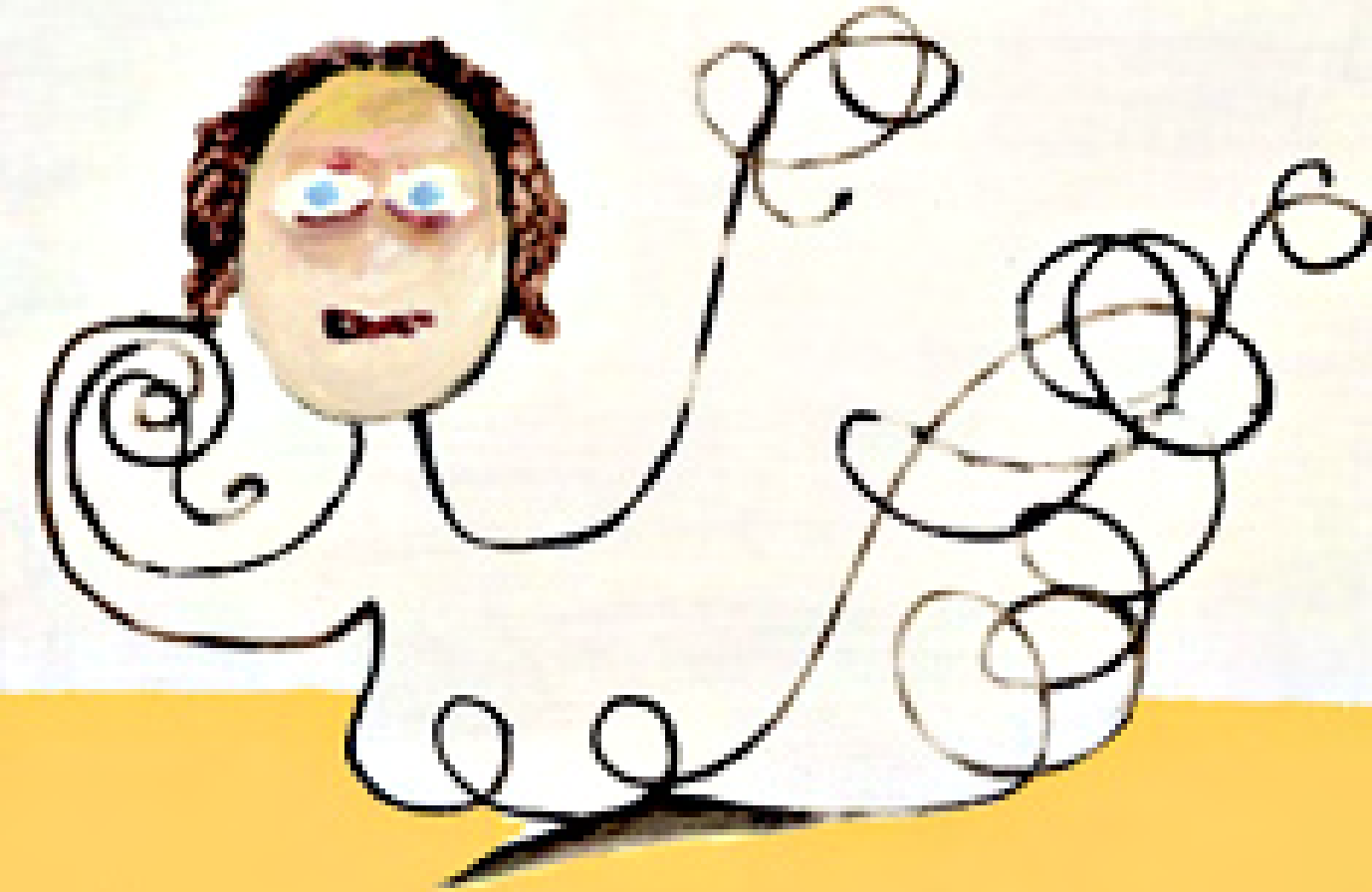
International Law and its Others



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INTERNATIONAL LAW AND ITS OTHERS

Institutional and political developments since the end of the Cold War have led to a revival of public interest in, and anxiety about, international law. Liberal international law is appealed to as offering a means of constraining power, representing universal values and governing relations between sovereign states. This book brings together scholars who draw on jurisprudence, philosophy, legal history and political theory to analyse the stakes of this turn to international law. These essays explore the history of relations between international law and those it defines as other – other traditions (theology, philosophy, morality, economics), other logics (sacrifice, war, despotism, calculation), other forces (God, desire, markets, imperialism) and other groups (indigenous peoples, corporations, barbarians, terrorists). The authors explore the archive of international law as a record of attempts by scholars, bureaucrats, decision-makers and legal professionals to think about what happens to law at the limits of modern political organization. The result is a rich array of responses to the question of what it means to speak and write about international law in our time.

