

BOOK REVIEW

CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM AND TRANSNATIONALISM¹ (Prabhakar Singh & Benoît Mayer eds., 2014)

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The lack of concerted methodological critique is a significant failing of international law scholarship. Critical international lawyers (“the Crits”) aim to question and destabilize the inaccurate assumptions behind international law, which have slowly become deeply entrenched as truths.² The Crits believe in the “absence of a central international legal order as an impartial point to which state actors can refer” and in a “mature anarchy in international relations (and) the recognition of states as independent centres of legal culture and significance...”³

In *Critical International Law*, Prabhakar Singh and Benoît Mayer bring together different scholars of this post modern tradition who carefully re-envision international law as it stands today. The scholars address three areas that have been systematically neglected in mainstream international law discourse and writing, and thus remain unexplored; post-realism, post-colonialism, and transnationalism.

This review will begin with an overview of the articles in the *Critical International Law*. Subsequently, this review will raise three points of analysis: internal differences in opinions in the book, the role of international law scholars, and the scope of the premise of the book.

1 CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM AND TRANSNATIONALISM (Prabhakar Singh & Benoît Mayer eds., 2014) [hereinafter “CRITICAL INTERNATIONAL LAW”].

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2 For an interesting overview and explanation of what is critical about critical international law, the Afterword to the book is a valuable read: Sébastien Jodoin and Katharine Lofts, *What’s Critical about Critical International Law?*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 326.

3 Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, <http://www.ejil.org/pdfs/2/1/2026.pdf>.

POST-REALISM

Post-realism explores the relationship between international law and international politics.⁴ The contributions recognise that the international legal order is no longer state-centric; rather, international law is a process of authoritative decision making that need not necessarily stem from the state, and that must, hence, account for rules, policies as well as individual state context.⁵ Thus, Rossana Deplano criticises the welfarist approach,⁶ which argues that “states are the primary actors of international law and bear the responsibility to enter global, welfare maximizing agreements with other states on behalf of their population.”⁷

However, despite states taking a backseat, the international order remains governed by prevailing power relations in interesting, new ways. John Morss argues that international law has failed to properly address time and power.⁸ For instance, at its inception, Israel did not strictly conform to the Montevideo requirements of statehood but in an interesting interplay of power and time, overwhelming recognition from other states (supplemented by military, economic and political support) became self fulfilling.⁹ Similarly, it is argued that the recognition received by Kosovo from other nations after its unilateral declaration of independence gave the Kosovar state otherwise absent legitimacy in the eyes of international law.¹⁰ Further, lopsided power relations even impact secondary sources of international law. The powers of modern international tribunals extend far beyond the mere settlement of disputes.¹¹ However, not all states readily internalise international law, given that the decisions of international courts and tribunals are self referential, often not pro-public, and tend to discriminate between states

4 Prabhakar Singh & Benoît Mayer, *Introduction*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 1, 5.

5 Rossana Deplano, *The Welfarist Approach to International Law*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 74, 87.

6 This approach is championed by Eric Posner: Eric Posner, *International Law: A Welfarist Approach*, 73 U. CHIC. L. REV. 487 (2006).

7 Rossana Deplano, *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 75-77.

8 John R. Morss, *The Riddle of the Sands*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 53-55. Morss says that historical change is articulated by international law in paradoxical ways.

9 *Id.*

10 Daniel Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L.J., 417 (2009).

11 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 98, 100.

based on region.¹² Even the work of highly influential publicists is mired in competition for persuasiveness, with Western nations retaining stronghold over the manufacturing of international law.¹³

The resonating lesson of the first segment is to re-imagine the international order while taking into account power relations. The New Haven School's policy oriented approach to international law¹⁴ is one such approach that views international law as being "rule by diplomacy". Although it is believed that the New Haven School tends to fetishize the role of realpolitik, it is true that "the analysis of power within international law, from an international law perspective – rather than the perspective of another discipline, be it ethics, political science, or international relations – is overdue".¹⁵

POST-COLONIALISM

In the 'Postcolonialism' segment, it is argued that international law is complicit in concealing and legitimizing imperialism.¹⁶ The creation of equal states is at the heart of international law; yet, non-European colonized states were not considered equal at all.¹⁷ These states were denied sovereignty by Western powers and on gaining political independence, remain marginalized. The failure of the 'New International Economic Order',¹⁸ and the coercive influence of Western dominated international institutions like the International Monetary Fund are signs of neo-economic imperialism. Anghie calls for an alternate analytic framework, a 'dynamic of difference', directed at studying how international law relates to colonialism,¹⁹

12 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 113-114, 117. Singh takes the example of international investment law decisions that are overwhelmingly pro-private and discriminatory.

