the subject or source of law that governs human relationships themselves:

> [F]or many Indigenous peoples, 'the land is the source of the law' as the Kombumerri/Munajahalai legal scholar Christine Black has put it succinctly. If…the law is not about the land but *in* the land, then one action (such as carving the profile of four heads of state into a mountain range) that is perfectly lawful… may amount to a very serious violation of another set of laws whose normativity is operational in the same space as the first.[140]

For Indigenous communities in Northern 'Australia', for instance, '*Djang*, in a word, is law'. And yet, 'when it is tapped into inappropriately – as with mining – it becomes a disorganizing principle, confounding and confusing, blighting the Land.'[141]

Taking, as its basis, Judge Trindade's understanding of *opinio juris communis* and refining it with a deliberative and reasoned understanding of conscience (as *con-scientia*), critical international law scholars might begin by reframing sources of customary international law to take into account a much broader set of knowledge systems and practices. The challenge in this process will be not to revert to a liberal universalism that then justifies coercion or force: *opinio juris communis* here would need to be grounded in a much deeper and complex relationship between subject and object, between time and space. If we begin, as Judge Trindade does, by invoking the principle of non-consent to that which threatens human existence as a whole, we may be able to start to think through how this might affect our understanding of the norms, principles and conventions that should be given priority in international law with respect to nuclear disarmament and non-proliferation and climate change, for instance. This could begin from the premise that the Earth is both the subject and object to be governed. We would begin also, by accepting that knowledge systems in existence for over the past two millennia may have something to teach us about how we conceive of law and the international.

[140]Parfitt, *supra* note 6, at 421.
[141]Parfitt, *supra* note 6, at 422.

Doing so does not detract from the *lex lata* of international law and the international legal order as it is today. As Kapur argues (and I would agree), there is a role for human rights (and by extension, statehood) as a liberal governance project in our contemporary moment. So too, is there a need to understand how geopolitical shifts in power are taking place and what role the state is playing in such shifts. However, a disordering critique of international law might yet move us beyond this conceptualization of liberal order, by beginning the painstaking and messy work of recognizing the knowledge systems and understandings of law that today comprise our world and the inter-sovereign. The task here would not stop at critique, in that the norms, conventions, principles and practices would need to be documented and brought into some form of as yet *dis*ordered order, a morass of worlds colliding. While initially being a disordered worldview, I would argue it is one international lawyers should confront. A disordered worldview may yet move what we imagine, and how we imagine, international law, beyond its liberal confines. It may also open up the possibilities for international law to govern a unified world, or worlds, on terms we are yet to see but which need to be seen – to make visible to us that which is already visible but seemingly beyond our grasp.[142]

6 Conclusions – International Law and a world beyond the liberal international legal order

In a speech broadcast before invading Ukraine in February 2022, President Vladimir Putin explained his actions as, amongst other things, resulting from the following:

> In general, one gets the impression that practically everywhere, in many regions of the world, where the West comes to establish its own order, the result is bloody, unhealed wounds, ulcers of international terrorism and extremism. All that I have said is the most egregious, but by no means the only examples of disregard for international law.[143]

Putin's move to 'other' the West in this instance sought to distance Russia from the bloodshed caused by the West, yet paradoxically (and seemingly without irony) to legitimate the Ukrainian invasion and bloodshed that would inevitably follow. Despite the obvious flaws in Putin's reasoning, as Marko Milanovic noted, this type of critique does have some impact

[142]Paraphrasing sentiments of M.Foucault, cited in Orford, 'In Praise of Description' 23 *LJIL* (2012) 609, at 617.
[143]The Spectator, 'Full Text: Putin's declaration of War on Ukraine' , 24 February 2022, available online at: https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine.

because 'for all its whataboutism and lack of moral substance' prior violations of international law 'by Western allies DO make it more difficult for them to persuasively criticize Putin…'.[144]

The speech followed earlier calls by Putin that 'the end of liberalism' was nigh. The war in Ukraine has since been characterised by Francis Fukuyama as part of 'a war on the liberal order'.[145] Putin's statement does appear to indicate significant animosity toward the liberal order as framed by 'the West', if not a justification for waging an outright war upon it. It has been followed by ongoing claims from politicians, civil society activists and international lawyers that governments should reaffirm their commitment to the liberal international legal order – most notably, through sanctioning proceedings enabling the public prosecution of Russia's acts of aggression, individuating Putin's criminal responsibility and bringing him to justice at an international criminal tribunal.[146]

