

# *Gender, Temporality and International Human Rights Law: From Hidden Histories to Feminist Futures*

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## I. INTRODUCTION

IN INTERNATIONAL HUMAN rights law, the relationship between gender and rights is often narrowly focused, closely aligned with a particular conception of ‘women’s’ rights and structured through binaries of male/female and sex/gender.<sup>1</sup> This limited vision of gender and rights is vulnerable to marginalisation, depoliticisation and co-option into wider international legal institutions in a way that undermines the possibility of far reaching change.<sup>2</sup> Despite these challenges, feminist scholarship continues to engage with questions of gender and rights, seeking to imagine and practice ‘visions of a better world’.<sup>3</sup> This chapter contributes to this feminist project by schematising the role played by time and temporality in thinking new futures of gender and international human rights law. Drawing upon a Deleuzian perspective, the chapter maps time not merely as the medium within which law unfolds, but as active, virtual, and multiplicitous. It argues that the repetition of human rights language and norms create grand narratives that seek, but inevitably fail, to bring order to the chaos of time’s multidimensional flow. Gendered practices and gender-based rights both contribute to and undermine these temporal movements. As such, by attending to temporalities of gender in international human rights law, we are

<sup>1</sup>R Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar, 2018) 89–95.

<sup>2</sup>S Kouvo and Z Pearson, ‘Introduction’ in S Kouvo and Z Pearson (eds), *Feminist Perspectives on International Law: Between Resistance and Compliance?* (Hart Publishing, 2014).

<sup>3</sup>D Otto and Anna Grear, ‘International Law, Social Change and Resistance: A Conversation Between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)’ (2018) 26 *Feminist Legal Studies* 351, 352.

better equipped to bring about futures that are not bound by the limitations of ‘ritualised incantations’<sup>4</sup> of gender and rights that have shaped past and present.

The temporal approach adopted here emphasises the multidimensionality of time in which past, present and future are all interconnected dimensions of each other. Thus, thinking new futures requires a careful engagement with legal presents and pasts. Informed by postcolonial and feminist legal analysis that centres the colonial encounter in the formation of the sovereign state and, eventually, the modern international human rights regime,<sup>5</sup> the chapter interrogates how gender is assembled within international legal doctrines and explores how these gendered dimensions of international legal history are habitually repeated in the present and projected into the future.

Beginning with an exploration of Deleuzian multidimensional temporalities, the chapter first explores how multidimensional time operates within international law and international human rights law. It then draws upon this theoretical framework to unpick the gendered dimensions of international human rights’ pasts, presents and futures. In particular, it examines how the gendered dimensions of the colonial origins of international law have shaped the visible and invisible presence of gender in modern international human rights law. The chapter concludes by exploring how a different, non-linear and multiplicitous temporal perspective opens up new possibilities beyond the limitations of our current framework of gender and rights.

## II. TIME’S MULTIDIMENSIONALITY AND THE CREATION OF THE STABLE SUBJECT

Viewing time as multidimensional foregrounds its capacity to both arrange and dissolve that which we normally think of as stable. For Rosi Braidotti:

The monistic unity of the subject is also posited in terms of time. A subject is a genealogical entity, possessing his or her own counter-memory, which in turn is an expression of degrees of affectivity and interconnectedness. Viewed spatially, the poststructuralist subject may appear as fragmented and disunited; on a temporal scale, however, its unity is that of a continuing power to synchronize its recollections.<sup>6</sup>

Adapting Braidotti’s argument to international human rights law requires acknowledgement that subjectivity in international law is ‘variegated’.<sup>7</sup> States

<sup>4</sup>H Charlesworth, ‘Talking to Ourselves? Feminist Scholarship in International Law’ in Kouvo and Pearson (n 2) 23.

<sup>5</sup>A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2007); M do Mar Castro Varela, ‘The Ethical State?’ in D Cooper, N Dhawan and Janet Newman (eds), *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (Routledge, 2020); Otto and Grear (n 3); Kapur (n 1).

<sup>6</sup>R Braidotti, *Transpositions* (Polity, 2006) 151.

<sup>7</sup>K Parlett, ‘The Individual and Structural Change in the International Legal System’ (2012) 1 *Cambridge Journal of International and Comparative Law* 60, 75.

are the traditional subjects of international law ‘with a full range of rights, duties and attendant capacities’.<sup>8</sup> Individuals, while still subjects, protected by a range of international human rights treaties have ‘much more limited capacity to engage in the international legal system’.<sup>9</sup> Nonetheless, both individual subject and sovereign state can be conceived as ‘geographically exclusive, sovereign, bounded, [and] “thing-like”’<sup>10</sup> and simultaneously as plural, multifaceted and discontinuous.<sup>11</sup> Thus, the foundations of gender-based rights in international human rights law rest upon unstable and changing subjectivities, held together by the operation of time and memory.<sup>12</sup>

Significantly, a multidimensional approach to time does not deny the importance of linear time, but does insist upon the incompleteness of linear temporality.<sup>13</sup> For Deleuze, linear, historical time is ‘Chronos’, ‘the oriented line of the present’,<sup>14</sup> or a series of successive moments, in which unity, synchronicity and identity are possible – the time of the stable subject above. Yet Chronos is not the whole of time, it is complemented by Aion: ‘the cyclical, dynamic and molecular time of becoming’.<sup>15</sup> If Chronos is the time of the living present, in which bodies act and are acted upon, Aion is the time in which the present is infinitely subdivided into past and future: the time where an action has always occurred, or is yet to occur, or the time of the infinite future and infinite, or pure, past.<sup>16</sup>

Thus, time cannot be reduced to a conscious experience, or to an interlocking series of moments: it is an active multiplicity of processes and syntheses. The past is not frozen as a fixed object, the future is not an unchanging ‘immanent prolongation of present action’.<sup>17</sup> Through the interaction of Chronos and Aion, past, present and future operate as dimensions of each other.<sup>18</sup> Within Chronos, present and future are contracted as dimensions of the present, within Aion, present is infinitely subdivided into past and future. In this sense, we

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.* 79.

