CSICL

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Reading Humanitarian Intervention

Human Rights and the Use of Force in International Law

ANNE ORFORD

CAMBRIDGE

more information - www.cambridge.org/9780521804646

financial institutions, and a Public Service'.[62] UNTAET had to provide training for police, 'not only on police methods and techniques but also on the ethics of a democratic police and respect for human rights, which is of course a new idea in East Timor'.[63] Training of the Civil Service also posed difficulties for UNTAET: 'What UNTAET wants to achieve is a Civil Service independent from political affiliations and cronyism, competent and not corrupt. These are ambitious goals anywhere but perhaps more so in this part of the world.'[64]

Cady's vision is of East Timor as a blank slate in terms of existing knowledge and experience, marked by cronyism, incompetence and corruption. The people of East Timor are portrayed as lacking a state, ethics, skills and respect for human rights. This representation can be traced back to ideas about Europe's mission to educate and develop the peoples of its colonies – one aspect of the culture of imperialism explored by Edward Said. As Said has shown so clearly, while 'profit and hope of further profit were obviously tremendously important' in the expansion of European imperialism, so too was a particular imperial culture which supported the notion that 'certain territories and people *require* and beseech domination'.[65] As I argue in Chapter 2, central to this civilising-mission rhetoric was the idea of colonialism as pedagogy, and the coloniser as an educator. As Leela Gandhi notes, the 'perception of the colonised culture as fundamentally childlike feeds into the logic of the colonial "civilising mission" which is fashioned, quite self-consciously, as a form of tutelage or a disinterested project concerned with bringing the colonised to maturity'.[66] This pedagogical imperative, and its conservative effects, continue to shape the way in which international administration is understood.

East Timor formally gained its independence on 20 May 2002. Despite this, the international community is still heavily involved in administration of the new state. The Security Council, while 'recognizing the primary responsibility of the people of East Timor for nation building', notes international assistance will be required in the period after independence to assist in the 'development and strengthening of East Timor's infrastructure, public administration, law enforcement and defence capacities'.[67] It established the United Nations Mission of Support in East Timor (UNMISET) to succeed UNTAET on 20 May 2002, and to

[62] *Ibid*., 1. [63] *Ibid*., 3. [64] *Ibid*., 4.
[65] Edward W. Said, *Culture and Imperialism* (London, 1993), p. 8 (emphasis in original).
[66] Leela Gandhi, *Postcolonial Theory: a Critical Introduction* (St Leonards, 1998), p. 32.
[67] SC Res. 1410 (2002), adopted on 17 May 2002.

assist in maintaining political stability and security, providing law enforcement and demarcating borders with Indonesia.[68] Similarly, the IMF and the World Bank have both signalled their intention to maintain their role in the economic management of East Timor and its development post-independence.[69] The powers exercised by the UN and international financial institutions sit uneasily with the existence of bodies intended to represent the will of an independent people.

Self-determination after colonialism

The economic and political management being developed by these international organisations on behalf of East Timor sets the stage for the kind of limited sovereignty that Antony Anghie has analysed in his study of the operation of the mandate system of the League of Nations after World War I.[70] Under that system, territories belonging to defeated powers were placed under the control of mandate powers who were responsible for the administration of those territories and required to report back to the League concerning the well-being and development of mandate peoples. The mandate system appeared to be premised on the international community's desire to move away from colonialism.[71]

Anghie argues, however, that far from representing a radical departure from international law's acceptance of colonialism, the mandate system merely changed its legal form, instituting a new form of colonial power based not on political but on economic control. The neocolonial process would be overseen by an international institution, one which, like the World Bank in East Timor, saw its role as technical rather than political. Administration of a territory was to be undertaken by a disinterested body of international experts intent on ensuring the proper development and welfare of those subject to their trust.[72] The policies

[68] *Ibid*., paras. 2, 4, 12.

[69] World Bank, East Timor: Donors Applaud East Timor's National Development Plan, Dili, 15 May 2002, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,contentMDK:20045490~menuPK:34466~pagePK:34370~piPK:34424~theSitePK: 4607,00.html (accessed 28 June 2002); Donors' Meeting on East Timor, Staff Statement by Stephen Schwartz, Deputy Division Chief, IMF Asia and Pacific Department, Dili, 14–15 May 2002, http://www.imf.org/external/np/dm/2002/ 051402.htm (accessed 28 June 2002).