13 Singh, *supra* note 15, at 118.

14 For more details on the collaboration between Profs. Lasswell and McDougal, see, O. Hathaway, *The Continuing Influence of the New Haven School*, FACULTY SCHOLARSHIP SERIES, PAPER 834, (2007), http://digitalcommons.law.yale.edu/fss_papers/834.

15 John R. Morss, *The Riddle of the Sands*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 53, 65.

16 Antony Anghie, *Towards a Postcolonial International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 123.

17 Antony Anghie, *Towards a Postcolonial International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 123, 129.

18 By which developing countries sought to assert control over their natural resources.

19 Antony Anghie, *Towards a Postcolonial International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 123, 130.

and which approaches international law as a problem of order between different cultures.²⁰

Human rights historiography is symptomatic of Anghie's observations. The existing human rights historiography is Eurocentric,²¹ fallaciously placing the crisis of modernity at the Holocaust²² when the crisis of modernity in reality began at its birth. Rationalism, modernism and the accumulation of wealth have consistently bred a dark side of slavery, genocide and dispossession.²³ Evidence of the crisis of modernity that do not find a place in modern historiography include the conquest of America,²⁴ the genocides in Cambodia, Rwanda and Bosnia that challenge the consequence of the UDHR and the wide exploitation and violence perpetrated in colonies.²⁵ To attain universal appeal, "human rights need to be located in a wider historical and geopolitical context", and be recontextualised to include five centuries of colonial genocide.²⁶ Upendra Baxi²⁷ has proposed an alternative historiography: Human rights are not a gift from the West. Baxi proposes a history from below where the original authors of history are people in struggles.²⁸ Baxi thus aims to close the "yawning gap" between theory and activism.²⁹ Toufayan believes that

20 Antony Anghie, *Towards a Postcolonial International Law*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 123, 134.

21 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143.

22 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 147.

23 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 156, 163.

24 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 154. Barreto substantiated this with Marx's example of the primitive accumulation of capital. José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 163.

25 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 149-151.

26 José-Manuel Barreto, *A Universal History of Infamy*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 143, 166.

27 Mark Toufayan, *Suffering the Paradox of Rights?*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 167, 175.

28 Mark Toufayan, *Suffering the Paradox of Rights?*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 167, 174.

29 Mark Toufayan, *Suffering the Paradox of Rights?*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 167, 169-170.

Baxi's work falls short methodologically, specifically in explaining *how* to make human suffering legible in discussions about international human rights.³⁰

The lopsided narrative has limited access to human rights to a select few by the installation of personal and geographical limitations.³¹ 'Big' states have disclaimed responsibility for external actions by using strategies such as offshoring human rights violations, as in the case of Guantanamo Bay,³² using the lack of citizenship to limit the rights available to victims as in *Hamdi*,³³ and by exploiting the need for establishing 'effective control' as required by *Bankovic*.³⁴ To be sure, the 'Magic Circle' of rights is expanding. The enforceability of international human rights law against a state has moved from being predicated on nationality and allegiance or territory and 'jurisdiction', to the more modern "power and authority" test.³⁵ Milanovic has proposed a more extensive test, whereby states are required to ensure negative rights to all individuals and positive rights to those within their effective control.³⁶ However, Mayer makes the case for the absence of any conditionalities on the applicability of human rights.³⁷

30 Mark Toufayan, *Suffering the Paradox of Rights?*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 167, 183. Not only is Baxi equivocal about the politics of the historian's use of past human suffering for the future of human rights, he is also unable to justify whether the grassroots voice is relevant to human rights decisionmaking. Moreover, left unaddressed are the methodological dangers of a history from below which can include issues of agency, representation and the creeping in of unwarranted assumptions and omissions. Mark Toufayan, *Suffering the Paradox of Rights?*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 167, 184.

31 Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 199.

32 Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 206.

33 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 203.

34 *Bankovic v. Belgium* 2001-XII Eur. Ct. H.R. 890; Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 210.

35 Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 202, 207: The power and authority test includes cases where a state has *de facto* and *de jure* control over an event.

36 Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 215.

37 Benoît Mayer, *The Magic Circle of Rights Holders*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 198, 216.

TRANSNATIONAL LAW

Judge Philip Jessup characterised transnational law being as “all law which regulates actions or events that transcend national frontiers...[including] [b]oth public and private international law...[plus] other rules which do not wholly fit into standard categories.”³⁸

The growth of a self-sufficient system of adjudication of international investment law is a product of transnationalism. Uruena explains that although arbitral awards do not bind later tribunals, precedent is widely used in international investment law.³⁹ To explain the legitimacy of this system, Uruena likens it to a model of global governance where collective expertise is introduced to remedy the failure of municipal laws to protect the interests of investors.⁴⁰ Prior investment awards are the only reliable source of remedying this failing.⁴¹ Thus, the legitimacy of the system derives not from state sovereignty, but from principles of global governance.