<sup>10</sup> D Cooper, *Feeling Like a State: Desire, Denial, and the Recasting of Authority* (Duke University Press, 2019) 84.

<sup>11</sup> Thank you to Roussa Kasapidou for our conversations on this topic.

<sup>12</sup> D Otto, ‘Lost in translation: re-scripting the sexed subjects of international human rights law’ in A Orford (ed), *International Law and its Others* (CUP, 2006); G Heathcote, ‘Security Council Resolution 2242 on Women, Peace and Security: Progressive Gains or Dangerous Development?’ (2018) 32 *Global Society* 374.

<sup>13</sup> A Al-Saji, ‘The Memory of Another Past: Bergson, Deleuze and a new theory of time’ (2004) 37 *Continental Philosophy Review* 204.

<sup>14</sup> G Deleuze, *The Logic of Sense* (Continuum, 2004) 89.

<sup>15</sup> Braidotti (n 6) 154, see also Deleuze, *ibid.* 89.

<sup>16</sup> RJ Johnson, ‘On the Surface: The Deleuze-Stoicism Encounter’ in RJ Johnson and AJ Greenstine (eds), *Contemporary Encounters with Ancient Metaphysics* (Edinburgh University Press, 2017); Deleuze (n 14) 74.

<sup>17</sup> Al-Saji (n 13) 205.

<sup>18</sup> J Williams, *Gilles Deleuze’s Philosophy of Time: A Critical Introduction and Guide* (Edinburgh University Press, 2011).

cannot necessarily privilege past, present or future, only map their differential and multiplicitous interaction.

Thus, the non-chronological, non-material, ‘virtual’ time of Aion is as real as linear, chronological time experienced by living bodies and minds. Virtual time ‘entails the coexistence of the present with the past, it also entails the continual elaboration of the new, the openness of things (including life) to what befalls them’.<sup>19</sup> Braidotti’s quote above is illustrative of the fact that *where* in time a subject is located determines its unity or fragmentation. The state is simultaneously unified and hierarchical, and stable and fragmented, non-linear and discontinuous. The rights bearing subject is both the repository of legal protections and a discordant and constantly changing assemblage that subverts both the identity of the rights bearer and the mechanisms by which these rights might be protected. By viewing the subjectivity of both individuals and states as temporally disunified, it is possible to regard the contradictory operation of gender-based rights as compatible rather than contradictory: they depend upon where in time (and space) we are located as we approach them. Section III explores the role of law within this process.

### III. INTERNATIONAL LEGAL TEMPORALITY

This section views law’s temporal rhythms through a Deleuzian reading of Bergsonian ‘duration’. For Bergson, time – or duration – is ‘ceaseless becoming’<sup>20</sup> encompassing all human and non-human lived experience.<sup>21</sup> Duration proceeds through self-differentiation in a multidirectional, multidimensional flow of ‘bifurcations, divisions and dissociations’<sup>22</sup> in contrast with linear (or for Bergson, mathematical) time. In Deleuze’s reading of Bergson, Bergson’s theory of memory is central to understanding duration.<sup>23</sup> Duration is memory, but is virtual rather than psychological: the whole of memory – referred to as the pure past – is preserved in itself, distinct from the present. Thus:

The past and the present do not denote two successive moments, but two elements which coexist: One is the present, which does not cease to pass, and the other is the past, which does not cease to be but through which all presents pass. It is in this sense that there is a pure past, a kind of “past in general”: The past does not follow the present, but on the contrary, it is presupposed by it as the pure condition without which it would not pass.<sup>24</sup>

<sup>19</sup> E Grosz, ‘Deleuze’s Bergson: Duration, the Virtual and a Politics of the Future’ in C Colebrook and I Buchanan (eds), *Deleuze and Feminist Theory* (Edinburgh University Press, 2000) 229.

<sup>20</sup> R Mawani, ‘The Times of Law’ (2015) 40 *Law and Social Inquiry* 253.

<sup>21</sup> G Deleuze, *Bergsonism* (Zone Books, 1991) 37.

<sup>22</sup> Grosz (n 19).

<sup>23</sup> Deleuze (n 21) 55.

<sup>24</sup> *ibid* 59.

The pure past coexists with the present at various levels of contraction and relaxation. This may pass unnoticed as we move habitually through linear time,<sup>25</sup> but is evident when the ‘present makes an appeal’.<sup>26</sup> In such moments, we leap into the virtual past, which contracts and rotates according to the needs of the present. This process is the ‘actualisation’ of the pure past – the whole of time – according to the orientation of the present and ‘the indeterminate, the unfolding emergence of the new.’<sup>27</sup> The actualisation of the pure past according to the needs of the present moment creates the conditions for difference, or the possibility of the present being other than itself. Thus, time is multidimensional – past, present and future are all intersecting dimensions of each other.

Law and jurisprudence can be approached through a Bergsonian metaphysics.<sup>28</sup> Law has particular temporal rhythms and routines – case law, precedent, statutory interpretation or treaty monitoring all constitute the legal past and can be viewed as a succession of moments that build progressively and logically from past, to present, to future. Law here is a series of ‘snapshots of reality’ within a constant flow of duration.<sup>29</sup> Yet while law can be viewed as a limited, logical progression, this is not the totality of law or legal action. Instead, law is also dynamic, non-linear, self-differentiating and multifaceted. The past and future of law are not fixed and static objects to be picked up and used in our legal present, but are dynamic, shifting and becoming.

