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**JULIE CRUTCHLEY**

**'HOW CAN A DECOLONIAL CRITIQUE REARTICULATE CONCEPTS  
OF PEACE AND VICTIMS IN INTERNATIONAL CRIMINAL LAW?'**

**Julie Crutchley**

**27 June 2017**



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The City Law School

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## HOW CAN A DECOLONIAL CRITIQUE REARTICULATE CONCEPTS OF PEACE AND VICTIMS IN INTERNATIONAL CRIMINAL LAW?

JULIE CRUTCHLEY\*

### Introduction

The limitations of the United Nations (UN) framework to achieve universal peace has been examined by post-liberal and critical scholars highlighting the influence of a hegemonic liberal bias in the practice of international law (IL) and peace building. Furthering this investigation through a decolonial critique, constructed upon a modernity/coloniality link, exposes the futility of seeking lasting peace through Western epistemologies which are linked to a paradigm of war and the creation of an “Other” (alterity) whose voices are not heard in the present international legal system.<sup>1</sup> A decolonial theory, as introduced by Anibal Quijano, can be applied to achieve a radical re-politicisation of epistemic Eurocentrism witnessed within the international legal system and its approach to peace, setting forth a methodology approaching the system from the underside in contrast to traditional top-down understandings.

The challenge of the role of IL in bringing forth a lasting peace is studied in closer detail through a genealogical analysis of the creation of international criminal law (ICL). ICL was conceived as a branch of the fragmented framework of IL, including the Security Council and the General Assembly, to enhance the achievement of international peace and security through its counter hegemonic role of holding powerful individuals accountable for their actions, ensuring no one could act with impunity, and its central mandate of seeking justice for victims. The pluralistic origins of ICL, based upon an unexamined amalgamation of IL and domestic criminal law, have limited the counter-hegemonic capacity of ICL and led to accusations of a neo-colonial legacy.<sup>2</sup> The current controversy within ICL, in which accusations of an African bias have developed and various African states have chosen to leave the court, calls into question merits of presenting a linear progression of ICL traced through the Nuremberg and Tokyo tribunals while overlooking the influence of European colonialism.<sup>3</sup> The modernity/coloniality analysis provides an epistemological explanation of the origins of this neo-colonial legacy in creating an exteriority whose cultures and practices are perceived as inferior to the international system.

This paper continues this critique to examine the expressed goal of placing victims at the centre of the International Criminal Court (ICC). The epistemology of victimhood is questioned, setting out the manner in which the construction of victims within the ICC can remove their agency.<sup>4</sup> This paper traces the need to reconceptualise victims through the lens of the negated “Other”, rearticulating their political agency and moving away from the image of a suffering victim in need

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<sup>1</sup> This working paper draws from a chapter of my PhD thesis examining “Can a critical rearticulation of the role of victims within International Criminal Justice contribute towards the goal of positive peace?”

<sup>2</sup> Christopher Gevers, ‘International Criminal Law and Individualism: An African Perspective’, in Christine E. J. Schwobel, *Critical Approaches to International Criminal Law: An Introduction*, (Routledge, Abingdon, Oxon, 2014)

<sup>3</sup> Hannah Woolaver, ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC’ (EJIL:Talk! 24 October 2016) <http://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc/>

Mark Kersten, ‘Some thoughts on South Africa’s Withdrawal from the International Criminal Court’ (Justice in Conflict 26 October 2016) [www.justiceinconflict.org/2016/10/26/some-thoughts-on-south-africas-withdrawal-from-the-international-criminal-court/](http://www.justiceinconflict.org/2016/10/26/some-thoughts-on-south-africas-withdrawal-from-the-international-criminal-court/)

<sup>4</sup> Tessa Lonsdale, ‘Victims’ What is Hidden Behind this Word?’ (2014) 43(1) *International Journal of Transitional Justice* 170

of a saviour.<sup>5</sup> The introduction of Dussel's theory of transmodernity presents an alternative to universal cosmopolitanism based upon a pluriversal approach including inter-cultural dialogue. This provides an opportunity for alternative subalterned cultures to ensure their voices are heard.

This paper does not engage with the peace/justice debate within ICL. Rather it utilises the decolonial critique to demonstrate the problems within current approaches to peace impacting upon the wider IL context. The epistemology of liberal peace within IL has led to a focus of a goal of negative inter state peace concerned principally with the removal of direct violence, in this the question of justice within ICL can be recognised as a conflicting aim. A rearticulation of peace based upon a transmodernity provides a role for ICL alongside wider peace building approaches in which peace and justice aims are synthesised.