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For Hamish and Felix

CONTENTS

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1

A jurisprudence of the limit

ANNE ORFORD*

Institutional and political developments since the end of the Cold War have led to a revival of public interest in questions of international law and cosmopolitan legality. This has intensified with the violent attacks on the US of 11 September 2001, and the use of force against the territory and people of Afghanistan and Iraq carried out in response. Many scholars in law and the humanities have embraced a cosmopolitan vision of the future of international law in answer to the sense of crisis which these events have precipitated.[1] Liberal international law is increasingly appealed to as offering a bulwark both against the threats posed by terrorists, religious militants, failed states, environmental degradation and epidemics, and against the excesses of the measures taken by states in response to these perceived threats. Commentators look to international law as a source of constraints on the abuses of hegemonic power, as a means of responding to the threats posed to the state by terrorism and economic globalization, or as a field in which economic justice and global co-operation should be on the agenda. The international is imagined, for good or ill, as a space outside the order imposed by independent sovereign states – a space in which law, the state and the subject all reach their limits.[2] The revival of interest in and anxiety about those limits is expressed in the appeal to international law and by reference to imperialism, terrorism, human rights and the state of exception.[3]

* Thanks to Hilary Charlesworth for discussions about the writing of this introduction, to Andrew Robertson and Peter Rush for their helpful comments on earlier drafts and to Megan Donaldson for her invaluable editorial assistance.

[1] See for example Zygmunt Bauman, *Europe: An Unfinished Adventure* (Cambridge, 2004); Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, 2003); Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London, 2001).

[2] Mark F. N. Franke, *Global Limits: Immanuel Kant, International Relations, and Critique of World Politics* (Albany, NY, 2001).

[3] R. B. J. Walker, 'International, Imperial, Exceptional' in ELISE Collective Volume, *Counter-Terrorism: Implications for the Liberal State in Europe* (Brussels, 2005), pp. 36–57.

At the same time, the discipline of international law is itself undergoing one of its periodic crises, in which it attempts to renew itself and reassert its relevance.[4] Dramatic changes seem daily to be proposed to existing international institutions and to legal doctrines relating to sovereignty, territory, responsibility and the use of force. This renewed public interest in cosmopolitan legality, occurring at the same moment as a perceived crisis of relevance for existing international law and institutions, offers a valuable opportunity. The questions to which international law is expected to offer an answer are some of the most important, vital and intriguing questions of our time. Yet international law as a discipline has lost its capacity to provide a compelling understanding of what is at stake when these questions arise. This collection is part of a broader movement seeking to regenerate the exchange between international law and the humanities in order to restore the ability of international law to address such questions more fully. It brings together scholars working in a range of critical traditions to contribute to the generation of an understanding of the stakes of the turn to international law in today's political climate.

The chapters in this book complicate the tendency to see international law as offering an answer to the questions generated by the war on terror, globalization and related events. Rather than look to international law or institutions for answers or as the source of a pre-packaged programme of reforms which can solve the problems of domestic politics, these essays explore international law as a record of attempts to think about what happens at the limit of modern political organization. Responding to the questions posed of international law requires understanding the forms that global governance takes today, and 'how the world has come to take this form'.[5] International law offers an archive of attempts to address the questions and solve the problems that arise under the conditions of a modern politics organized around territorial sovereignty. It provides a valuable history of the ways in which a politics imagined as involving encounters between independent, sovereign entities and a commitment to cosmopolitan ideals has materialized through specific practices, institutions and relations. Many of the issues currently on the agenda of international institutional reform – terrorism, human rights violations, civilian immunity, security, states of emergency, the responsibility to protect,

[4] Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441.

[5] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London, 2004), p. 8.

peace-building – are about the point at which we reach the limits of modern political organization. By bringing together theorists working on these issues from the perspective of history, political theory, philosophy and international law, this book explores what the turn to international law might mean, and what the archive of international law offers as a way of understanding the stakes of this politics. These theorists remind us that the war on terror, attended as it is by a sense of 'threats, challenges and change', is not exceptional.[6] International law guards the secret history of a modernity which is itself terrorized by the lack of any sovereign authority to guarantee the law or make sense of death.

More specifically, this book is about the many forms of the relation to the other, as it is figured, performed, inscribed and imagined in the discipline of international law. To give this book the name *International Law and its Others* is immediately to invoke a critical project which has an established trajectory within international law. The well-versed reader of international legal texts, glancing at the title, might anticipate that this is a book which will describe and denounce the ways in which international law was complicit in, and founded upon, European imperialism. Such a book, being published as it is during an era of wars on terror, of development rounds at the World Trade Organization, of an institutional language of threats and challenges at the United Nations, might be relied upon to demonstrate the continuities between imperialism in its classical form and imperialism lite (or not so lite) in Iraq and elsewhere in the twenty-first century. Ideally, it might be expected that some of international law's 'others' will be invited to speak within these pages, to give the perspective of the 'native informant' on how the progress of international law should properly be measured, or to offer a description of what it is like to be an other of a law which imagines itself as international, even at times universal. There is a generous and liberal impulse within the mainstream of international law which wants the voice of the other to be heard, and which believes, in true cosmopolitan fashion, that we have now arrived at the moment when the truth of our history will finally be available to us. This book owes a great deal to this tradition of thinking critically about the need to reform international law to make it more inclusive and humane, and its authors take seriously the questions of responsibility that are posed by the history of imperialism.

[6] *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (2004).