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

[71] *Ibid*., 278. [72] *Ibid*., 284.

of such institutions were seen as scientific and objective, rather than self-interested. The system as a whole, however, operated to integrate the mandate society into the international economy in a subordinate role. As a result, while those territories appeared to be freed from political control, they remained subject to the control of the parties that exercised power within the international economy.[73] The resources and people of those territories were exploited just as efficiently under this new arrangement as they were under classical colonialism. Many of the same arguments can be seen to apply in the cases of Bosnia-Herzegovina and East Timor.

In some quarters, even this limited sovereignty is seen as posing too great a constraint on the freedom to act of the international community and private investors. For example, Allan Gerson has written that the direct degree of control exercised by the World Bank and the UN over the economic development of East Timor prior to independence provides a model which is greatly to be preferred to the situation in the Balkans. For Gerson, 'East Timor presents the most concerted effort at UN–World Bank coordination, *unhampered* by the type of self-imposed legal restrictions hindering the Bank's engagement in Bosnia and Kosovo.' This is particularly the case as 'in the latter, Serbia *nominally* retains sovereignty'.[74]

The questions these case studies raise for the legitimacy of international law are demonstrated in an article by Matthias Ruffert on the administration of Kosovo and East Timor by the international community. Ruffert struggles to find a legal category to capture the nature of the international personality of those territories under administration, given that all the existing categories that intuitively seem to fit – protectorate, trust territory – must be dismissed because of their links to colonialism.[75] He explains his reluctance to adopt these categories on the basis that 'the colonial context should not inadvertently be alluded to', despite his recognition that 'even if there are traces of self-determination, particularly in East Timor, the power of final decision remains with the UN-administration in all areas of government'.[76] For Ruffert, there is 'without any doubt' no colonising impulse at work

[73] *Ibid*., 283.

[74] Allan Gerson, 'Peace Building: the Private Sector's Role' (2001) *American Journal of International Law* 102 at 110 (emphasis added).

[75] Matthias Ruffert, 'The Administration of Kosovo and East Timor by the International Community' (2001) 50 *International and Comparative Law Quarterly* 613 at 631.

[76] *Ibid*., 627, 629.

here – both because 'the special status of both territories is temporary' and because of 'the benevolent character of international administration'.[77]

The colonial character of the categories to which Ruffert is drawn illustrates for me what is at stake for international law in the post-conflict reconstruction process. The narrative of humanitarian intervention operates to construct this sense of the 'benevolent character of international administration'. Participation in this narrative limits our understanding of what is taking place in those territories. As Homi Bhabha comments in the context of colonial governance:

> The barracks stands by the church which stands by the schoolroom; the cantonment stands hard by the 'civil lines'. The visibility of the institutions and apparatuses of power is possible because the exercise of colonial power makes their relationship obscure, produces them as fetishes, spectacles of a 'natural'/racial pre-eminence.[78]

The texts of humanitarian intervention and of international economic law play a central part in making this relationship obscure. These texts make sense of the relations between barracks, 'investors' and 'developing states' in terms of a narrative of progress and development, in which a character called Foreign Capital is the agent of wealth and prosperity.[79] As a result, economic coercion as exploitation in the Third World is hidden from sight.[80] The international legal literature celebrating the achievement of post-intervention reconstruction plays its part in masking this relationship by failing to attend critically to the nature of the economic order that is put in place through the reconstruction process.

Attention to this colonial heritage suggests something else that is at stake in these texts, beyond economic questions of control over territory and resources. The international community constitutes itself in these texts of intervention and reconstruction as a designer of new worlds, a solver of problems, and a saviour of suffering peoples. As the work of Annelise Riles has shown, the aesthetics of international legal practice is premised upon an appreciation of the art of global design, and a faith in the ability of lawyers to create 'new and universally attractive

[77] *Ibid*., 629. [78] Homi K. Bhabha, *The Location of Culture* (London, 1994), p. 83.