### **A Decolonial Critique of Modernity**

Decolonial critique provides an important insight into the evolution of a hegemonic approach to Western liberal theories and knowledge. It offers a salient analysis of the influence of colonial epistemology in the practice of IL, impacting both on the opportunities to create lasting peace through IL and the role of victims within ICL. The critique theorises that current limitations of modernity arise from a dominance of Western epistemology in which modernity/coloniality interlink, perceiving the conquest of the Americas as an important step in the universality of Western epistemic approaches. The construction of the decolonial critique was introduced through Quijano's work on the Coloniality of Power, perceiving decoloniality as an epistemic and political project in which the modern construction of Europe cannot be divorced from the impact of its colonial history.<sup>6</sup> Critically he suggests the need to disengage and delink from Western epistemology as a tool to remove a dominant colonial legacy.

Essential to understanding decolonial critique lies in its distinction from post-colonial theory occurring through the different historical periods upon which their critiques are based. Ramon Grosfoguel demonstrates this noting how post colonial scholars such as Edward W. Said and Gayatri Chakravorty Spivak begin their analysis from the mid 18<sup>th</sup> Century, at which point modernity had already occurred in Europe. While the experiences of the Americas from 1492 are critical in decolonial theory.<sup>7</sup> This paper recognises the importance of the post-colonial critique and in particular utilises Spivak's writing. Arturo Escobar explains the importance of this recognising that, "the Modernity/Coloniality group certainly finds inspiration in a number of sources, from European and North American critical theories of modernity and postmodernity to South Asian subaltern studies, Chicana feminist theory, postcolonial theory, and African philosophy; many of its members operate within a modified world systems perspective. Its main driving force, however, is a continued reflection on Latin American cultural and political reality, including the subaltern knowledge of exploited and oppressed social groups."<sup>8</sup>

Following the delinking from Western epistemology, Quijano recommends utilising epistemological decolonisation as it is the first step in clearing the way "for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality".<sup>9</sup> Including intercultural dialogue prevents the limitations of one hegemonic approach in which provincialism is presented as

<sup>5</sup> Emily Haslam, 'Silences in International Criminal Legal Histories and the Construction of the Victim Subject of International Criminal Law: the Nineteenth-century Slave Trading Trial of Joseph Peters' in Christine E. J. Schwobel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, Abingdon, Oxon, 2014)

<sup>6</sup> Anibal Quijano, 2000, 'Coloniality of Power and Eurocentrism in Latin America' (2000) 15 (2) *International Sociology* 215 <http://iss.sagepub.com/content/15/2/215.abstract>

<sup>7</sup> Ramón Grosfoguel, 'Decolonizing Western Uni-Versalisms: Decolonial Pluri-Versalism from Aimé Césaire to the Zapatistas' (2012) 1(3) *TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World* <http://escholarship.org/uc/item/01w7163v> p95

<sup>8</sup> Arturo Escobar, 'Worlds and Knowledges Otherwise,' (2007) 21 (2-3) *Cultural Studies* 179 doi:10.1080/09502380601162506

<sup>9</sup> Anibal Quijano, 'Coloniality and Modernity' (2007) 21 (2-3) *Cultural Studies* 189 doi:10.1080/09502380601162506

universalism. Walter Dignolo explains that the decolonial critique is seeking to include a wide range of cultures, knowledge and languages leading to “philosophical practices that cannot be dependent from (sic) Greek canonical dictums in matters of thoughts.”<sup>10</sup> Enrique Dussel extends the importance of intercultural dialogue into his understandings on transmodernity and it is recognised by Grosfoguel in his conceptualisation on a radical form of “universality decolonial anti-systemic diversity.” The consequence of utilising diversity is examined further in relation to peace and the role of the “Other” and a rearticulation of the concept of victimhood later in this paper.

Decolonial critique exposes the need for all scholars to examine their own bias in research. For Quijano a decolonising project is one that draws attention to the limiting character of colonial and Eurocentric epistemologies, recognising that the idea of knowledge is interlinked to the colonial matrix of power as well.<sup>11</sup> Quijano explains the distinction of the decolonial critique, recognising the fundamental co-constitution of ‘modernity’ and ‘coloniality’ in the contemporary production of knowledge about world politics and the pervasive legacy this has on universal ideals.<sup>12</sup> Quijano recognises a weakness in the conventional European discussion on the nature of present-day Europe as it tends to look inwardly and ignores the colonial context in which its cultural, economic and political systems developed.<sup>13</sup> The approach of the decolonial school challenges epistemologies of research, demonstrating the hegemony of Western academia originating through a coloniality of knowledge.<sup>14</sup> Recognising that the challenges of unacknowledged bias have previously affected scholars, this work aims to delink from the illusion of zero point epistemology, as explained by Mignolo and Dussel.<sup>15</sup> As such I am aware that bias influences my research, my own focus of enunciation is that of a woman who grew up in Northern Ireland during the “Troubles”, studies in a Western education system and has worked with victim/survivors in the Americas and Northern Ireland.