Yet many of these chapters also depart from, and at times challenge, this mode of critical engagement. In particular, the authors writing here hesitate to name once and for all the inside and outside, the self and other of law, as if fearing that the other can only ever be represented by accommodating or assimilating it to existing economies, languages or practices. They attempt in a variety of ways to come to terms with the complicated and infinite process of constituting the self in relation to the other through the institutions of law and language. In these pages, sovereigns proliferate and take different forms, those addressed by the speech of law are figured and encountered in many ways, and the contingent and unstable meanings of legal texts are stabilized and take effect over the bodies and territories of those who are included in the community of international law only through their exclusion.[7] This sense of the fragmentary nature of critique is a product of the challenge that imperialism poses to history. As Gayatri Spivak writes, 'the epistemic story of imperialism is the story of a series of interruptions, a repeated tearing out of time that cannot be sutured'.[8] Writing about 'the other' after such a history can be one way of attempting to regain that which has been lost in the process. Yet, as Spivak adds, if 'we are driven by a nostalgia for lost origins, we too run the risk of effacing the "native" and stepping forth as "the real Caliban", of forgetting that he is a name in a play, an inaccessible blankness circumscribed by an interpretable text'.[9] It is the task of interpreting the texts of law, rather than attempting to access the blankness which they circumscribe, with which these chapters are engaged.

The themes which emerge from this book in terms of the relation between self and other include responsibility, desire and violence. Each of these themes addresses the conflict at the very interior of the subject, whether that subject be the liberal individual, the sovereign state or the discipline of international law. For one group of authors, the challenge posed by imperialism is to provide histories of the ways in which the other has been represented. They ask what has been done to the other who is figured in relation to sovereignty and imperialism. For a second group of authors, the 'other' of international law is that from which we set off or which we push away in order to constitute a subject, an institution or a tradition.[10] These chapters are concerned with how one might respond

[7] On the form of law which includes through exclusion, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998).

[8] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA, 1999), p. 208.

[9] *Ibid.*, p. 118. [10] *Ibid.*

to the call of the wholly other understood in this sense. There is a quality to international law as a discipline that brings some of the anxiety or the excitement involved in this question of responsibility into sharp relief. For some of the authors, there is something about this relation to the other from which they take pleasure, or which drives their work. They bring together fragments from disparate traditions or engage across idioms, writing about texts and ideas taken from worlds that would name themselves as theory on the one hand and practice on the other, and seeing how these texts open out when read together. Marjorie Garber describes the quality of this pleasure in terms of disciplinary libido. Garber says that this libido is that which keeps 'scholarly disciplines from becoming inert and settled'.[11] Each field differentiates itself but also desires to become its nearest neighbour, whether at the edges of the academy, among the disciplines, or within the disciplines. To quote David Kennedy, this is 'the disruptive edge of each discipline vibrating excitedly with the other'.[12] For others, this engagement with the other of law is also disturbing. Many of the chapters use the language of responsibility and ethics to develop the sense of the other as posing a question which the subject cannot answer. For scholars faced with the horrors of the war on terror, of detention of asylum-seekers, of suspension of law in the name of security or national interest, this sense of responsibility gives rise to an anxiety about the irrelevance of scholarship and the academic role. The terms in which we might once have thought about this academic responsibility are in flux. As Antony Anghie writes in his concluding chapter:

> The question of what role should be played by the scholar, or, more particularly, the international law scholar and adviser, is a very old and complex one. But, clearly, profound changes have occurred. The traditional divisions and debates, between 'realists' and 'pragmatists' and the 'crits', seem in retrospect to have been based on a curiously secure intellectual order, one in which, whatever the divisions, certain shared assumptions were maintained. The older verities that bound together the members of the 'invisible college of international lawyers', in Oscar Schachter's memorable phrase, no longer obtain.[13]

This sense of the relationship between 'older verities' and the grounds of critique can be seen in an earlier exchange between a sovereign and

[11] Marjorie Garber, *Academic Instincts* (Princeton, 2001), p. ix.

[12] David Kennedy, 'Law's Literature' in Marjorie Garber, Rebecca L. Walkowitz and Paul B. Franklin (eds.), *Field Work* (New York, 1996), pp. 207–13 at p. 212.

[13] Antony Anghie, 'On critique and the other', pp. 389–400 at p. 397 (reference omitted).

an errant philosopher. In the preface to *The Conflict of the Faculties*, Immanuel Kant cites a letter that he received from the King of Prussia, Friedrich Wilhelm, reproaching Kant for abusing his philosophy and deforming and debasing certain dogmas in his book, *Religion within the Limits of Reason Alone*. Wilhelm accused Kant of failing two responsibilities. The first was his 'inner responsibility and personal duty as a teacher of the young'. The second was his responsibility to 'the father of the land, to the sovereign, whose intentions are known to him and ought to define the law'.[14] Kant quoted from the letter as follows:

> You must recognize how irresponsibly you thus act against your duty as a teacher of the young and against our sovereign purposes, which you know well. Of you we require a most scrupulous account and expect, so as to avoid our highest displeasure, that in the future you will not fall into such error, but rather will, as befits your duty, put your reputation and talent to the better use of better realizing our sovereign purpose; failing this, you can expect unpleasant measures for your continuing obstinacy.[15]