[79] Judith Grbich, 'Taxation Narratives of Economic Gain: Reading Bodies Transgressively' (1997) 5 *Feminist Legal Studies* 131; Arturo Escobar, *Encountering Development: the Making and Unmaking of the Third World* (Princeton, 1995).

[80] Gayatri Chakravorty Spivak, *In Other Worlds* (New York, 1988), p. 167.

forms'.[81] International legal form brings problems into existence 'for itself to solve'.[82] This is never clearer than in the literature on intervention, where problems of poverty, violence, ethnic tension and authoritarianism are a background against which to imagine the international community as a designer of solutions and a manager of their implementation. In their resolutions and statements on East Timor, the IMF applauds 'the UN's skilful management of the transition' and 'the effectiveness of the international community's financial and technical support',[83] while the Security Council pays tribute to 'the dedication and professionalism of UNTAET and to the leadership of the Special Representative of the Secretary-General in assisting the people of East Timor in the transition towards independence'.[84] The Secretary-General comments that UNTAET 'had a truly historic mandate in East Timor' and that 'few would have imagined that a de novo public administration could have been established within just 30 months'.[85] In this sense, the internationalisation of Bosnia-Herzegovina and East Timor contributes to the constitution of the 'international community', both materially and symbolically.

Imagining self-determination

I want now to ask whether the emancipatory promise of self-determination can offer a counter to the efficient management practices underpinning international administration. Are international lawyers doomed 'to manipulate a discourse gone dead in their hands',[86] or can the language of self-determination serve as a basis for responding to the issues I have raised about Bosnia-Herzegovina and East Timor?

The answers to these questions depend in large part upon the formulation of self-determination that is named as the law. A minimalist view of self-determination dominates the texts of law in the context of international intervention or peace-building. Catriona Drew has argued

[81] Annelise Riles, 'Global Designs: the Aesthetics of International Legal Practice' (1999) 93 *American Society of International Law Proceedings* 28 at 33.

[82] *Ibid*., 34.

[83] Donors' Meeting on East Timor, Statement by Stephen Schwartz, Deputy Division Chief, IMF Asia and Pacific Department, Oslo, 11–12 December 2001, http://www.imf.org/external/np/dm/2001/121201.htm (accessed 28 June 2002).

[84] SC Res. 1410 (2002), adopted on 17 May 2002.

[85] Report of the Secretary-General on the United Nations Transitional Administration in East Timor, S/2002/432, p. 15.

[86] Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255 at 256.

persuasively that there has been much attention paid internationally to the procedural aspect of 'the right of a people to a free choice over its political and territorial destiny', at the expense of other substantive elements.[87] According to this narrow reading of the content of the right, self-determination merely guarantees the right to a process, by virtue of which all peoples 'freely determine their political status'.[88]

The implications of treating the right of self-determination as a right to a free choice in the absence of more substantive rights are well illustrated by the arguments of Rosalyn Higgins, then acting as agent for Portugal, in her oral argument before the International Court of Justice (ICJ) in the *Portugal* v. *Australia* case.[89] Portugal there claimed that Australia had violated its duties to respect the right of the people of East Timor to self-determination, by negotiating and concluding the Timor Gap treaty with Indonesia for the exploitation of the natural resources of East Timor.[90] Australia argued that the conclusion of this treaty did not prevent a future choice regarding their political status by the people of East Timor, and thus did not infringe their right of self-determination. In her response, Rosalyn Higgins criticised Australia's perception of the law of self-determination, describing it as 'at once mechanistic and minimalist'.[91] She observed:

> The Australian perspective on self-determination is this: its substantive requirements are very little, and they may be fulfilled in two ways: by periodically intoning that one recognises the right and by complying with United Nations sanctions. That's it. There is nothing else that States (at least those who are not administering Powers or trusteeship authorities) have to do . . . The policy implications of this view of self-determination are obvious and we do not need to dwell on them. It is a view which leaves peoples awaiting self-determination at the

[87] Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law* 627 at 663.