### **Liberal Peace theory and the Paradigm of war**

The form of peace understood as liberal Western peace is one that arises from universal, cosmopolitan ideas.<sup>16</sup> Behr explains how this approach of liberal peace, built upon a concept of universal reason, may in fact “contribute to, if not cause, conflict and even war fighting in the first place.”<sup>17</sup> These cosmopolitan universal ideals of liberal peace theory can be seen in the United Nations Charter 1945 and in many peace treaties, both historical and present-day.<sup>18</sup> The prioritisation of liberal ideals is witnessed through the work of the UN system and is the vision of peace in IL following Kantian ideas of state building and democratization.<sup>19</sup> It is recognised that this influences the development of peace processes striving to achieve liberal ideals, not acknowledging the merits of alternative/subaltern cultures. Given that these peace processes do not adequately address root cause problems within societies, instances of inequality or structural violence remain. The decolonial school seeks to address these limitations of the liberal peace approach based upon a modernity/coloniality understanding of peace and war.

<sup>10</sup> Walter D. Mignolo, ‘Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of de-Coloniality’ (2007) 21 (2/3) Cultural Studies 449 doi:10.1080/09502380601162647 P456

<sup>11</sup> Anibal Quijano, ‘Coloniality of Power and Eurocentrism in Latin America’ (2000) 15 (2) International Sociology 215

<sup>13</sup> Anibal Quijano, ‘Coloniality and Modernity/Rationality,’ (2007) 21 (2-3) Cultural Studies 168 doi:10.1080/09502380601164353.

<sup>14</sup> Walter D. Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011)  
Walter D. Mignolo *The Darker Side of the Renaissance: Literacy, Territoriality, & Colonization* (2nd Revised edition ed. Ann Arbor: The University of Michigan Press)

<sup>15</sup> Walter D. Mignolo, ‘Epistemic Disobedience, Independent Thought and De-Colonial Freedom’ (2009) 26 (7-8) Theory, Culture & Society 1(SAGE, Los Angeles, London, New Delhi, and Singapore),

Enrique Dussel, ‘Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation’ (2012) 1 (3) Transmodernity 28

<sup>16</sup> Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing, Oxford and Portland Oregon 2013)

G. Visoka, & O. Richmond, ‘After Liberal Peace? From Failed State-Building to an Emancipatory Peace in Kosovo’ [2016] International Studies Perspectives

<sup>17</sup> Hartmut Behr, *Politics of difference: epistemologies of peace*, (Taylor & Francis 2014, Routledge, New York)

<sup>18</sup> Oliver P. Richmond, *The transformation of peace* (Basingstoke: Palgrave Macmillan. and Palgrave Connect. 2005)

<sup>19</sup> Bo Stråth, ‘Perpetual Peace as Irony, as Utopia, and as Politics’ and S. Kroll, ‘The Illiberality of Liberal International Law’ in *The International and the Local: Essays on the Philosophy of Peace in Nineteenth-Century Europe* (Oxford University Press 2015)

Far from conceiving that the universal ideals in IL will lead to peace in inter state relations, Nelson Maldonado-Torres contends that European Modernity is inextricably linked to the experience of the warrior and conqueror.<sup>20</sup> He recognises this as a “master morality” inspiring and legitimising racial policies, imperial projects and wars of invasion. Torres argues that war is tied up with European Modernity and that “a paradigm of war” exists in which humanity, knowledge, and social relations are conceived in a form privileging conflict or “polemos”.<sup>21</sup> He explains how in a paradigm of war, the horrors of war and the coloniality of power become normalised into peacetimes. This paradigm of war occurs in connection with the production of race and colonialism and the universalistic concepts of peace will instead cause conflict and war. He sums up this understanding detailing how, “through colonialism, race, and dehumanising ways of differentiating genders. War, in turn, is no longer solely found in extraordinary moments of conflict but rather becomes a central feature in modern life-worlds.”<sup>22</sup>

Quijano provides a detailed explanation of the connection between the coloniality of power and race in Eurocentric ideas. He demonstrates that the interconnection of these forms of exploitation and domination were as a result of structures of power put into place in the Americas. He determines that the different biological structures were utilised to place some groups of peoples as inferior to others, “the conquistadors assumed this idea as the constitutive, founding element of the relations of domination that the conquest imposed.”<sup>23</sup> Dussel considers the myth of modernity, evident in Kant’s definition of the Enlightenment.<sup>24</sup> This myth constructs the idea of the “innocence” of enlightened Europeans, and the intrinsic culpability of non-enlightened peoples. Recognising positive elements to modernity Dussel draws attention to ambiguous elements that can arise such as an epistemology of superiority and the need to rescue others through a “civilising mission”.<sup>25</sup> Extracting a lasting peace from this paradigm of war necessitates overcoming the coloniality of power; a procedure that Dussel suggests could be achieved through transmodernity, explored later in this paper.