Discussing this passage, Jacques Derrida comments:

> [T]he nostalgia that some of us may feel in the face of this situation perhaps derives from this value of responsibility: at least one could believe, at that time, that responsibility was to be taken – for something, and before some determinable someone. One could at least pretend to know whom one was addressing, and where to situate power; a debate on the topics of teaching, knowledge, and philosophy could at least be posed in terms of responsibility. The instances invoked – the State, the sovereign, the people, knowledge, action, truth, the university – held a place in discourse that was guaranteed, decidable, and in every sense of this word, 'representable' . . . Could we say as much today? Could we agree to debate together about the responsibility proper to the university?[16]

The institution of international law is intimately concerned with these notions of the State, the sovereign, the people, action and truth, and so repeatedly brings us up against the challenge which Derrida here articulates. These chapters explore the relations between the inside and the outside of the university, between the critic and the practitioner. They detail the hopes that generations of lawyers and scholars have had for their engagement with others – women, civilians, decision-makers, sovereigns,

[14] Jacques Derrida, 'Mochlos, or The Eyes of the Faculty' (trans. Richard Rand and Amy Wygant) in Jacques Derrida, *Eyes of the University* (Stanford, 2004), pp. 83–112 at p. 86.
[15] As quoted in *ibid.*, pp. 86–7 (translation notes omitted). [16] *Ibid.*, p. 87.

imperial administrators, indigenous peoples, savages, nature, power, history, masculinity and war. They detail the anxieties that lawyers have felt when their work seemed irrelevant to those outside the discipline or the academy. Throughout, they read the texts of international law as a concentrated and charged record of the ways in which scholars, bureaucrats, decision-makers and legal professionals write about relations to the other and about what happens at the limits of the spatial and temporal ordering upon which international law depends. The resulting exploration of the relation between critique, the other and responsibility offers a rich array of responses to the question of what it means to speak and write about international law in our time.

Part I: Sovereignty otherwise

> [W]e were still awaiting a response, as if such a response would help us not only think otherwise but also to read what we thought we had already read . . .[17]

One way in which a sense of international law as a jurisprudence of the limit emerges is through exploring the centrality of the conception of the sovereign state to the discipline. The chapters in Part I challenge the well-rehearsed disciplinary history of sovereignty, one of progress from religious absolutism to secular rationalism. The moment of secularization in these narratives is usually figured by the Peace of Westphalia in 1648. In this account, Westphalia marks a clean break between the social formations of Christendom and their successors – the sovereign independent states of modern times. According to international law, one of the essential elements of statehood is territorial sovereignty – the idea that within its territory 'supreme authority is vested in the state'.[18]

The idea that the medieval international system was transformed at a particular point in history into a system of modern sovereign states, each with an effective government exercising exclusive and absolute control over territory and people, is difficult to sustain when we look to those decisions of international arbitrators and tribunals concerned with competing claims to sovereignty over territory. The archive of empire offered by international law suggests the implausibility of a version of history in which a stable and uniform mode of political organization named the

[17] Jacques Derrida, *The Work of Mourning* (ed. Pascale-Anne Brault and Michael Naas, Chicago, 2001), p. 206.

[18] I. A. Shearer, *Starke's International Law* (11th ed., London, 1994), p. 144.

modern State emerged in 1648. The cases that develop the norms governing traditional modes of acquisition of territory reiterate the notion that the effectiveness of occupation as a mode of acquisition depends not only upon making known in a public, clear and precise manner the intention to consider a particular piece of earth as the territory of a sovereign, but that this must be accompanied by an effective exercise of control. International law, in an oft-cited formulation, does not 'reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations'.[19] This phrasing has become iconic in international legal doctrine, raising the question of how we might account for this compulsion repeatedly to invoke such a vision of sovereignty. While the reiteration of effective control in such decisions operates to support the ideal-type of the sovereign as all-powerful, effectively controlling territory and potentially able to kill, starve, exploit, imprison and subordinate those within it, the image of the European sovereign that emerges if we look at the facts grounding successful claims to territory in the texts of international law is a far smaller, more absurd and ridiculous figure. Paying attention to the record of what counted as a 'concrete manifestation' of control over territory reveals that 'effective control' often meant very little in practice. Europeans had to provide only limited evidence of control, often in the form of some kind of writing or speech, in order to be recognized as sovereign over a territory.[20] The declaration of a French lieutenant on board a commercial vessel cruising past an island in the Pacific that the island was owned by France and the publication of this declaration in a Hawaiian journal,[21] the signing of a contract on the part of Dutch East India company officials,[22] and the passing of legislation in relation to a territory,[23] have all been treated as relevant evidence of effective occupation. Only a powerful fantasy could support the use of such concrete manifestations of sovereignty to demonstrate that the sovereign state is a form of political organization which in fact depends upon exclusive

[19] *Island of Palmas Case (Netherlands* v. *United States)* (1928) 2 RIAA 829 at 839 ('*Island of Palmas Case*').