[88] 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UN General Assembly, 14 December 1960. GA Res 1514, UN GAOR 15th Sess., Supp. No. 16, at 66, UN Doc A14684 (1961), para. 2; International Covenant on Civil and Political Rights, opened for Signature at New York, 16 December 1966 (in force 23 March 1976), 999 UNTS 171 Article 1(1); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3, Article 1(1).

[89] R. Higgins, Final Oral Argument, paras. 59–98, http://www.icj-cij.org/icjwww/icases/ipa/ipa cr/iPA icr9513 19950213.PDF (accessed 6 March 2002).

[90] Australia and Indonesia: Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (with Annexes), signed over the Zone of Cooperation, above the Timor Sea, 11 December 1989, in force 9 February 1991, reprinted in (1990) 29 ILM 469.

[91] Higgins, 'Final Oral Argument' para. 69.

very margin of international law, as a 'left-over' in the robust world of sovereign freedoms . . . That effectively guarantees that if a certain people awaiting self-determination is not in the middle of an ongoing war-and-peace environment, nothing will be done for them.[92]

If this 'minimalist' view of self-determination is successfully named as the law, it offers little to those who fought for independence in East Timor.

A second view of the meaning of self-determination is couched in terms of guaranteeing to people the right to freedom from alien subjugation, domination and exploitation. This formulation of a right to political and economic independence appears in the language of the 1960 Declaration on Colonial Independence, which declares that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights' and speaks of the right of all peoples 'to complete independence'.[93] Similarly, the 1970 Declaration on Friendly Relations proclaims that by virtue of the principle of self-determination enshrined in the UN Charter, 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'.[94] The common Articles 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also describe self-determination as both the right of a people 'freely [to] pursue their economic, social and cultural development' and the right to control over territory and resources. It states 'all peoples may, for their own ends, freely dispose of their natural wealth and resources . . . In no case may a people be deprived of its own means of subsistence.'[95]

Commentators writing in the 1990s have advocated a renewed focus on this economic aspect of self-determination. For example,

[92] *Ibid*., paras. 61–3. [93] 1960 Declaration on Colonial Independence, paras. 1 and 4.

[94] 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, adopted by the UN General Assembly, 24 October 1970. GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN DOC A/8028 (1971), reprinted in (1970) 9 ILM 1292, para. 1.

[95] International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966. The 1986 Declaration on the Right to Development also makes clear that full realisation of the right of peoples to self-determination includes 'the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'. Adopted by the UN General Assembly, 4 December 1986. GA Res. 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc. A/41/53 (1987).

J. Oloka-Onyango argues that by 'primarily focusing on the political aspects of colonialism (i.e. on the political domination exercised over their territories), the anti-colonial nationalists left out of the paradigm the extensive linkages that the system (as an economic phenomenon) had created between colony and colonized'.[96] For Oloka-Onyango, economic self-determination as enshrined in international law is of utility for those seeking to challenge the exploitative international political economy that is a legacy of classical colonialism. Christine Chinkin and Shelley Wright note that while the right of self-determination has been largely viewed as 'a political right of fairly narrow interpretation', the final limb of common Article 1 of the international human rights covenants states that 'in no case may a people be deprived of its own means of subsistence'.[97] Chinkin and Wright suggest that while the right to subsistence has received little attention, it is the most important aspect of common Article 1.[98] For Catriona Drew: 'Implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set of resources . . . To confer on a people a right of 'free choice' in the absence of a more substantive entitlement – to territory, natural resources etc – would simply be meaningless.'[99]

The Human Rights Committee's General Comment on Article 1 notes that this economic aspect of the right of self-determination entails corresponding duties for all states and for the international community.[100] Thus this reading of self-determination does allow a focus on the role of the international community and a return to the question of control over territory and resources. This interpretation of self-determination provides a legal framework for addressing the ways in which power and profit operate in the postcolonial context, and can help to make visible the economic exploitation that is enabled through the practice of humanitarian intervention and post-conflict reconstruction.

Yet I am uneasy about the vision of the state and its relationship to the international community that such readings of self-determination assume. I want to explore that uneasiness now through an examination

[96] J. Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) 15 *American University International Law Review* 151 at 171.

[97] Christine Chinkin and Shelley Wright, 'The Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan Journal of International Law* 262 at 301, 307.