A decolonial critique of liberal peace incorporates a more profound disruption of its Eurocentric epistemic underpinnings, as well as a “re-politicisation of that sensibility of Western distinctiveness that is taken as an ontological ‘given’.”<sup>26</sup> Exploring this further Mignolo recognises that “it would be a tragic mistake to pursue peace by dragging in the defunct “Globe” as a locus for the common world of cosmopolitanism.”<sup>27</sup> This moves beyond post-modern critiques or post liberal peace, as these critiques do not disrupt the overall claims to hegemony of social, scientific or legal knowledge<sup>28</sup>. These ideas challenge the traditional belief that liberal peace theory is a universal understanding of peace. The cosmopolitan peace which could follow from this concept would suit Western, liberal societies but not function effectively in alternative concepts.

### **Hegemonic Legacy arising through International Criminal Law?**

The practice of ICL and its reliance on a top-down approach permits a more comprehensive understanding when viewed in light of the modernity/coloniality link. In this manner the limitations

<sup>20</sup> Nelson Maldonado-Torres, *Against War: Views from the Underside of Modernity* (Duke University Press Books 2008)

<sup>21</sup> IBID 4

<sup>22</sup> IBID 4

<sup>23</sup> Anibal Quijano, ‘Coloniality of Power and Eurocentrism in Latin America’ (2000) 15 (2) *International Sociology* 215

<sup>24</sup> Enrique Dussel, *Europe, Modernity, and Eurocentrism*, <http://biblioteca.clacso.edu.ar/ar/libros/dussel/artics/europe.pdf>

<sup>25</sup> Enrique D. Dussel & Michael D. Barber 1949. *The invention of the Americas: eclipse of “the other” and the myth of modernity*, (Continuum, New York 1995) 32

<sup>26</sup> Walter Mignolo, ‘Cosmopolitanism and the De-Colonial Option’ (2010) 29 (2) *Studies in Philosophy & Education* 111

Oliver Eberl, ‘The Paradox of Peace with ‘Savage’ and ‘Barbarian’ Peoples’ in Thomas Hippler, and Miloš Vec (eds) *Paradoxes of Peace in Nineteenth Century Europe* (Oxford University Press 2015)

<sup>27</sup> Walter Mignolo, ‘Cosmopolitanism and the De-Colonial Option’ (2010) 29 (2) *Studies in Philosophy & Education* 111

<sup>28</sup> Walter Mignolo, ‘Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality’ (2007) 21 (2-3) *Cultural Studies* 449

Walter Mignolo, ‘The Geopolitics of Knowledge and the Colonial Difference’ (2000) 404 (4) *The South Atlantic Quarterly* 57

of the practice of the court to date can be addressed, whilst simultaneously recognising the achievements of the court and the evolution of the landscape of ICL.<sup>29</sup> This critique highlights the genealogical issues affecting the court to date and then suggests how an intercultural approach through which to address these can build upon a bottom up, grass roots approach. Examining the genealogy of ICL arising through an unchecked amalgamation of IL and domestic criminal law provides insight into the formation of current challenges and Dussel's theory of transmodernity presents a method through which to overcome these limitations.<sup>30</sup> In the pluralistic genealogy of ICL the coloniality of power arises two-fold, through both IL and domestic criminal law. The influence of the coloniality of power can be witnessed through the international legal system. Anghie demonstrates the impact of the colonial encounter on the development of IL, with his critique of the development of modern secular IL.<sup>31</sup> Moving beyond the current criticism of the role of victims within ICL and instead recognising how the conceptualisation of victimhood could be negatively impacting upon the participatory rights of victims through the court presents an opportunity. An explanation of how the role of victims could be reconsidered in the midst of an inter-cultural, grass roots theory is presented below through transmodernity.

This is further analysed by De Sousa Santos, demonstrating how the international legal system has only achieved a counter-hegemonic role in relation to post Westphalia state sovereignty, not moving beyond its top-down approach to recognise the role of the marginalised, the victims of neo-liberalism, who maintain this position. His volume gives examples of bottom-up approaches in which communities play a key decision making role.<sup>32</sup> He recognises that the current counter hegemonic international legal systems and organisations furthers the neo-liberal agenda and does not address the exclusion of subalterned peoples.<sup>33</sup> Santos recognises the role of the legal system as part of the process of neoliberal legal globalization, "replacing the highly politicized tension between social regulation and social emancipation with a depoliticized conception of social change whose sole criterion is the rule of law and judicial adjudication by an honest, independent, predictable and efficient judiciary."<sup>34</sup> Pureza builds upon De Sousa Santos' recognising that the approach of ICL is in fact part of the practice fuelling hegemonic globalisation through key liberal concepts such as the rule of law rather than working as a counter-hegemonic tool. He considers how the "Nuremberg paradigm," adopts a deontological view of IL focused on ensuring retribution for individual criminal responsibility without considering wider political factors or root causes.<sup>35</sup>