From this perspective, law’s temporality is multiplicitous, but produces a narrative of regularised temporal progression. Like the constant interplay of Chronos and Aion, there is a push and pull of an organising legal narrative, that also cannot escape (and indeed must contain) the whole of virtual time. As such, law’s linearity is a grand narrative that can only be produced through the actualisation of the pure past in the present, or through the engagement with the dynamic time of duration. Law depends upon and denies time’s multiplicity in order to maintain its coherence. Indeed, as Fleur Johns notes ‘[t]he temporalities of international law are thus multiple and misaligned. Just as there is no “general history”, so there is no general temporality of international lawfulness’.<sup>30</sup>

The different legal-temporal horizons that emerge or are organised through law’s functioning are not simply a result of law responding to external factors. Law as duration engages in its own internal movements, it differentiates itself from itself, bifurcates and divides to create different internal temporalities.<sup>31</sup>

<sup>25</sup> K Lalor, ‘Encountering the Past: Grand Narratives, Fragmented Histories and LGBTI Rights “Progress”’ (2019) 30 *Law and Critique* 21.

<sup>26</sup> Deleuze (n 21).

<sup>27</sup> *ibid* 229.

<sup>28</sup> A Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008); J MacLean, ‘Rhizomatics, the Becoming of Law, and Legal Institutions’ in L de Sutter and K McGee (eds), *Deleuze and Law* (Edinburgh University Press, 2012); Mawani (n 20).

<sup>29</sup> Maclean *ibid* 160.

<sup>30</sup> F Johns, ‘The Temporal Rivalries of Human Rights’ (2016) 23 *Indiana Journal of Global Legal Studies* 39–44.

<sup>31</sup> Mawani (n 20).

International lawyers may seek a facsimile of coherence or linearity, but this can never represent the whole of law's memory.<sup>32</sup> Different jurisdictional arrangements, legal forms and articulations of legal problems, or even moments within a case bring different spatio-temporal horizons in to play. Moreover, temporal movement is not neutral – it is a series of conscious or unconscious actualisations of the pure past that either maintains or challenges present practice. A legal problem makes a demand of the pure past, which is actualised around those facts or circumstances in a way that brings certain space-times into contact, thickening and shaping particular processes and modes of action. Most often, this process is 'habitual', unnoticed and depoliticised – facilitating a particular temporal arrangement in which some elements within a legal assemblage are foregrounded and others ignored. Within the context of gender and human rights, Hilary Charlesworth has described this as the 'ritualised incantations' of feminist ideas within international institutions,<sup>33</sup> to the extent that the vocabulary 'feminism' or 'women's rights' is emptied of meaning, even while the inclusion of women is celebrated.<sup>34</sup>

A temporal analysis of rights is particularly useful here: ritualised repetitions of human rights language and norms bring both stability and frameworks for action. However, these repetitions exist simultaneously with the pure past, which both exposes the limitations of stable systems and maintains the possibility of difference and change. The remainder of the chapter explores this tension in the context of pasts, presents and futures of gender and rights. Beginning with the colonial encounter, which generated various modern legal doctrines including those of sovereign states and rights bearing subjects, the chapter explores linear, gendered 'incantations' of human rights and their destabilisation by the different temporalities that they inevitably contain and express.

#### IV. GENDERED DIMENSIONS OF HUMAN RIGHTS PASTS, PRESENTS AND FUTURES

The analysis above pushes back against the historicisation of law that fixes events and their effects in time and depoliticises mechanisms by which these events were produced. Indeed, law as duration is law that continuously internally reproduces – 'a moving forward but also a turning back'<sup>35</sup> – diving into the pure past and extending out into the unknown future. The sections that follow first present a relatively static or fixed narrative of gender and international human rights law before complicating this story by unmooring the past and future from their orientation within the present.

<sup>32</sup> Johns (n 30).

<sup>33</sup> Charlesworth (n 4) 23.

<sup>34</sup> BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd edn (CUP, 2017) 384–85.

<sup>35</sup> Mawani (n 20) 260.

### A. Linear Pasts: Gendered Dimensions of the Colonial Encounter

Balakrishnan Rajagopal notes that even when rights might hold emancipatory potential, ‘the human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics’.<sup>36</sup> This section argues that gender has been part of this paradox from the genesis of modern international law – and thus to understand gendered rights, we must understand gender and international law.

Cynthia Weber has written powerfully on the gendered dimensions of colonialism.<sup>37</sup> The Victorian image of the masculine, conquering state and man colonising the feminised colonial other resonated through the ontological, epistemological and legal orders of empire.<sup>38</sup> The division of the world into colonised and coloniser, and erasure of colonised knowledges as part of the imperial ‘rage for order’<sup>39</sup> is well established. Of interest here, is the division of the world into a masculine/feminine dichotomy of power and submission within which women are the ‘naturally’ weaker half of the binary: dependent extensions of men rather than full subjects of law.<sup>40</sup> Simultaneously, the expansion of empire laid the foundations for the modern Western, bourgeois, heterosexual family.<sup>41</sup> The gendered division of labour, confinement of (middle and upper class) women to the private sphere and the industrialisation and globalisation of work create a new and totalising gendered order. As part of this process, other knowledges and practices beyond the gender binary were erased, as imperial legislators sought to impose Victorian moralities and structures of gender relations on those that they had colonised. These gendered subjectivities expanded beyond intersubjective practice, into state behaviour, and carry forward into the present. In particular, Weber, following Richard Ashley, argues that a particular vision of ‘sovereign man’ – modern enlightened and rational – exists as the necessary foundation of the modern state and is juxtaposed with the chaotic, barbarous and uncivilised ‘other’, who transgresses gendered norms in various ways.<sup>42</sup>

Logics that maintain a masculine/feminine binary but oscillate between intersubjective and interstate practice also inhere in imperial ‘civilising missions’.