[98] *Ibid*., 307.

[99] Drew, 'East Timor Story', 663.

[100] Human Rights Committee, *General Comment 12: The Right to Self-Determination of Peoples, Article 1, Twenty-First Session, 1984*, http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+12.En?OpenDocument (accessed 8 March 2002).

of the two concepts of 'self' and 'determination' underpinning this discourse.

The autonomous self

Both the political and the economic formulations of self-determination as a right to freedom from foreign domination and exploitation are concerned with questions of autonomy and freedom from foreign intervention. The powerful appeal of this notion can be seen in the case of East Timor, a nation which on 20 May 2002 was declared independent after three centuries of Portuguese colonial rule, twenty-four years of Indonesian occupation and two-and-a-half years of UN administration. It is moving to read Secretary-General Kofi Annan's welcome to the East Timorese nation, and his invocation of the moral and legal legitimacy of independent statehood: 'Your identity as an independent people will be recognised by the whole world . . . At this moment, we honour every citizen of East Timor who persisted in the struggle for independence . . . We also remember the many who are no longer with us, but who dreamed of this moment.'[101]

Yet such language affirms the image of the ideal state as separate, secure and autonomous. It reinforces a vision of international order as essentially consisting of an 'aggregate of independent, private spaces, socialised and connected through contractual relations'.[102] As Martti Koskienniemi has argued, this sense of self-determination both explains and justifies the existing state-centred international order: 'Without a principle that entitles – or perhaps even requires – groups of people to start minding their own business within separately organised 'States', it is difficult to think how statehood and everything we connect with it – political independence, territorial integrity and legal sovereignty – can be legitimate.'[103]

[101] 'New Country, East Timor, Is Born: UN, which Aided Transition, Vows Continued Help', http://www.un.org/apps/news/story.asp?NewsID=3714&Cr=timor&Cr1= (accessed 20 May 2002).

[102] Kane Race, 'The Beast with Two Backs: Bodies/Selves/Integrity' (1997) 9 *Australian Feminist Law Journal* 24 at 25, 29, discussing the 'ideal phallic body'. As Race notes, 'no body conforms to such an ideal', just as no state is as impermeable and isolated as this account would have us believe. On the parallels between the constitution of the phallic, masculine body and the sovereign body of the state, see Anne Orford, 'The Uses of Sovereignty in the New Imperial Order' (1996) 6 *Australian Feminist Law Journal* 63; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: a Feminist Analysis* (Manchester, 2000), pp. 137–8.

[103] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241 at 245.

I am reluctant to deploy this notion of the state and the international for a number of reasons. First, the use of the right of self-determination imagined in terms of a right to autonomy has strategic limitations, for reasons that parallel the problems faced by feminists attempting to rewrite the feminine body as autonomous, rather than lacking and partial. As Moira Gatens has argued, to do so essentially reproduces the masculine fantasy of an impossible, ideal body that is separate and isolated from all other bodies.[104] A similar notion emerges in international legal texts, which present the ideal sovereign state as impermeable, bounded, independent and separate from the chaotic world that surrounds it. This notion developed in part as a response to the anxieties about who should count as international legal subjects generated by the colonial enterprise.[105] The doctrinal attempt to define the 'proper subjects of international law' was fuelled by the political imperative of European lawyers seeking to find a way to distinguish 'sovereigns proper from other entities that also seemed to possess the attributes of sovereignty, such as pirates, non-European states, and nomads'.[106] The answer for positivists such as Thomas Lawrence was to create a distinction based on cultural differences between sovereigns and others.[107] Sovereignty was based on independence from external authority, and effective control over a territory and its inhabitants.