The pluralistic origins of ICL incorporate not only the challenges of the international legal system but also the potential colonial legacy arising from the practice of domestic criminal law.<sup>36</sup> Martineau explains a postcolonial reading of international criminal jurisprudence, considering colonial criminal law as based on exclusion; "through the implementation of a differentiated legal regime for indigenous criminals and inclusion, through the will to civilise colonies and their

<sup>29</sup> C. Kress, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in A. Cassese et al (eds.), *The Oxford Companion to International Criminal Justice* (OUP 2009) 143

<sup>30</sup> James G. Stewart and Asad Kiyani, 'The Ahistoricism of Legal Pluralism in International Criminal Law' (2016). Available at SSRN: <https://ssrn.com/abstract=2710899> or <http://dx.doi.org/10.2139/ssrn.2710899>

<sup>31</sup> Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 (5) *Third World Quarterly* 739 doi:10.1080/01436590600780011.

Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (OUP 2007)

<sup>32</sup> Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, Cambridge Books Online EBS 2005)

<sup>33</sup> Boaventura de Sousa Santos, *Epistemologies of the South: justice against epistemicide* (Routledge, Taylor & Francis Group, London 2016)

<sup>34</sup> Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, Cambridge Books Online EBS 2005) see also J. Barreto, J. (2014). Epistemologies of the south and human rights: Santos and the quest for global and cognitive justice (2014) 21 (2) *Indiana Journal of Global Legal Studies* 395

<sup>35</sup> J. M. Pureza, 'Defensive and oppositional counter-hegemonic uses of international law: from the International Criminal Court to the common heritage of humankind', in B. de Sousa Santos and C.A. Rodriguez-Garavito (eds.) *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press 2005) 267

<sup>36</sup> L. Benton *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, (Cambridge, Cambridge University Press 2002)



criminal justice system.”<sup>37</sup> Tauri examines how the construction of the ICL is part of the wider retributive justice system that has been crippled as the entirety of the construction is based upon coloniality ideas of power, race and knowledge including criminology.<sup>38</sup> The focus of retributive justice is therefore considered not to be in keeping with indigenous justice systems, favouring individualistic western criminal justice and has led to a lack of accountability for colonial crimes.<sup>39</sup>

The legacy of international criminal justice is also traced through to colonial practice of in establishing governments and legal systems in newly colonised lands. In this process the ruling power creates a system foreign to the indigenous population who therefore become an exteriority or negated alterity, classified as an “Other.”<sup>40</sup> This acknowledges the fact that within the current system a legacy remains stemming from the creation of an “Other” in contrast to a ruling elite who were different to the indigenous populations.<sup>41</sup> These populations are an exteriority to the ruling class, who subdue them but do not understand them.<sup>42</sup> This builds upon the legacy of the influence of the “Other” set out by Walsh and the impact this may have on international criminal justice.<sup>43</sup> The creation of the “Other” in ICL is recognized by these scholars to have arisen through an imperialist influence.<sup>44</sup> It is this legacy that pluriversal inter-cultural approaches are seeking to address, ensuring a role for the “Other” in the midst of a system rather than maintaining their exteriority.

### **Transmodernity - re-examining International Criminal Law from the underside**

In working to overcome the limitations of the international system a form of intercultural dialogue has been suggested by both post liberal and decolonial scholars. The post-liberal scholars perceive an opportunity to approach international systems from their underside allowing the grassroots a voice and agency.<sup>45</sup> Moving away from the top down universalist legacy it provides the opportunity to reconsider existing systems, recognising their limitations and move forward in a bottom up approach rather than something required to be covered over or denied, ensuring the voices of those traditionally excluded from the ruling class are heard. The decolonial scholars utilises aspect of the concepts proposed by post-liberal theorists, while also addressing the limitations of modernity/coloniality. Dussel envisages a concept of transmodernity which seeks to subsume “the best of globalized European and North American modernity” from the perspective of liberating reason (not European emancipation), and on the other the critical affirmation of the liberating aspects of the cultures and knowledge excluded from or occluded by modernity”.<sup>46</sup> Dussel sets out the current need to embrace an alternative historical project to modernity in which liberation and racial diversity are included in the goals.<sup>47</sup>

<sup>37</sup> Anne Charlotte Martineau, ‘Overcoming eurocentrism? Global History and the Oxford Handbook of the History of International Law (2014) 25 (1) European journal of international law 329.