[20] In contrast, non-Europeans were rarely able to satisfy the demand that they manifest sovereign control. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005).

[21] *Clipperton Island Arbitration (Mexico* v. *France)* (1931) 2 RIAA 1105; translation in (1932) 26 *American Journal of International Law* 390.

[22] *Island of Palmas Case.*

[23] *Legal Status of Eastern Greenland (Norway* v. *Denmark)* (1933) PCIJ Rep (Ser. A/B) No. 53 ('*Eastern Greenland Case*').

jurisdiction over fixed territory and effective control over the inhabitants of that territory.

Recent accounts in political theory have also begun to complicate the history of modern politics as one in which the sovereign state emerged in Europe in the seventeenth century as a stable entity exercising control over territory and people.[24] Similarly, philosophers have begun to ask whether and how sovereignty makes sense as a concept across time and space, and whether there are alternative ways of imagining sovereignty that may have been lost in the rush to celebrate or bemoan the omnipotent sovereign of liberal imagination. The chapters in Part I draw on these contemporary developments in philosophy, legal history and political theory in order to think sovereignty otherwise. They put into play relations between sovereignty, speech, performance and flesh. For these authors, the critical project involves the strategic rewriting of histories of sovereignty. They put historical knowledge to work 'not to refute, but to eliminate and render impossible' particular theoretical and political strategies.[25] In so doing, each attempts to shift the focus 'on to something else which [offers us] more options, more places to go'.[26]

Costas Douzinas explores whether and how sovereignty – in its modern form as indivisible, unconditional and absolute – continues to make sense and take effect in the world. For Douzinas, this political form of sovereignty is under attack, an attack that is rather more to be feared than to be welcomed. His concern about the political effects of the retreat of sovereignty derives from an understanding of the ways in which sovereignty as a metaphysical concept relates to contemporary forms of political organization. Like Carl Schmitt, Douzinas sees the modern political form of sovereignty as a secularized version of a theological concept. However, unlike Schmitt, Douzinas understands this theological form of sovereignty as uncertain, and it is here that he finds room for optimism. This sense of the uncertain nature of theological sovereignty derives from a rigorous jurisprudential analysis of the foundations of that sovereign form. For Douzinas, sovereignty is the name given to the event of coming together or self-constitution of a community in and through jurisdiction,

[24] For example Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of International Relations* (London, 2004); Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extra-Territorial Violence in Early Modern Europe* (Princeton, 1994).

[25] Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France* (trans. David Macey, London, 2003), p. 98.

[26] Jacqueline Rose, *On Not Being Able to Sleep: Psychoanalysis and the Modern World* (London, 2004), p. 29.

the speaking of law. In the form of bare sovereignty, this coming together is a potentially infinite process. It involves a spatial ordering, a proper name, an institutional ordering and, in its democratic mode, a mutual address. This bare sovereignty is transformed into theological sovereignty through the inauguration of law through words. The law must be spoken in order to exist, and it is because this is so, 'because the law must have a mouth and a body', that the unique individuals and the great legislators 'enter the stage'.[27] Yet, while these legislators (or dictators) speak the law, they do so in the name of some 'silent partner for whom they speak, God, King, the People or Law'.[28] The particular and the universal are brought together through the saying of law. Here we see emerging the 'theologico-political form of sovereignty', the transformation of bare sovereignty into 'the definite figure of a Sovereign'.[29] This is the modern all-powerful sovereign feared or celebrated in much modern political philosophy, the sovereign who decides the exception, goes to war, abandons his subjects and annihilates his enemies. The secularization of sovereignty in modern democracies does nothing to render this figure any less terrible. While the One and Only God is no longer imagined as the source of sovereignty, the place of power does not remain empty – instead the 'people' are 'but one further link in the chain of substitutions of the metaphysical principle of the One'.[30] However, it is the space between the particular and the universal, bare and theological sovereignty, which for Douzinas offers hope, as it renders the 'particular claim to state a universal law . . . always an uncertain claim'.[31] It is because this claim can fail, because the particular and the universal can be seen as two moments which are not necessarily connected, that both violence and critique are possible.[32] Thus Douzinas might agree with Schmitt that 'whether the extreme exception can be banished from the world is not a juristic question',[33] and indeed both Douzinas and Schmitt seem to suggest that the modern constitutional attempt to eliminate the sovereign in this sense is doomed to failure. Yet Douzinas insists that this is not necessarily bad news – the bounded and uncertain claims of sovereignty are to be preferred to a politics of humanity with 'no foundation and no ends'.[34] He leaves us with the possibility of a political theology which gives some hope for the future. While the vision

[27] Costas Douzinas, 'Speaking law: on bare theological and cosmopolitan sovereignty', pp. 35–56 at pp. 43–4.
[28] *Ibid.*, p. 46. [29] *Ibid.*, p. 47. [30] *Ibid.*, p. 48. [31] *Ibid.*, p. 52. [32] *Ibid.*
[33] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab, Cambridge, MA, 1988), p. 7.
[34] Douzinas, 'Speaking law', p. 55.