Of course, no sovereign state existed, or exists, in the splendid autonomy dreamt of by positivist international lawyers. All states are creatures of law, situated in a network of legally defined rights and obligations. The subjects of international law are themselves always constituted by that law. Yet the notion of the sovereign state as an autonomous entity, and of international law as emanating from the will of such states, justified the dispossession of those people who were characterised as non-sovereign. To reaffirm this notion of the ideal state is to risk branding as less than sovereign any state that 'receives the international',[108] in the sense of

[104] Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (London, 1996), pp. 29–45.
[105] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1 at 17.
[106] *Ibid*., 26.
[107] Thomas Lawrence, *The Principles of International Law* (London, 1895), pp. 1–25.
[108] This phrase is taken from David Kennedy, 'Receiving the International: What's the Public/Private Distinction Got to Do with It?', paper presented at the New York University Institute for Law and Society, 3 March 1995. I am inspired here by Kane Race's arguments about ways 'to imagine positions of receptivity that need not suppose violence': Race, 'The Beast', 44.

being represented as the objects of aid or intervention. Indeed, just such a use of independence as an ideal can be seen in the statements made by those Indonesians and pro-Indonesian East Timorese who resent the end of Indonesian rule and want to characterise East Timor as too immature for statehood. For example, Mario Viegas Carrascalao, former governor of East Timor under Indonesian occupation and leader of the opposition Social Democratic Party in East Timor, argues 'independence represents a victory for everybody, but it's a very dependent independence . . . It's been done too quickly and we're not ready for the day after. We are becoming a nation with our hand held out.'[109]

Equally, the deployment of a notion of self-determination as a right to autonomy reinforces the sense of the foreign as a threat. It fits too easily into the terms of a debate premised on the need to protect a boundary between self and other, national and international, sovereign autonomy and foreign control. That which threatens to cross state borders – such as flows of refugees, introduced diseases, foreign capital or environmental pollution – is presented as a threat to the integrity of the nation or the health of the body-politic. There is today a disturbing, at times paranoid, side to the discussion of the threat posed to the nation by foreign influences.[110] We can see this illustrated in the increased racist attacks on refugees and migrants in many industrialised states, and in the re-emergence of xenophobic, far-Right nationalist parties in many parts of the world. In Australia, this trend is also evidenced by the hostility of responses to adverse findings by UN human rights bodies about issues ranging from Australia's anti-gay laws in Tasmania to the detention of refugees and to mandatory sentencing laws.[111]

[109] Tom Hyland and Lindsay Murdoch, 'The Future Begins Here', *The Age*, 18 May 2002, Insight, p. 3.

[110] On the emergence of a paranoid form of politics as a response to the vacuum created by the ending of the Cold War and its narratives about otherness and danger, see Eric L. Santner, *My Own Private Germany: Daniel Paul Schreber's Secret History of Modernity* (Princeton, 1996), p. xiii.

[111] For a discussion of media reactions to the *Toonen* decision of the Human Rights Committee in such terms, see Philip Alston, 'Reform of Treaty-Making Processes: Form over Substance?' in Philip Alston and Madelaine Chiam (eds.), *Treaty-Making and Australia: Globalisation versus Sovereignty?* (Canberra, 1995), pp. 1–26 at p. 5. The issue arose again in Australia in 2000, when the federal Attorney-General responded to an adverse report by the UN Committee on the Elimination of Racial Discrimination, rejecting it as 'an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs': The Australian Attorney-General, the Hon. Daryl Williams, *CERD Report Unbalanced*, Press Release, 26 March 2000, http://law.gov.au/aghome/agnews/2000newsag/71700.htm (accessed 16 October 2001). The Foreign

Indeed, international intervention legitimised in the name of self-determination as a right to autonomy shares underlying assumptions with the use of force in the name of self-defence. In each case, the ideal 'self' to be determined or defended is one that is free from foreign interference. The argument that the use of force by the USA against Afghanistan is lawful as an act of self-defence, or 'defensive self-preservation', can be understood as part of this tradition.[112] The USA *is* engaged in 'self-defence' in its war on terror. The self it is defending is an imaginary one, defined by a belief in its capacity to achieve closure against that which is perceived as foreign. As Shelley Wright argues, the responses of the USA and some American international lawyers to the events of September 11 represent an 'anxious grab for certainty', a reaction to the anxiety produced by the failure of law or the nation-state ever to achieve absolute mastery over itself and its others.[113]

How then to affirm the right of self-determination, without reifying the autonomous state as the end of intervention? One strategy may be to reimagine the 'self' of self-determination, so that the integrity of the sovereign state and the right of a people to control their own territory is not dependent upon closure or separateness. The challenge then becomes to find ways to affirm and extend this sovereign state through interaction and connection, or through monitoring and controlling exchanges across its borders. The aim of such control is not to achieve perfect independence, but to reject those relations and flows that are exploitative, while welcoming those that are life-affirming and life-enhancing.