<sup>38</sup> J. M. Tauri and N. Porou 2014. ‘Criminal Justice as a Colonial Project in Contemporary Settler Colonialism’ (2014) 8 (1) African Journal Of Criminology & Justice Studies 20

<sup>39</sup> B. Agozino, ‘Imperialism, crime and criminology: Towards the decolonisation of criminology’ (2004) 41 (4) Crime, law and social change 343

B. A. Igbo, ‘Indigenous European Justice and Other Indigenous Justices’ (2014) 8 (1) African Journal of Criminology and Justice Studies 1

<sup>40</sup> A. Deckert, ‘Neo-Colonial Criminology: Quantifying Silence’ (2014) 8 (1) African Journal Of Criminology & Justice Studies 39

D. Short, ‘Reconciliation and the Problem of Internal Colonialism’ (2005) 26 (3) Journal of Intercultural Studies 267

<sup>41</sup> F. Fanon, *The Wretched of the Earth* (1967 Translated by Constance Farrington. (New York: Grove Press, 1991)

<sup>42</sup> E. D. Dussel, ‘Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation’ (2012) 1 (3) Transmodernity 28

<sup>43</sup> C. Walsh, ‘Shifting the Geopolitics of Critical Knowledge’ (2007) 21 (2/3) Cultural Studies 224

<sup>44</sup> J. Pieret & M. Hébert-Dolbec, ‘International Criminal Justice as a Critical Project: Introduction’ (2016) (Vol. XIII) Champ Pénal, doi:10.4000/champpenal.9309

<sup>45</sup> O. P. Richmond ‘The dilemmas of a hybrid peace: Negative or positive?’ (2015) 50 (1) Cooperation and Conflict 50

David Roberts, *Post-conflict Statebuilding and State Legitimacy: From Negative to Positive Peace?* (2008) 39 (4) Development and Change 537

P. Lundy and M. McGovern, M. (2008) ‘Whose justice? Rethinking transitional justice from the bottom up’ (2008) 35 (2) Journal of Law and Society 265

<sup>46</sup> Enrique D. Dussel, ‘World System and ‘Trans’-Modernity’ (2002) 3 (2) Nepantla 223

<sup>47</sup> W. Mignolo discussing E. Dussel in ‘Geopolitics of Sensing and Knowing: On (de)coloniality, Border Thinking, and Epistemic Disobedience’ (2013) 4 (4) *Critique* 420

Following decolonial theory, transmodernity involves recognition of not only cultural but also epistemic difference as well. Transmodernity is, among other things, Dussel's response to Eurocentrism and the formation of an "epistemic community of masters." It posits that theory does not travel exclusively from Europe to the world, but is rather found in different sites and travels in different directions. The methodology of transmodernity is in keeping with Quijano's concept of epistemological decolonization, opening up new opportunities for intercultural dialogue. This moves away from the system in which Eurocentric knowledge systems and voices are privileged and determined to be universally relevant. Providing a strategy through which alterity and difference have an equal voice within a system that recognises the need to ensure subalterned voices are heard. Dussel introduced the idea of transmodernity as an alternative to modernity building upon the understanding of the Coloniality of Knowledge and Power.<sup>48</sup> Transmodernity represents a system in which all forms of knowledge, rooted in their particular experiences, are in dialogue.<sup>49</sup>

A radical rearticulation of the concept of victims can be constructed within transmodernity. This is based upon the connection between the victim and the alterity (or exteriority) located within those excluded from the prevailing political system, viewed through the lens of the suffering "Other".<sup>50</sup> Grosfoguel furthers the understanding of a transmodern methodology explaining how decolonial thinking arises from the geopolitics of knowledge of exteriority to create a critique of modernity moving towards a pluriversal transmodern world of multiple and "diverse ethico-political projects in which a real horizontal dialogue and communication could exist between all peoples of the world."<sup>51</sup> Uniting the elements of dialogue and the "Other" together within ICL can therefore fundamentally change its practice. Dussel argues that dialogue, which involves grassroots and stems from different epistemologies and experiences provides an opportunity to address global challenges from a different perspective. The paradigm of war lens and the legacy of empire construct the idea that difference means war.<sup>52</sup>

The approach to difference through transmodernity provides an opportunity to reconsider methods of achieving peace. Rather than perceiving difference as something to be overcome, transmodernity embraces varied and contrasting epistemologies. The key to the concept of transmodernity is not to disain all elements of modernity by rather, "collectively identify the positive elements, as well as those from other cultures."<sup>53</sup> Transmodernity identifies the positive elements of European Modernity as well as elements of alternative societies.<sup>54</sup> Importantly pluriversal transmodernity reconsiders modernity from the underside, seeking the perspective of the excluded "Other" arising as objects of modernity's constitutive violence.<sup>55</sup> The work of Dussel on transmodernity sets forth the requirement for the "reactivation" of subaltern knowledges, "including those subalternized by the secular discourse of the imperial West and modern nation-states in the periphery."<sup>56</sup> Transmodernity is neither Christian nor secular, opening the space for

<sup>48</sup> A. Fornazzari & E. D. Dussel, 'World-System and "Trans"-Modernity' (2002) 3 (2) *Nepantla: Views from South* 221

<sup>49</sup> *IBID*

see also Ramon Grosfoguel, Ramón. "Decolonizing Post-Colonial Studies and Paradigms of Political Economy: Transmodernity, Decolonial Thinking, and Global Coloniality." *TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1, no. 1 (May 13, 2011).