of sovereignty which emerges in reading this chapter is not the theological sovereignty of the all-powerful, One and Only God, it is still graced by the divine. It resonates with the vision with which Jacques Derrida closes his meditation on the end of sovereignty:

> [W]herever the name of God would allow us to think something else, for example a vulnerable nonsovereignty, one that suffers and is divisible, one that is mortal even, capable of contradicting itself or repenting (a thought that is neither impossible nor without example), it would be a completely different story, perhaps even the story of a god who deconstructs himself.[35]

Ian Duncanson is also concerned to explore how the reiteration of an indivisible, all-powerful sovereign state which so dazzles, comforts, seduces and terrorizes might be resisted. For Duncanson, English legal and political history offers a secret history of sovereignty, one quite different to the Hobbesian conception of a world without Leviathan. In a close reading of the documents of post-Glorious Revolution England, which he admits is an unlikely place to begin to look for a peaceful account of the sovereign, Duncanson finds a version of sovereignty constrained by practices of politeness, education, manners, conversation and scepticism. This version of sovereignty was a hard-won response to the lessons learnt by the bourgeois English both from internal challenges (religious divisions and the threat of the newly politicized labouring poor) and from imperial misadventures (including in Ireland and later America). It was only with the imperial ambitions of the nineteenth century in India that the vision of sovereignty as absolute and omnipotent took hold. Later writers about law in the tradition of Bentham, Austin, Dicey and Hart forget the connection of the grandeur of sovereignty with what constituted its authority – the lesson taught by Locke, Shaftesbury, Hume and Burke. Thus Duncanson follows Benno Teschke in suggesting that we have been captured for too long by the myth of 1648. Duncanson spells out the implications of this rewriting of history for international lawyers currently faced with renewed claims about the priority of a certain vision of sovereignty as a basis for reformulations of international norms relating to use of force, the responsibility to protect and so on. Those jurists who continue to offer us the 'secular version of something like the Stuart constitution' serve 'the performative function, not only in academe, but in the media, politics and public life in general, of reducing the citizen to a subject at risk

[35] Jacques Derrida, *Rogues: Two Essays on Reason* (trans. Pascale-Anne Brault and Michael Naas, Stanford, 2005), p. 157.

of Hart's slaughterhouse'.[36] This suggests a different way to think about the responsibility of those writing about international relations – to the extent we write and behave 'as if' the sovereign were all-powerful, we participate in making it so. International lawyers memorialize a certain set of knowledges and practices, which place the sovereign state at the foreground of the law, and a certain group of actors as principal law-makers. In his lectures published as *Society Must Be Defended*, Michel Foucault explores the 'memorialization function' performed by the work of state historians, 'from the first Roman annalists until the late Middle Ages'.[37] Foucault suggests:

> The annalists' practice of permanently recording history also serves to reinforce power. It too is a sort of ritual of power; it shows that what sovereigns and kings do is never pointless, futile or petty, and never unworthy of being narrated. Everything they do can be, and deserves to be, spoken of and must be remembered in perpetuity, which means that the slightest deed or action of a king can and must be turned into a dazzling action and an exploit. At the same time, each of his decisions is inscribed in a sort of law for his subjects, and an obligation for his successors.[38]

Thus when international lawyers record the deeds, actions or decisions of sovereigns they in turn inscribe a 'sort of law' for subjects, as well as an obligation for those who are successors to the sovereigns of Europe. Duncanson's rewriting of English legal history suggests how international lawyers might approach this process of inscription differently, and shift the ways in which they represent the international.

The idea of changing the practice of inscription is taken up in the chapter by Dan Danielsen. Corporations, and mercantile entities before them, have disturbed and depended upon the categories of international law for centuries. Doctrines such as state responsibility – a regime for the protection and preservation of the private property of foreign investors in the face of upheavals such as decolonization, civil wars, revolutions or regime change – reveal the functional separation of politics and economics, which works to define the functions of a state over which the sovereign has exclusive jurisdiction. The functions of the state as they emerged in Europe were largely political, and the fundamental distinction between 'political possession of territory and economic ownership' meant that much of international law worked to ensure 'that even the *enemy's* property rights

[36] Ian Duncanson, 'Law as conversation', pp. 57–84 at p. 83.
[37] Foucault, *Society Must Be Defended*, p. 66. [38] *Ibid.*, p. 67.

were protected'.[39] Danielsen seeks to challenge the effects of this separation of the political from the economic. He points to the fact that, while international lawyers have long sought to account for the role played by corporations in global governance, international law has tended to treat such actors as subjects for regulation or as an influence on regulation. Yet international lawyers have not treated corporations as producers of law or as 'governance institutions', perhaps out of a desire to preserve the nation-state as uniquely sovereign. Danielsen argues that corporations in fact perform regulatory functions, that corporate governance laws have a quasi-constitutional status, and that international lawyers should begin to treat corporations as agents of law, rather than assuming that international or transnational law always emanates from the state. According to Danielsen, we need to 'map the decisions of corporate actors with the same attention, specificity and rigour that international lawyers and academics have applied to state activity'.[40] This mapping would produce a new kind of law and a new kind of sovereign – the corporation. Danielsen moves towards making corporate decision-makers responsible for their decisions and institutional planning by treating these practices as a source of law and thus potentially making them opposable and generalizable. His proposal that we map these actions, that we treat what these actors do as 'never unworthy of being narrated',[41] gives to their deeds a new weight.