Similarly, while conventionally, human rights obligations derive from state consent, a transnational framework also allows for the creation of new entitlements by placing reliance on novel sources. The human right to water does not constitute a positive international law, as custom is silent and conventions only call for progressive realization.⁴² Owen McIntyre states that the rights and obligations of actors such as individuals, corporations, vulnerable communities, investors, and state agencies can be garnered from transnational regulations using the Global Administrative Law framework, akin to administrative law questions.⁴³ Closer study reveals that the principles relating to universal access to water as articulated

38 Harold Koh, *Why Transnational Law Matters*, 24 PENN STATE INT’L L. REV. 745 (2006). To borrow Prof. Harold Koh’s definition: “[t]ransnational law represents a hybrid of domestic and international law that has assumed increasing significance in our lives.”

39 Rene Uruena, *Of Precedents and Ideology*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 276, 280.

40 Rene Uruena, *Of Precedents and Ideology*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 276, 293-301.

41 Rene Uruena, *Of Precedents and Ideology*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 276, 301.

42 Owen McIntyre, *The Human Right to Water as a ‘Creature’ of Global Administrative Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 249, 259.

43 Owen McIntyre, *The Human Right to Water as a ‘Creature’ of Global Administrative*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 249, 250.

by a variety of non-state actors and institutions reflect accountability, participation, predictability, and transparency.⁴⁴

Other non-conventional governance institutions are constantly posing challenges to international law.⁴⁵ How should modern international law be visualised? Should a plural approach that appreciates non-state actors functioning as norm setting agencies be taken, or should a state-centric constitutional approach be adopted? As of now, there are no clear answers. The European Court of Human Rights in *Behrami*⁴⁶ took a constitutional approach by upholding the member states' obligations under the United Nations resolution over European Union obligations. On the other hand, in *Kadi*,⁴⁷ a plural approach was taken, as the European Court of Justice by providing judicial review over a Security Council Resolution. Singh and Kubler conclude that both constitutionalism as well as pluralism are necessary to maintain the delicate transnational fabric: the former to "ensure the legitimacy of the international legal order in the face of fragmentation" and the latter to "curtail the hegemonic intent that international law's makers...might have."⁴⁸

The tussle between the power of the state and that of new fangled international institutions is also apparent in the development of the "international man". An international civil service comprising of individuals who owed allegiance only the international order was first visualised when the League of Nations was established.⁴⁹ However, the international man failed to materialise. Not only was the field far from representative (positions were overwhelmingly filled by elite Anglo-Saxon men)⁵⁰, the vision of cultivating the fine balance between a strong international

44 Owen McIntyre, *The Human Right to Water as a 'Creature' of Global Administrative*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 249, 257, 275.

45 Prabhakar Singh and Benoît Mayer, *Introduction*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 1, 5.

46 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* Joined App Nos. 71412/01 & 78166/01.

47 CFI *Kadi* Case T-315/01.

48 Prabhakar Singh and Sonja Kubler, *Constitutionalism and Pluralism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 304, 304.

49 Frédéric Megret, *The Rise and Fall of International Man*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 223

50 Frédéric Megret, *The Rise and Fall of International Man*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 223, 233.

orientation with national foundations (“a rooted rootlessness”⁵¹) was hard to achieve.

SOME POINTS OF ANALYSIS

The contributions in *Critical International Law* are divided on a number of subjects. Non-state actors are treated by McIntyre as being legitimate members of global governance mechanisms with the capacity to create administrative norms. Uruena paints a vivid picture of international investment arbitrations as being legitimate, self referential systems created by non-state, ad hoc arbitral tribunals. Singh, on the other hand, is more sceptical about self referring international courts and tribunals and even authoritative publicists becoming agents of legitimacy as he believes that there may not be “enough political will among states...to transnationalize”.⁵² On occasion, these might even turn into opportunities for the unwarranted exercise of private power,⁵³ or for errant behaviour such as the invention of international law particularly by dominant Western sovereigns.⁵⁴ Thus, while one group of scholars sees legal pluralism and the growth of non-state actors as a reality with benefits, others believe that when power imbalances permeate to these non-state actors, there is cause for concern. Constitutionalism, too, is a contested notion. The overwhelming approach of the authors is to question the established system of international norms. Anghie’s postcolonial critique strikes at the core of the system of international law itself, attacking its biased constitution. However, Singh and Kubler’s contribution looks at the benefits of constitutionalism as maintaining framework for the international legal order. By and large, all contributions see value in the existence of an international legal order. This emerges as a central challenge: reshaping the foundation of international law while retaining its functionality.

51 Frédéric Megret, *The Rise and Fall of International Man*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 223, 232.