This is, after all, what the East Timorese people sought in the aftermath of the violent response to the announcement on 4 September 1999 that an overwhelming majority had voted for independence from Indonesia in the UN-sponsored referendum. When East Timorese leaders such as Xanana Gusmao and Jose Ramos Horta called for Indonesia to leave and for UN peace-keepers to take their place in East Timor, they were not demanding complete autonomy for that territory and its people. Rather, at stake was the right of the East Timorese people to

Minister Mr Downer, said that the Federal Government would not allow Australia 'to be run by people in UN committee meetings in Geneva': Debra Jopson, Simon Mann and Mike Seccombe, 'Ministers Tell UN Lobbyists: Stop Meddling', *Sydney Morning Herald*, 21 July 2000.

[112] See, for example, Thomas M. Franck, 'Terrorism and the Right of Self-Defence' (2001) 95 *American Journal of International Law* 839.

[113] Shelley Wright, 'The Horizon of Becoming: Culture, Gender and History after September 11' (2002) *Nordic Journal of International Law* (forthcoming).

control over the terms on which their borders were breached and intercourse conducted. A right of self-determination understood in these terms suggests that reconstruction as currently practised is unjust, not because it poses a foreign threat to sovereign autonomy, but rather because it represents a denial of the right of the peoples of Bosnia-Herzegovina and East Timor to control the terms on which they receive globalisation and the international community.[114]

The act of determination

Luce Irigaray begins her essay 'The Looking Glass, from the Other Side', with the following quote from *Through the Looking Glass*:

> she suddenly began again. 'Then it really *has* happened, after all! And now, who am I? I *will* remember, if I can! I'm determined to do it!' But being determined didn't help her much, and all she could say, after a great deal of puzzling, was: 'L, I *know* it begins with L.'[115]

This text provides a useful starting point for exploring a related concern about the use of 'self-determination' as a concept. As this quote suggests, the notion of 'determination' carries with it a sense of a subject that is in control of its identity, capable of willing a particular version of that identity to carry the day. The etymology of the verb to 'determine', from the Latin *determinare* (to bound, limit or fix) evokes a subject capable of fixing its boundaries and limits. To determine something may mean to make an authoritative or judicial decision (as in the legal determination of a question), to fix or locate something in space (in the mathematical usage), or to identify the nature of something conclusively. 'Determination' also connotes the action of coming to a reasoned decision or directing the will towards an end or goal (as in Alice's determination to remember who she is). The action of self-determination, determination *of* the self *by* the self, suggests a subject capable of making authoritative decisions, using reason, directing its will, achieving its ends and establishing the location, boundaries and identity of its self.

Yet the work on subject-formation in the psychoanalytic field unsettles that conception of identity at the level of the individual subject. Irigaray's inclusion of the Alice passage at the beginning of her essay

[114] See generally Leela Gandhi, 'The Dialectics of Globalisation' in Christopher Palmer and Iain Topliss (eds.), *Globalising Australia* (Melbourne, 2000), pp. 133–9 at p. 139.

[115] Luce Irigaray, *This Sex Which Is Not One* (trans. Catherine Porter, Ithaca, 1985), p. 9 (emphasis in original).

on the looking glass (or mirror) hints at one way of reading the limits of determination in the field of identity, as it points us towards the Lacanian theory of the 'mirror stage' and its role in the creation of the self. According to this theory, in the beginning there is primal union between the mother and the child.[116] This is the time of the Real, of the child's sense that it is one with nature and the maternal body, a time of blissful unity. At the time of Lacan's mirror stage, which he posits as lasting from about the ages of six to eighteen months, the child begins to be aware that it is not one with the mother.[117] This is accompanied by a sense of loss or lack, as if the mother is suddenly perceived as completely absent or separate from the child.