<sup>50</sup> Enrique D. Dussel, "Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation," (2012) 1 (3) *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 43 <http://escholarship.org/uc/item/6591j76r>.

<sup>51</sup> Ramon Grosfoguel, 'Developmentism, Modernity, and Dependency Theory in Latin America' in Mabel Moraña, Enrique D. Dussel, and Carlos A. Jáuregui (eds) *Coloniality at Large: Latin America and the Postcolonial Debate* (Durham: Duke University Press, 2008)

<sup>52</sup> Enrique D. Dussel, 'Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation' (2012) 1 (3) *TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World* <http://escholarship.org/uc/item/6591j76r> 43

<sup>53</sup> *IBID*

<sup>54</sup> Arturo Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalization Social Movements' (2004) 25 (1) *Third World Quarterly* 207

<sup>55</sup> Arturo Escobar and Walter D. Mignolo, (eds) *Globalization and the Decolonial Option* (London: Blackwell, 2010) Arturo Escobar, 'Worlds and Knowledges Otherwise: The Latin American Modernity/Coloniality Research Program.' (2007) 21 (2-3) *Cultural Studies* 187

<sup>56</sup> Enrique D Dussel, *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (United States

the articulation of different forms of knowledge. Dussel examines a discourse of liberation through an ethics grounded on the distinction between the self and the “Other”. Grosfoguel recognizes the need for a new form of universality in contrast to Eurocentric epistemologies which subsume the particular in to the same. He determines that a “radical universal decolonial anti-systemic diversity” would be a project of liberation.<sup>57</sup> The pluriversal approaches set out in this section provide an opportunity to reexamine the construction of ICL in which the voices of those traditionally excluded could be heard and the influence of a colonial legacy be reduced. The role of victims within ICL provides an example of a mechanism with the potential to ensure their agency is increased and also to appreciate the valuable insight the “Other” can provide.

### Reconsidering victimhood and the “Other”

The rhetoric of victims within ICL has highlighted the need to place them at the centre of the system, however the current practice has led commentators to question if this is the reality?<sup>58</sup> Critiques within ICL recognise problems in trying to seek justice for victims ranging from the need for selectivity of ICL and the limitations this brings, or if the adversarial trial processes are fit for purpose for victims?<sup>59</sup> Building upon the limitations recognised through Spivak’s idea of the conception of victims in IL, portrayed as helpless and in need of saviours, demonstrates that the term victim is an evocative term itself, one which people may not associate with.<sup>60</sup> Critical in understanding the limitations currently experienced by victims in ICL is the explanation by Arendt that the term “victim” causes limited agency. Her work details how traditional understanding creates a scapegoat theory of victims in which they are granted no influence over the harm experienced or potential future solutions.<sup>61</sup>

Utilising an alternative connected to understandings of the “Other” could move the approach beyond current limitations. Spivak demonstrates that the approach is of: “White men saving brown women from brown men.”<sup>62</sup> Spivak’s argument resolves that the ‘subaltern voice’ is incapable of comprehensibility within hegemonic communication processes. In this the suffering voice is not considered as the voice of theory, rather that the suffering is a problem to be solved by a theorist.<sup>63</sup> At best, those that suffer are invited to await the trickle-down of whatever benign ‘solution’ theorists may purport to offer. Jayan Nayar explains the creation and subsequent power dynamics of a “suffering-Other” and those working to deliver them from their suffering.<sup>64</sup> She determines that although it might be agreed that the days of the Noble Savage are gone and that those “Other-ed” do not need a go-between in their struggles. The search remains for ways to bring them into the Enlightenment out of their own darkness.

Dussel moves away from this approach towards victims and instead conceptualises them as “negated alterity in modernity.”<sup>65</sup> Dussel explained the elevated position of the conquistador in the newly discovered lands where he exerted his power by denying the “Other” his dignity, “The

<sup>57</sup> Ramon Grosfoguel ‘Decolonizing Post-Colonial Studies and Paradigms of Political Economy: Transmodernity, Decolonial Thinking, and Global Coloniality’, (2011) 1 (1) *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1

<sup>58</sup> A. Sagan, ‘African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law’ (2010) 39 (1) *Millennium - Journal of International Studies* 3

<sup>59</sup> R. Cryer, & Cambridge Books Online *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge 2005)  
see also Christine E. J. Schwobel, *Critical Approaches to International Criminal Law: An Introduction*, (Routledge, Abingdon, Oxon, 2014)

<sup>60</sup> Tessa Lacerda ‘Victim’: What Is Hidden behind This Word? *IJTJ* (2016) 10 (1): 179-188 doi:10.1093/ijtj/ijv028

<sup>61</sup> H. Arendt, 1906-1975 *The origins of totalitarianism* (Schocken Books, New York 2004)

<sup>62</sup> Spivak, Gayatri Chakravorty. ‘Can the subaltern speak?’ in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture*, (London: Macmillan 1988)