<sup>36</sup> B Rajagopal, ‘Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy’ (2006) 27 *Third World Quarterly* 767, 768.

<sup>37</sup> C Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (OUP, 2016).

<sup>38</sup> *ibid.*

<sup>39</sup> L Benton and L Ford, *Rage for Order: The British Empire and the Origins of International Law 1800–1850* (Harvard University Press, 2016).

<sup>40</sup> D Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry’ in M Davies and V Munro (eds), *A Research Companion to Feminist Legal Theory* (Routledge, 2013).

<sup>41</sup> A McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge, 1995).

<sup>42</sup> Weber (n 37) 35.

The denigration of colonised peoples was a mechanism for legitimising their conquest, repurposing the use of extreme violence that accompanied colonial conquest as the white man's burden, and thus a neutral or even benevolent project.<sup>43</sup> Most significant here is not only the gendered dynamics of state logics, but the extent to which gender – specifically the treatment of colonised women – became part of the logic by which the colonised man was proved to be barbaric and unable to govern. The gendered logic of the imperial saviour became that of 'white men saving brown women from brown men'.<sup>44</sup> Moreover, as Kapur notes, the civilisational discourse of empire has translated readily into modern international human rights discourses.<sup>45</sup> Thus, static and binary notions of gender are integral to various international human rights campaigns, including anti-trafficking and Gender, Peace and Security movements.<sup>46</sup> Not only does this reify 'woman' as weak and in need of protection from aggressive (usually non-Western) men, it recreates colonial, civilisational logics of empire, within modern international spaces, and strengthens regimes of carcerality and surveillance often doing little to help the most vulnerable.<sup>47</sup>

These gendered binaries sit in stark contrast with 'rich multiplicity of women's history'<sup>48</sup> and with feminist theoretical critiques that femininity cannot be thought simply as the 'other' of the rational male subject.<sup>49</sup> Moreover, class and colonial projects of empire were enthusiastically embraced by Western women – even at the time, the dynamics of dominance and control was more complex than a simple binary.<sup>50</sup> Indeed, a huge amount of work is done by this binary as it is continually repeated in different forms within different spatial and temporal horizons of different legal orders. The complexity of international legal histories means that the feminised subject of international human rights law must be constantly refreshed and reproduced anew in different circumstances (or temporal horizons) so that its masculine other can maintain the appearance of stability. Ironically – but unsurprisingly – the colonial drive for order and stability sits upon unstable ontological foundations. Significant here is the totalising, nature of the gendered, hierarchical state that is produced in this

<sup>43</sup> *ibid*; T Mahmud, 'Geography and International Law: Towards a Postcolonial Mapping' (2007) 5 *Santa Clara Journal of International Law* 525.

<sup>44</sup> G Chakravorty Spivak, "'Can the Subaltern Speak?'" revised edition, from the "History" chapter of Critique of Postcolonial Reason' in RC Morris (ed), *Can the Subaltern Speak? Reflections on the History of an Idea* (Columbia University Press, 2010) 70.

<sup>45</sup> Kapur (n 1) 39.

<sup>46</sup> *ibid* ch 3.

<sup>47</sup> *ibid*.

<sup>48</sup> Kapur in Otto (n 12) 347.

<sup>49</sup> R Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference* (Columbia University Press, 1994) 83. See also Otto (n 12).

<sup>50</sup> SM Rai, 'Reimagining the state: Marxism, feminism, postcolonialism' in D Cooper, N Dhawan and J Newman (eds), *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (Routledge, 2020).



framework. The logics of imperial statecraft expand to fill all available space and in so doing stabilise and justify their own existence.

### **B. Gendered Repetitions of Coloniality in Modern Human Rights: From Linear Presents to Static Futures**

The complex presence of gender in the colonial encounter and the genesis of international law has led to habitual unthinking repetitions of gendered dynamics in the postcolonial present. This means that it is particularly important to attend to how gender contributes to the memory of the present in different ways and how the interaction of gender and time is at once multiplicitous and unaware of its multiplicity. Returning to the gendered colonial divide, Anne McClintock notes that '[d]espite most anti-colonial nationalisms' investment in the rhetoric of popular unity, most have served more properly to institutionalize gender power.<sup>51</sup> McClintock's intervention here makes clear the habitual repetition or incantation of gender in international law – the unthinking patterns of action and behaviour that maintain certain axioms over others. Ironically, each repetition of these patterns might be slightly different – as the foundational figuration of modern state and modern man is unstable, its ongoing repetition must adjust to account for this. Yet while patterns may differ in material terms, they repeat an unacknowledged axiom of the gendered organisation of international power.