The child addresses this sense of loss or lack because fortuitously, at about this time, the child begins to be able to perceive visual images although it is not yet able to control its motor functions. The child identifies with the coherent, whole, unified image of itself it sees in the mirror (the other), and/or with the whole body of the mother, who in turn appears to the child to be coherent and unified.[118] The child's subjectivity or sense of itself as being a coherent and unified totality is based on this incorporation of the specular image, as opposed to the fragmented and chaotic sense of self produced through its perceptions. Lacan describes this as a tension between the 'turbulent' and 'fragmented' body which the child perceives, and the unified, specular body which the child jubilantly assumes.[119] 'The child *sees* its wholeness before it *feels* its wholeness, and this seeing is actually constituent of its future identity as a distinct and whole being.'[120] Thus for Lacan, the child's gestalt or body image 'is certainly more constituent than constituted'.[121] At heart the subject is split, and incorporated within this split subject is the other. As Elizabeth Grosz describes it:

> From this time on, lack, gap, splitting will be its mode of being. It will attempt to fill its (impossible, unfillable) lack. Its recognition of lack signals an ontological rift with nature or the Real. This gap will propel it into seeking an identificatory image of its own stability or permanence (the imaginary), and eventually language (the symbolic) by which it hopes to fill the lack. The child . . . is now constituted within the imaginary (i.e. the order of images, representations, doubles, and others) in its specular identifications.[122]

[116] Elizabeth Grosz, *Jacques Lacan: a Feminist Introduction* (Sydney, 1990), p. 34.
[117] Jacques Lacan, *Ecrits: a Selection* (trans. Alan Sheridan, London, 1977), pp. 1–7.
[118] Gatens, *Imaginary Bodies*, p. 33. [119] Lacan, *Ecrits*, pp. 2, 4.
[120] Gatens, *Imaginary Bodies*, p. 33 (emphasis in original). [121] Lacan, *Ecrits*, p. 2.
[122] Grosz, *Jacques Lacan*, p. 35.

Central to the subject is the sense of identifying with a unitary image which is at once alien and yet familiar. The child is now 'enmeshed in a system of confused recognition/misrecognition', involved in a 'dual, ambivalent relation to its own image'.[123] The image with which it identifies is accurate in that it is 'an inverted reflection, the presence of light rays emanating from the child: the image as icon'.[124] Yet it is also a delusion, in that 'the image prefigures a unity and mastery that the child still lacks'.[125] In other words, the image of the self as coherent and unified is dependent upon a split or fragmented relation between self and other at the heart of (masculine) subjectivity. The subject is formed through identification with a misrecognised, imagined other, so that otherness is paradoxically at the heart of the subject's sense of itself as unified and coherent.

Homi Bhabha argues that this scene of Lacanian Imaginary is the location of the colonial stereotype, a mode of representation which he sees as central to colonial discourse. For Bhabha:

> The Imaginary is the transformation that takes place in the subject at the formative mirror phase, when it assumes a *discrete* image which allows it to postulate a series of equivalences, samenesses, identities, between the objects of the surrounding world. However, this positioning is itself problematic, for the subject finds or recognizes itself through an image which is simultaneously alienating and hence potentially confrontational. This is the basis of the close relation between the two forms of identification complicit with the Imaginary – narcissism and aggressivity. It is precisely these two forms of identification that constitute the dominant strategy of colonial power exercised in relation to the stereotype which, as a form of multiple and contradictory belief, gives knowledge of difference and simultaneously disavows or masks it.[126]

I will return in the next chapter to consider some of the implications of Bhabha's argument that colonial stereotypes are essentially unstable and thus productive. Here, I want to explore further his suggestion that the Imaginary is the location of the colonial stereotype – that the colonised is imagined as a double of the coloniser. International texts about intervention share the form of this doubling. The Third World has long been imagined as the double or other of 'the West', now the international community. Jennifer Beard has argued that we can read European texts dealing with the 'discovery' of the New World as attempts to master an encounter that took place, for explorers like

[123] *Ibid*., p. 39. [124] *Ibid*. [125] *Ibid*.
[126] Bhabha, *Location of Culture*, p. 77 (emphasis in original).