The chapter by Connal Parsley is a reminder of the political stakes of this question of the writing of sovereignty. Parsley explores the performance of sovereignty through the acts of those who speak the law, by attending with great care to the meanings made of one sign across time and space. The sign is a thumbprint appearing on an administrative form, by which Topsy Kundrilba was found by an Australian judge to have consented to the removal of her son (aged seven years) by the Director of Native Affairs in 1956. The form was written in English (a language which Topsy Kundrilba did not speak) and spoke of her 'desire' that her son, 'a part European-blood, his father being a European', be 'educated and trained in accordance with accepted European standards'.[42] The litigation during which this sign was used again to mark the sovereignty of Anglo-Australia was one of an ongoing series of legal actions by which indigenous Australians

[39] Susan Buck-Morss, *Dreamworld and Catastrophe: The Passing of Mass Utopia in East and West* (Cambridge, 2002), p. 15.

[40] Dan Danielsen, 'Corporate power and global order', pp. 85–99 at p. 98.

[41] Foucault, *Society Must Be Defended*, p. 66.

[42] As quoted in Connal Parsley, 'Seasons in the abyss: reading the void in *Cubillo*', pp. 100–127 at p. 104.

have sought recognition of the harms done to the 'stolen generation' of children forcibly removed by the state.[43] Parsley reflects upon the refusal of the judge in this case, O'Loughlin J, to consider the non-documentary evidence suggesting that the thumbprint did not signify the will or consent of Topsy Kundrilba to the removal of her son. He argues that the decision by O'Loughlin J that the thumbprint signified consent, and his privileging of the consequent meaning of the form over oral evidence relating to the conditions surrounding the production of the form, is an emblematic instance of the performance of sovereignty. This performance depends upon the idea of a natural writing capable of conveying a full and perfect meaning, and upon an image of the sovereign subject who writes. The 'I' of the form of consent is its sovereign, or in the words of Shoshana Felman, 'the authority of the performative is nothing other than that of the first person'.[44] Parsley draws on the work of Giorgio Agamben and Jacques Derrida to argue that this invocation of a subject who writes erases the institutional conditions by which the form seeks to interpellate those it addresses. For Parsley, this erasure is emblematic of the logic of sovereignty. In the moment of decision, O'Loughlin J performs as sovereign by inscribing consent as a fact within his judgment, while at the same time refusing to acknowledge his responsibility in writing the facts of law and thus determining the fate of the indigenous claimants.[45] Yet, as Parsley shows, the law cannot ever fully secure its own interpretation. Like the thumbprint of Topsy Kundrilba, the judgment of O'Loughlin J is also 'broken from its context, engendering a new possibility'.[46] The world of speech we inhabit as lawyers or scholars opens out through the practices of reiteration, giving flesh to the words of others, often in community but also in the silence of our solitary reading (in the office, at a café, under the blanket). Our reading, no less than our writing, is bound up with the political theology of modern sovereignty.

[43] According to the *Bringing Them Home* report into this history, which was released in April 1997, 'between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal': see Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra, 1997), p. 37.

[44] Shoshana Felman, *The Scandal of the Speaking Body* (Stanford, 2003), p. 33.

[45] On the inability of law to understand itself as writing, see Nina Philadelphoff-Puren and Peter Rush, 'Fatal (F)laws: Law, Literature and Writing' (2003) 14 *Law and Critique* 191 at 202.

[46] Parsley, 'Seasons in the abyss', p. 101.

Part II: Human rights and other values

International law as a regime that recognizes certain kinds of actors as sovereign produces a world of legitimate violence which is territorially-bounded. International law, through the institutionalization of human rights, also produces the techniques by which the law attempts to mediate that violence. In the words of Rob Walker, '[c]laims about the sovereignty of states . . . replace the angels as a marker of the margins of human existence'.[47] It is the question of what happens at the margins that absorbs international human rights lawyers. International human rights law is the field in which international lawyers and others try to make sense of the ways that modern states grasp human life as a project and a problem. It is also the vehicle through which many lawyers and activists attempt to constrain the power exercised by states over the individuals within their territory or jurisdiction. The understanding of power which informs this legal tradition is largely that which Michel Foucault has described as juridical or sovereign power – power understood as a commodity held by a sovereign and dependent upon control over the earth and its products. Yet human rights law is increasingly resorted to as part of a struggle against the globalization of disciplinary or bio-power, a mechanism of power exercised through bodies and what they do. This is most visible in the engagement of the human rights community with the American treatment of detainees as part of the war on terror, and with the related detention of asylum-seekers in Australia as part of an Australian immigration control policy seeking to deter 'economic refugees'. In other words, lawyers invoke human rights when confronted with the fate of human beings who are abandoned by the law of the sovereign state – included as subjects of law only by being excluded from the community to which the law gives rise. The authors of the chapters in Part II ask whether human rights offer a mode of resistance for the subject – a way of resisting modernity's 'hounding of the subject beyond death, apparently without limit'[48] – or whether instead the invocation of human rights constrains our capacity to think about and counter the ways in which power circulates in this global politics and economy. They show that, in order to understand the place of international human rights law in the modern global political

[47] R. B. J. Walker, 'From International Relations to World Politics' in Joseph A. Camilleri, Anthony P. Jarvis and Albert J. Paolini (eds.), *The State in Transition: Reimagining Political Space* (Boulder, 1995), pp. 21–38 at p. 28.