The repetition of unacknowledged axioms of gender and law makes space for the distinct, but related acknowledged presence of gender in international human rights arenas. This 'history' of women's rights at the UN is captured by the Report of the Special Rapporteur on violence against women, its causes and consequences:

Over the past 25 years, violence against women has come to be recognized as a violation of women's human rights and a form of gender-based discrimination. The struggle by the women's rights movement to persuade the international community to view discrimination against women and gender-based violence against women as human rights violations came about gradually and was reinforced by the evolution of the international legal framework on women's human rights and violence against women, including with regard to domestic violence, along with the growing role of independent expert mechanisms established to monitor its implementation, including the mandate of the Special Rapporteur, as well as other relevant United Nations and regional mechanisms that contributed to such developments.<sup>52</sup>

<sup>51</sup> A McClintock, 'The Angel of Progress: Pitfalls of the Term "Post-Colonialism"' (1992) 31/32 *Social Text* 84.

<sup>52</sup> UNHCR, 'Violence against women, its causes and consequences: Report of the Special Rapporteur on violence against women, its causes and consequences' (20 June 2019) UN Doc. A/HRC/41/42.

In this iteration, gender entered international human rights law in the late 1980s and early 1990s. Yet the flourishing of feminist international legal conversations during this era sat alongside the realisation of a tension in which feminists found themselves trapped between ‘resistance and compliance’ in which they were ‘asked to be the “women’s voice”, but not to challenge the foundations of international law and its institutions’.<sup>53</sup> The tension here is not gender’s invisibility but that its inclusion is often on very narrow terms that do little to challenge international law’s foundations – which cohere around a self/other binary within which the ‘other’ is generally identified with the feminine. The result is the ongoing ‘peripheralisation’ of gender in international law.<sup>54</sup> The habitual or ritualised incantations of international law stabilise a female rights bearing subject, but their capacity for more radical change is limited.<sup>55</sup> Moreover, ‘women’ as half of the binary cannot capture the complexities of gendered lives beyond or alongside binarised gender as they are lived and embodied in different material contexts.<sup>56</sup>

Thus, a relatively coherent narrative of the stable rights bearing female subject and bounded state that secures these rights emerges through the habitual repetition of epistemological certainties that are rooted in the colonial encounter. This accompanies the literal repetition of human rights practices in the cyclical rhythms of international law’s monitoring mechanisms such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Universal Periodic Review (UPR) reporting cycles. Even those charter-based mechanisms with the capacity to act ad-hoc, such as the Special Rapporteur on Violence Against Women and Girls or the Independent Expert on Sexual Orientation and Gender Identity (SOGI), also have cyclical reporting responsibilities. These cyclical rhythms inveigh international human rights law with a series of ritualised processes (or incantations), by which gendered issues are iterated through formal languages that translate a myriad injustices into the overarching structures and languages of UN human rights.<sup>57</sup> The point here is not that there is no room for flexibility in international approaches to women’s rights, but that the formal mechanisms through which these rights are known and administered at the highest levels follow particular temporal patterns.

Kathryn McNeilly notes that the cyclical monitoring of international treaties sits alongside a strong sense of linear time.<sup>58</sup> Indeed, repetition helps to ensure that the linearity or predictability of the international legal present

<sup>53</sup> Kouvo and Pearson (n 2).

<sup>54</sup> Charlesworth (n 4) 23.

<sup>55</sup> Kapur (n 1).

<sup>56</sup> See D Otto in K McNeilly, ‘Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change’ (2018) 28 *Social & Legal Studies* 817, 831.

<sup>57</sup> J Mertus, ‘Road Blocks, Blind Spots, Speed Bumps: A Feminist Look at the Post-9/11 Landscape for NGOs’ in Kouvo and Pearson (n 2).

<sup>58</sup> McNeilly (n 56). This too has a colonial aspect. See CJ Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1988–1989) 98 *The Yale Law Journal* 1631.

projects forwards into the future. In particular, and recalling the civilising mission of colonialism, there is an alignment of gender equality or women's rights with civilisation or 'progress'. One of the effects of this is the reproduction of imperial temporalities that require a separation between the barbaric 'other' – located temporally and spatially 'elsewhere' – and the civilized 'self'.<sup>59</sup> As such, 'progress' acts as a myth or an ideology: it is a standard to be met – measured by development goals, concluding observations and reports – and simultaneously, a goal that will remain continually out of reach. It is thus both unattainable but always visible and predictable.<sup>60</sup>

Various consequences emerge here. First, to maintain the myth of progress, law shapes time and temporalities, rendering certain aspects of gender visible or invisible in international human rights practice. The maintenance of these visibilities requires a simultaneous erasure of the colonial origins of both sovereign statehood and rights bearing subjectivity. The past is actualised in the present and then rendered invisible. It is necessary for international human rights law's authority and for directing the focus of international instruments, but remains unacknowledged as a source of that authority, even while parallels can be drawn between 'then' and 'now'.<sup>61</sup>

The second point that emerges is the tendency of habitual repetition to freeze us in a permanent, predicable present. The civilised self is in permanent opposition to the savage 'other' that exists as a marker of the past, but this duality emptied of the violence of colonial relations. Simultaneously, the cyclical mechanisms through which gender and human rights are administered render the present inert, habitual and predictable. Thus, in the linear temporal narrative outlined here (the time of Chronos), the past and future are dimensions of the present. Key objects of human rights law – the state, sovereignty and rights bearing subjectivity – remain static and fixed. There is no space for thinking of how they might exist differently. This resonates with Kapur's observation that there is little space for how the male/female binary might be otherwise in international human rights law. Nevertheless, constant renewal is needed to maintain this illusion of stability in the binary as it relates to statehood, sovereignty and rights: the sovereign state and sovereign man need very particular conditions to maintain themselves. The pure past and future infinitives of Aion are always present, telling minor stories, hinting at hidden histories and new becomings.

<sup>59</sup>I Mgbeoji, 'The civilised self and the barbaric other: imperial delusions of order and the challenges of human security' (2006) 27 *Third World Quarterly* 855.