Not surprisingly, given the urgency of the response required, far less attention has been paid to engaging in an analysis of whether continuing to characterize the world as governed by a 'liberal international legal order' is in fact, part of the problem. Could it be that in coming to terms with Russia's acts of aggression in Ukraine and the ineptitude of the existing responses, we are in fact 'disabled by the governing idioms of international lawyering' itself?[147] Rather than reverting to promoting the liberal international legal order and speaking solely of sanctions, military aid and trials, what would it take to speak of international law and of international legal order differently? How might we yet think through this crisis not as a crisis *of* the liberal legal order but instead, as a crisis *because* of our ongoing reversion to that order? Could it be that the legal order we inhabit is in fact, best described as neither liberal nor illiberal, but something beyond these binary depictions? Might there yet be a more impassioned yet equally deliberative and reasoned way in which to articulate international legal responses to world order and disorder? Might we begin, in so doing, to acknowledge the ongoing failure of a liberal international legal order to explain the governing of inter-sovereign relations as understood by the majority of the world's people? And what might yet result from such an inquiry?

In this article, I have argued that critical international law scholars have not fully let go of the liberal international legal order, despite ongoing disavowals of the same. I have provided

[144]Milanovic, 'What is Russia's Legal Justification for Using Force against Ukraine?', 24 February 2022, available at: https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/.
[145]Fukuyama, *supra* note 19.
[146]*Supra* note 3.
[147]Simpson, *The Sentimental Life of International Law* (2022), at 2.

an analysis of how critiques advanced of institutional *praxis* and custom, statehood and geopolitics, and finally, international law's ontology, have not yet let go of a dualist mentality that remains wedded to understanding the international legal order in largely liberal terms. Even when liberalism is 'othered' it remains present as a spectral force from which to draw international law's meaning and purpose anew, rather than as a means through which to interrogate and fully synthesize new understandings of law and legal order. In this article, I have begun the task of building upon those critiques to reframe what that order might yet look like. My hope has been to provide the possibility for alternate generative pathways to emerge that will consider both what international law is and how it is understood in practice.

Drawing primarily from the work of Ratna Kapur, I have sought to provide an alternative reading of the world creating possibilities of international law. By adopting a disordering sensibility, I have argued that the primary role of international legal critique in doing so might be to disrupt the systemic function or neat arrangement of legal ordering and to move beyond the liberal paradigm without fear of becoming illiberal. Then, drawing from critiques in three different registers – namely, institutional *praxis* and custom, statehood and the rule of law, and legal ontology – I have shown how that generative pathway might begin to be determined through disordering our understanding of time, subjectivity and freedom. Disordering here, remains grounded in the practice of international law and seeks to unite past, present and future temporalities by drawing from non-Western epistemologies.

In many respects, the argument made here may be interpreted as an argument in favour of international legal pluralism or perhaps more aptly, as what Frédéric Mégret has identified as being an approach informed by a 'plurally constituted international law'.[148] The argument however, should be understood as distinct from most arguments in favour of transnational legal pluralism (and other forms of global legal pluralism) that have emerged to date. Broadly speaking, transnational legal pluralists' aim is primarily to focus on public and private systems of law and regulation between and across states and to constitutionalize systems of law accordingly.[149] This has included, in some instances, a failure to fully acknowledge deep cultural, social, political, economic and legal heterogeneity when adopting a pluralist approach.[150] The argument I have made here is in favour of letting go of our statist assumptions

[148] Mégret 'International Law as a System of Legal Pluralism' in P.S. Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (2021), at 551.
[149] Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (2021). See also Tamanaha, *supra*, note 86.
[150] Tamanaha, *supra* note 86, at 199.

when determining what counts as international law. Yet it does so in order to better frame an understanding of *inter*-national law and the legal order it has created and may yet still create.

The fear of becoming illiberal is, in some quarters, palpable – an ongoing spectre for many international lawyers who have become used to the 'calm, reasonable, position-less' liberal ideal that has become a hallmark of most contemporary international legal scholarship.[151] A disordering sensibility does not provide a simple solution, but instead a jurisgenerative pathway. It should, therefore, be embraced, for what it is: a messy and complex task, but one which might yet help us to understand international law freed from the liberal international legal order, and anew.

[151]Simpson, 'The Sentimental Life of International Law' 3 *London Review of International Law* (2015), at 3. See also White 'Chapter 30: Images of reach, range and recognition: Thinking about emotions in the study of international law' in S.A. Bandes, J.L.Madeira, K.Temple and E.K. White *Research Handbook on Law and Emotion* (2021).