52 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 98, 112.

53 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 98, 116.

54 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in *CRITICAL INTERNATIONAL LAW*, *supra* note 1, at 98, 118.

Interestingly, *Critical International Law* indicates a dynamic role for scholars as bearing the ultimate burden of reforming the international order. Saberi acknowledges the professional image of the international law as being a distinctive contribution of the New Haven School.⁵⁵ The international scholar is envisaged as an activist lawyer “at the service of human dignity”⁵⁶ who participates in different phases of the legal process⁵⁷ and influences perspectives by communicating ideologies.⁵⁸ Similarly, in an attempt to break Western hegemony in the realm of highly acclaimed publications as a source of international law, Singh calls for all nations to invest in their international law intelligentsia who may then create scholarship from their national perspective that can influence the direction taken by international law.⁵⁹ Toufayan’s piece describes the ‘historiographical turn’ that encompasses a “growing need on the part of international lawyers to review (even to confirm) the history of international law and to establish links with the past and present”.⁶⁰ Thus, critical international law is raising the bar for international law scholars by introducing new ethical dimensions to scholarly research. In assessing whether international scholars are capable of performing this role, Saberi cautions against the dangers of unconditional faith in a class of persons,⁶¹ and alerts readers to the fact that questions of what kind of political behaviour can be considered acceptable are subject to much political and historical debate that international scholars may be unable to agree upon or to resolve.⁶² Perhaps the potential of scholarship from different parts of the world to influence and correct the prevailing vision of international law is for time to tell.

55 Hengameh Saberi, *Descendents of Realism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 52.

56 Hengameh Saberi, *Descendents of Realism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 31.

57 Hengameh Saberi, *Descendents of Realism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 42 including: intelligence, recommendation, prescription, invocation, application, termination, and appraisal.

58 Hengameh Saberi, *Descendents of Realism* in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 43.

59 Prabhakar Singh, *Revisiting the Role of International Courts and Tribunals*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 98, 119.

60 Mark Toufayan, *Suffering the Paradox of Rights?*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 167, 170.

A prime criticism levied against the Crits has been that their critique is chiefly deconstructive.⁶³ *Critical International Law* aims to “reflect the many ways in which critical scholars think about international law”.⁶⁴ Is the premise of this book too limited and should the book address the implementation of the paradigms proposed by the Crits as well? While Anghie makes a strong point regarding the manner in which imperialism has shaped and continues to shape international law,⁶⁵ he is silent on how this realisation can be utilized to impact current international lawmaking. Can raising caution regarding the colonial overtones of international law alter and inform international negotiations, decision-making or the drafting of treaties? Can revealing the imperial proclivities of jurists⁶⁶ adversely affect the authority of their word on international law? What is the consequence of Western powers acknowledging the historically lopsided nature of international law and what amends can they make? On similar lines, while Barreto’s call for a “recontextualization of human rights” is pressing and convincing, it is not supplemented by the parameters of the recontextualization. Accounting for the vast experience of colonialism is no small task, and is fraught with complex methodological concerns. Further thought on who is responsible for recontextualizing the history of international law, and how, would be welcome. The Afterword also notes that the Crits have been accused of “remain[ing] at arm’s length from the more practical concerns of their discipline”.⁶⁷ While Morss has a convincing critique of the paradoxical ways in which power is understood

61 Hengameh Saberi, *Descendants of Realism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 46.

62 Hengameh Saberi, *Descendants of Realism*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 29, 48.

63 The Afterword to *Critical International Law* notes that “[o]f particular concern is the failure of many critical international scholars to effectively, explicitly reflect on what comes after their structural critiques”. Sébastien Jodoin and Katharine Lofts, *What’s Critical about Critical International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 326, 334.

64 Prabhakar Singh and Benoît Mayer, *Introduction*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 1, 5.

65 Antony Anghie, *Towards a Postcolonial International Law* in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 123, 140.

66 Antony Anghie, *Towards a Postcolonial International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 123, 142.

67 Sébastien Jodoin and Katharine Lofts, *What’s Critical about Critical International Law*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 326, 334.

in international law, the solution proposed is to ‘take apart’ statehood and self-determination and create a new account that will make legal sense of legitimacy.⁶⁸ The effectuation of this solution is obscure. Can the genesis of states that were contested at their inception be questioned today on theoretical grounds? If so, what are the consequences of a historical case of self-determination being illegitimate under the new paradigm of analysis?

As it stands, united by the loose common thread of “thinking critically”, and approaching international law from three powerful vantage points, the novelty and richness of perspectives presented in the compilation make *Critical International Law* a compelling read.

68 John R. Morss, *The Riddle of the Sands*, in CRITICAL INTERNATIONAL LAW, *supra* note 1, at 53, 72.