<sup>60</sup>Weber (n 37).

<sup>61</sup>Otto (n 12). See also R Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest is History ...' (2018) 31 *Leiden Journal of International Law* 509 for a detailed expansion of how this kind of chronotropic work can reveal unacknowledged 'truths' of international law and legal ordering.

### C. Thinking Aion in International Law

This chapter does not seek to untangle the multiple and misaligned temporalities of international law. Chronos and Aion are complementary, not opposites, together forming the totality of temporal movement. As Braidotti notes, sometimes it is necessary to engage in activism and action that is tied closely to predictable, linear temporality.<sup>62</sup> Indeed, while habitual repetition may be limiting, Elizabeth Grosz also argues that predictability is not always a bad thing and within habitual action, there is still potential for transformation and emancipation.<sup>63</sup> In legal terms however, the importance of repetition does not necessarily surmount the problem of the suspension of both gender-based and women's rights between 'resistance and compliance' in international legal spheres. The final sections of the chapter ask how thinking the present as a dimension of the past and future allow it to be re-oriented in a way that destabilises that which we have assumed to be fixed and static, and in this sense allows us to think the multidimensionality of gender and international human rights law.

In many respects, this approach has much in common with feminist projects of imagining new futures.<sup>64</sup> Our starting point, however, should be one of caution. The unknown future is not certain – it poses risks that may be beyond those who seek to bring about positive change.<sup>65</sup> Moreover, imagining a new future cannot be done without also carefully attending to the past and present:

Attempting to resolve issues of justice without recognizing the continuing heavy weight of the past only privileges those who are already powerful enough to evade their responsibilities to the past. While it is tempting to look toward the future, every indication suggests that those who fail to learn from the past are doomed, not to repeat it, but to think that they have escaped it. Is it possible, then, not to dwell in the past; not to be blind to the past and wish only for the future; but to bring all these times together?<sup>66</sup>

Within the framework adopted here, the past cannot be viewed as a single stable object that can be easily reclaimed, because it is an actualisation in the present of the whole of virtual time, and the actualised past that we know and experience will always be smaller than the virtual whole. Instead, by mapping the multidimensionality of international law we can, bring times together without demanding that one dimension of time be collapsed into another.

Attempting to think through multidimensions of gender and international human rights law requires a returning to and acknowledging of the violence of coloniality and racialization that stemmed from the colonial encounter. Alia Al-Saji draws upon Frantz Fanon's argument that 'the racialization and

<sup>62</sup> Braidotti (n 6).

<sup>63</sup> E Grosz, 'Habit Today: Ravaisson, Bergson, Deleuze and Us' (2013) 19(2–3) *Body & Society* 217.

<sup>64</sup> Otto and Gear (n 3).

<sup>65</sup> Braidotti (n 6).

<sup>66</sup> J Tronto, 'Time's Place' (2003) 4 *Feminist Theory* 119, 129.

colonization of the past represses other pasts and rewrites them'.<sup>67</sup> The dichotomization and dualism of the civilized 'self' and barbaric 'other' (which is also a gendered process), becomes the foundation for a universalising (linear) history that progresses in one direction from the dark past to the enlightened future. Race, gender and colonialism combine in multiple ways in the ontological, epistemological and legal frameworks that ordered the colonial past and haunt our 'post-colonial' present.

Thus, the project of imagining new futures must also be one that is attentive to the repression of 'other' pasts. This is done with the knowledge that there are some pasts that cannot be fully known because empire destroyed forms of knowledge production as it conquered.<sup>68</sup> Yet even with this limitation, past, present, and future do not need to be static or linear. The pure past exists as a virtual whole and can always be actualised anew in response to new problems. This actualisation takes multiple forms: it might begin with a line of flight that is not legal, but affective or imaginative. For example, within postcolonial literature, Lorna Burns has argued that the tradition of 'writing back' to empire can go far beyond producing hybrid, revised, or creolised texts, and can instead chart a path that, in repeating the virtual past in new, future oriented forms, charts and crosses new horizons.<sup>69</sup> The question of crossing new horizons is not limited to literature. In developing the tradition of counter histories of empires, Priyamvada Gopal details how anti-colonial resistance shaped Britain and its ideas:

[T]he possibility that Britain's enslaved and colonial subjects were not merely victims of this nation's imperial history and subsequent beneficiaries of it crises of conscience, but rather agents whose resistance not only contributed to their own liberation but also put pressure on and reshaped about freedom and who could be free.<sup>70</sup>

In re-orienting space, to make clear the temporal horizons and narratives that those spaces make possible, Gopal repositions the relationship between colonised periphery and colonial metropole with respect to the flow of ideas, the emergence of dissent and the way in which diasporic understandings shaped meaning making in the metropolitan centres.

The section above demonstrated how gendered logics resonated through the ontological, epistemological and legal orders of empire. Similarly, wider epistemological and ontological projects of actualising imperial history anew can also be found in *legal* counter histories of empire.<sup>71</sup> For example, continuing with the project of reorienting centre and periphery, Arnulf Becker Lorca's *Mestizo International Law* challenges conventional histories of international

<sup>67</sup> A Al-Saji, 'Too Late: Racialized Time and the Closure of the Past' (2013) 6(5) *Durham University Insights* 2.

<sup>68</sup> R Connell, *Southern Theory* (Polity, 2007).

<sup>69</sup> L Burns, 'Becoming-Bertha: Virtual Difference and Repetition in Postcolonial "Writing Back", a Deleuzian Reading of Jean Rhys's *Wide Sargasso Sea*' (2010) 4 *Deleuze Studies* 16.