<sup>63</sup> S. Tapia Tapia, ‘Sumak Kawsay, coloniality and the criminalisation of violence against women in Ecuador,’ (2016) 17 (2) *Feminist theory* (1464-7001) 141

<sup>64</sup> Jayan Nayar, ‘The Politics of Hope and the Other-in-the-World: Thinking Exteriority’ (2013) 24 (1) *Law and Critique* 63

<sup>65</sup> Enrique Dussel, Enrique ‘From fraternity to solidarity’ (Trans. M. Barber and J.S. Wright 2005 (Towards a Politics of Liberation), <http://www.enriquedussel.com/Files/005-From%20fraternity%20to%20solidarity.pdf>)

conquest practically affirms the conquering ego and negates the Other as Other.”<sup>66</sup> This presents an idea of the formation of the concept of the “Other” in modernity and helps to guide the approach that should be taken to overcome this creation. Perceiving a role through a bottom up approach for this alterity. Dussel examines how the oppressed possess the maximum exteriority and that they alone “can project a real and new alternative for future humanity.”<sup>67</sup> This recognises victims of alterity in relation to a political category, moving away from the absence of political agency described by Spivak and Arendt in the traditional understandings of victims through the trial process in international courts. An opportunity to rearticulate the traditional notion of victims is presented through a consideration of the “Other,” realising their political potential. In contrast to top-down approaches transmodernity bring forth a route through the underside of the international legal system. This bottom-up approach to victims follows Dussel’s idea of the need to accept the excluded to ensure the world can move on from the “rationality of domination.”<sup>68</sup>

The approach of transmodernity is a principle of liberation for the negated “Other” and is defined by Dussel as a project for overcoming modernity, not simply by negating it but by thinking about it from its underside, from the perspective of the excluded “Other”. Transmodernity is a future-oriented project that seeks the liberation of all humanity, “in which both modernity and its negated alterity (the victims) co-realize themselves in a process of mutual fertilization.”<sup>69</sup> This critical approach moves to utilize non-hegemonic, subalterned and silenced counter-discourses of alterity from which the role of victims can be rearticulated. Through this setting, the idea of victims can take on a new focus which considers the importance of their voice being heard in the development of a form of international criminal justice culturally suitable to their specific post conflict situation, critically recognising the importance of the “Other”. Ramon Grosfoguel extends the challenge beyond the notion of victims in ICL through the explanation of the role of exteriority in the creation of a geopolitics of knowledge moving away from modernity towards a pluriversal transmodern world. In contrast to restricting the role of victims, his approach recognises the potential of “diverse ethico-political projects in which a real horizontal dialogue and communication could exist between all peoples of the world”.<sup>70</sup> It is through this dialogue that a hegemonic liberal legacy could be overcome and the potential to achieve lasting peace in which multiple forms of democracy could be conceived.

## Conclusion

The decolonial critique provides a radical approach to Western theory, challenging liberal and post-liberal critiques. Ultimately, it redefines the traditional historic narrative of ICL demonstrating why this is fundamental to understand its current practices. A reevaluation of Western epistemology should be developed for the examination of peace and the role of victims. From this realisation the approach of transmodernity provides an opportunity to address the limitations of the traditional approach to peace in IL interlinked with a paradigm of war. Critically, the pluriversal intercultural approach set out in this paper can overcome the coloniality of power and race that has limited the achievement of lasting peace. In recognizing a role for difference that grants those in the exteriority agency rather than seeking to assimilate their cultures within one banner the formation of the international legacy system can be reconsidered from its underside. This approach can create a reimagining of ICL, working with the positive elements of the current system while also seeking to overcome elements of epistemic violence remaining unexamined

<sup>66</sup> Enrique D. Dussel & Michael D. Barber 1949. *The invention of the Americas: eclipse of “the other” and the myth of modernity*, (Continuum, New York 1995).

<sup>67</sup> Enrique D. Dussel ‘Eurocentrism and Modernity, Frankfurt lectures’, (1993) 20 (3) *The Postmodernism Debate in Latin America* 63

<sup>68</sup> Enrique D. Dussel, *Philosophy of liberation* (Translated Aquilina Martinez and Christine Morkovsky. Eugene: Wipf and Stock Pub 2003)

<sup>69</sup> Enrique D Dussel, *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (United States 1996)

<sup>70</sup> Ramon Grosfoguel “Decolonizing Western Uni-Versalisms: Decolonial Pluri-Versalism from Aimé Césaire to the Zapatistas.” (2012) 4 (2) *TRANSMODERNITY: Journal of Radical Cultural Production of the Latin American World*

in current practice. The reevaluation of the articulation of victims provides an opportunity to bring forth cultural relevancy within ICL and ensure the victims can maintain their agency. This critique is not designed to set forth a solution to the many existing imperfections but rather ensure that the need to address ICL from its underside is part of the discussion.

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