<sup>70</sup> P Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (Verso, 2019) 5.

<sup>71</sup> See H Van Rijswijk and A Vogl, 'Across Islands and Oceans: Re-imagining Colonial Violence in the Past and the Present' (2019) 30 *Law and Critique* 293.

law by presenting a non-Eurocentric mestizo history that traces the investment of non-Western scholars, lawyers and ‘semi-peripheral elites’ in international law’s formation. For Becker Lorca, challenging Western, universalising narratives of the history of international law may allow us to ‘clear up space for new and more emancipatory legal practices tomorrow’.<sup>72</sup>

Actualising the past anew is thus more than simply re-reading or revising the past. A future focused repetition of the past is one that re-orientes bodies, practices and knowledges in order to open up new ways of being or to reveal new ways of approaching gender and international human rights law. The aim is not hybridity, but new or hidden histories that open space for new futures. In short, past and present cannot be evacuated from the future, but are dimensions of its existence. Most importantly, this adds some nuance to any project of imagining new futures. As Grosz notes, ‘how we understand the relations between past and present has direct implications for whatever conceptions of the future, the new, creation, and production we may develop’.<sup>73</sup> Such a project cannot just operate in the time of Chronos: we are interested here in the whole of time – or duration – and this includes the virtual potential that is only known through its different actualisations in the present and future. The virtual past will always give rise to another reading, which will animate the future in different ways. Thus, the project here is not about finding new or correct readings of past and future but attending to the multiplicity of temporality, to the openness of the past and future as dimensions of time in and of themselves rather than projections forwards and backwards from the present instant.

#### D. Human Rights Futures

The analysis above suggests that while imagination of the future may involve an instinctive leap into duration, this leap is not uncontrolled: it requires careful attendance to multiplicities of past and present. This chapter has insisted upon the importance of postcolonial analysis of the genesis of international law, to show how this history shapes the present of human rights law, gendered statehood and gendered subjectivity. Through this lens, and mindful of Braidotti’s discussion of the role of temporality in the formation of unitary subjectivity of individual and state, we might ask how, within a different temporal register, state, subjectivity and international human rights law might be thought differently.

<sup>72</sup>A Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (CUP, 2014) 16.

<sup>73</sup>E Grosz, ‘Histories of a Feminist Future’ [2000] 25 *Signs: Journal of Women in Culture and Society* 1017, 1018.

As the section above suggested, this first requires the exploration of counter-narrative. In particular, there are numerous histories within which individuals and groups acted against gendered colonial norms. These histories range from the involvement of women in peace processes in the early twentieth century,<sup>74</sup> to the histories of women's leadership in human rights and anti-colonial struggles,<sup>75</sup> to non-western gender systems that directly challenged the notion of a universal binary of male/female.<sup>76</sup> They also encompass historical and present queer and trans activists who insist both on the paucity of the male/female binary as a representation of their cultural norms of gender and on their place within those cultures.<sup>77</sup> Yet these histories appear primarily as revisions or additions: important stories that occupy a minor register within the grand narrative of human rights history. This alone would be insufficient: it is not enough to offer a peripheral and hybridised feminist history of international law. Instead, centre and periphery must be upended. We need to question the past to differently configure the future: to engage with our histories in a way that allows for a spatial and temporal reorientation of our foundational subjects and axioms of international law.

It is here that Braidotti's argument that the modern subject is a temporally fragmented subject that gives the appearance of wholeness gains urgency. Within international human rights law, both individual and state subjectivities function as grand narrative, held together across multiple temporalities. From different temporal perspectives, rights operate both as a triumphant narrative of progress and as a hopelessly unsuitable tool for capturing the wholeness of the state, individual subjectivity, or the injustices that rights should work to remedy. The response to this paradox should not be nihilism in the face of the unknowable virtual, but active questioning and engagement with the world. Such paradoxes represent the present making a demand of the past, and thus a moment to leap into duration to reorient past and present, opening up the possibility for a new future. Most often, we progress (legally or otherwise) through time in a habitual fashion – unthinkingly repeating numerous unconscious assumptions, axioms

<sup>74</sup> A O'Donoghue, 'Article 7 of the Covenant of the League of Nations, 1919' in E Rackley and R Auchmurty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Hart Publishing, 2019); D Otto, 'The Security Council's Alliance of Gender Legitimacy: The Symbolic Capital of Resolution 1325' in H Charlesworth and J-M Coicaud, *Fault Lines of International Legitimacy* (CUP, 2010) 239.

<sup>75</sup> Gopal (n 70) 202–03 Y Bouka, 'Women, Colonial Resistance, and Decolonization' in O Yacob-Haliso and T Falola (eds), *The Palgrave Handbook of African Women's Studies* (Springer International Publishing, 2020); F Gaer, 'Women, international law and international institutions: The case of the United Nations' (2009) 32 *Women's Studies International Forum* 60; C Johnson-Odim, "'For their freedoms": The anti-imperialist and international feminist activity of Funmilayo Ransome-Kuti of Nigeria' (2009) 32 *Women's Studies International Forum* 51.

<sup>76</sup> See eg T Boellstorff et al, 'Decolonizing Transgender: A Roundtable Discussion' (2014) 1 *TSQ: Transgender Studies Quarterly* 419.

<sup>77</sup> eg N Ayub, 'Transgender Rights in Malaysia: Religion, Politics and Law' in K Lalor et al (eds), *Gender, Sexuality and Social Justice: What's law got to do with it?* (Institute of Development Studies, 2016).

and ways of being in the world. Moments arise that bring these habits from their position of unconscious background repetition, the forefront of action. It is then when we are faced with a choice – to repeat old habits, or to counteractualise the past anew, finding new ways of orienting ourselves and others in the world.<sup>78</sup> The encounter – or the point when we pause in the repetition of habit – is the point when the repetition of the future becomes possible. The challenge is that we cannot anticipate ahead of time when this will be. However, by attending to habitual patterns and to counter narratives that open up minor histories, we might equip ourselves with the tools that mean that when we are faced with the unexpected, our instinct is not towards a return to normal through the ‘ritualised incantations’ of binarised human rights but to seek an openness to the new.

There are examples of recent work that has undertaken this kind of re-thinking in relation to the state. For example, Davina Cooper, Nikita Dharwan and Janet Newman explore what forms of law and gender are brought into view when the state is understood as networked, rhizomatic and horizontal, rather than top-down and hierarchical.<sup>79</sup> For Cooper, such imaginaries demand new forms of pre-figurative politics: living in the present as if the future has already arrived,<sup>80</sup> or living in a way that renders the past and present as dimensions of an open future. A note of caution is required here however: lines of flight into new becomings do not always succeed.<sup>81</sup> For example, re-thinking the state in a way that juxtaposed the (masculine) bounded, hierarchical state with the (feminine) networked, rhizomatic state does not necessarily overcome the structuring narrative of masculine/feminine discussed above. However, Cooper’s analysis does not simply posit a replacement of a masculine state with a feminist alternative. Instead, it asks important questions of the totality of the state’s relationship with gender:<sup>82</sup> whether the relationship between gender and the state might be entirely re-oriented allowing for the emergence of new kinds of state-subject relations.

Cooper’s analysis of gender and the state focuses primary on the operation of state power at the national and subnational level – asking, for example, what properties of gender are brought in to view when we consider the possibility of ending the state’s power to classify its citizens by gender on their identity documents. These questions could be extended to the supernational – can a masculine/feminine binary offer anything useful to rights, sovereignty or statehood especially in light of how our histories and presents are filled with relations

<sup>78</sup> Williams (n 18) 149, 168.

<sup>79</sup> J Newman and N Dhawan, ‘Concluding Reflections’ in D Cooper, N Dhawan and J Newman (eds), *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (Routledge 2020) 269.

<sup>80</sup> D Cooper, ‘Conceptual prefiguration and municipal radicalism: Reimagining what it could mean to be a state’ in Cooper, Dhawan and Newman (ibid).

<sup>81</sup> G Deleuze and C Parnet, *Dialogues 2* (Continuum, 2006) 104.

<sup>82</sup> D Cooper and F Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43 *Journal of Law and Society* 483.



more complex than a simple binary and include relations with the earth and the non-human? Moreover, what does this tell us about the properties of 'gender' as assembled within international human rights law? Indeed, what does this tell us about the realities of engaging with gendered bodies, rather than just using masculinity or femininity as a metaphor for dominance and submission?

Such an approach brings together the fragmented temporalities of gendered state and subject as they exist in a complex assemblage with the past, present and future of rights. We cannot reclaim lost histories, but we can attempt to make space to attend to the possibility of these lost histories, in order to imagine otherwise. This act of imagining leaves us better able to respond to those moments when we might break old habits to counteractualise new futures. Acting in the time of the future does not ignore past and present – it requires deeply and materially rooted knowledge of past and present, in order to better acknowledge those temporal practices that we take for granted. Within the international context adopted here, this means that we must attend not just to the politics of international human rights law – between resistance and compliance – but gendered roots of international law's founding axioms.

## V. CONCLUSION

The urgent question for both scholarship of gender and human rights and for activists and practitioners who must negotiate the tensions of human rights in real time, is whether rights can be usefully re-oriented away from their habitual, colonially embedded iterations. This chapter has taken a perspective that zooms out and approaches human rights from a different scale that encompasses not just women, but gender, and not just rights but the system of sovereign states through which rights are secured. It explores the gendered dimensions of the genesis of international law to expose its habitual repetition in international human rights law's present and future.

Yet this repetition is a grand narrative rather than a fundamental truth. In actualising histories in a way that gives the (masculine) state and (male) subject unity and coherence across time, the limitations of these practices of stabilisation cannot be ignored. The simple binary of identity and its other (masculine/feminine, man/woman, coloniser/colonised, developed/backwards) cannot capture the whole of any subject's reality. As such, approaches that seem to 'add women' to already existing rights regimes, or even to replace a masculine subject with the feminine could only ever be the first step in seeking new futures for international human rights law. Gender and rights are not just peripheral and unevenly acknowledged 'women's' issues, but instead encompass the whole of gender in its intersection with imperialism, coloniality, race, class, security, development and multiple other aspects of experience and identity. This is why the final part of section IV returned to the question of statehood and subjectivity and specifically to how the state might be reimagined in a way that changes

how gendered rights could be configured. This is not a re-configuration that replaces masculinity with femininity, nor does it use ‘the feminine’ as a stand in for the virtual. Instead it asks what possibilities might be brought to bear by thinking gender and state differently and how this would resonate across the whole of international human rights law’s temporalities, allowing for the actualisation of new pasts and the opening up of new futures.

There is no certainty in this process, but we also cannot deny the ongoing presence and promise of Aion – and its potential to burst through at unanticipated moments in order to re-orient and re-make what was certain and settled. While these moments cannot necessarily be anticipated, they inhabit both the complexities of activist practice and theoretical debates. Thus, we can prepare for the possibility of the new – in whatever form it comes – by better knowing and facing the temporalities of gendered human rights law, past and present. In this way, unexpected moments might be counteractualised, finding new, and hopefully feminist, futures.