[48] Joan Copjec, *Imagine There's No Woman: Ethics and Sublimation* (Cambridge, 2002), p. 47.

order, it is necessary to explore and reconfigure the historical relationship between human rights, economics and security.

The chapter by David Kennedy explores what happens when humanitarian values are successfully 'transformed into legal and institutional projects'.[49] Kennedy argues that American humanitarians find it difficult to acknowledge their participation in rulership, despite the fact that human rights as a vocabulary and a tool is now used not only by human rights activists and NGOs, but by militaries, corporations and trade lawyers. For Kennedy, one of the major challenges facing the human rights movement in the years ahead is to learn to be more 'responsible partners in governance' – coming to terms with the power that humanitarians now exercise and taking responsibility for the costs of that power.[50] Being attentive to the costs of human rights work requires focusing on its everyday routines rather than the more spectacular aspects of intervention, and facing squarely the choices that have to be made in the process of ruling or governing. Central to Kennedy's argument is the relationship between responsibility and pragmatic calculation. To be responsible means to 'become more pragmatic' and 'to acknowledge and take responsibility for the costs as well as the benefits of [our] work.'[51] Responsibility also requires accepting the limits to calculation and thus the freedom and power inherent in the moment of decision. According to Kennedy, human rights law offers a false promise that 'it knows what justice means, always and for everyone; all you need to do is adopt, implement and interpret these rights'.[52] Kennedy resists this vision of the decision-maker or ruler as implementer of a programme or the act of decision as merely the application of a law. He focuses instead on the freedom experienced by the decision-maker, as the subject who pre-exists the decision.[53] This is a subject who is 'capable of deciding, in its "thinking and reasoning" way, what s/he wants, and whether or not to conform to the rules laid down before it and for it' (or to know when there are no such rules).[54] For the decision-maker to do justice requires the exercise of human freedom – this in turn requires that he or she find space amongst rules and institutions

[49] David Kennedy, 'Reassessing international humanitarianism: the dark sides', pp. 131–55 at p. 131.

[50] *Ibid.*, p. 132. [51] *Ibid.* [52] *Ibid.*, p. 134.

[53] For an articulation of a different view, that 'it is through the decision that one becomes a subject who decides something' and that 'if there is a decision, it presupposes that the subject of the decision does not yet exist', see Jacques Derrida, 'Remarks on Deconstruction and Pragmatism' in Chantal Mouffe (ed.), *Deconstruction and Pragmatism* (London, 1996), pp. 77–88 at p. 84.

[54] Rachel Bowlby, *Shopping with Freud* (London, 1993), p. 82.

in which to discover 'opportunities for political engagement'.[55] Kennedy's closing paragraph conveys eloquently this vision of the relationship between freedom, responsibility and decision.

> There is freedom here – the freedom of discretion, of deciding in the exception, a human freedom of the will. It is at once pleasurable and terrifying. It entails responsibility to decide for others, causing consequences that elude our knowledge but not our power.[56]

My chapter also engages with the themes of responsibility and decision. While Kennedy calls for more pragmatism and for a clearer sense of the choices involved in the moment of decision, I argue that to decide is not simply to be outside the constraints of a pre-existing code or 'law as answer machine'.[57] Rather, at the moment of decision, the decision-maker is *both* bound by a code and called to respond to the wholly other. In other words, the decision-maker is 'not only fragmented but irretrievably split',[58] not just faced with 'a difficult and unsettling choice' but faced with 'an insoluble and paradoxical contradiction' between the demands of general accountability and absolute responsibility.[59] The chapter develops this idea through an exploration of the sacrificial tradition of thinking about responsibility. It begins with the biblical story of Abraham, of whom God demands that he offer his son Isaac as a sacrifice, and traces the meanings of this story for Christianity and for international politics.[60] Sacrificial responsibility involves a singular relationship with the absolute other. In the Christian tradition, this other is named God, but in the tradition of international economic law with which this chapter is concerned, we might name this other 'the Market'. Responsibility in this tradition describes the split relationship of an individual to the public world of universal principles, and to the unknown other to whose demands the individual must respond in secret. The madness of decision lies in this split between the need to hold universal principles, and the call to betray those principles in response to the sacrificial demand of

[55] Kennedy, 'Reassessing international humanitarianism', p. 151.
[56] *Ibid.*, p. 155.
[57] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004), p. 318.
[58] Jenny Edkins and Véronique Pin-Fat, 'The Subject of the Political' in Jenny Edkins, Nalini Persram and Véronique Pin-Fat, *Sovereignty and Subjectivity* (Boulder, 1999), pp. 1–18 at p. 1.
[59] Jacques Derrida, *The Gift of Death* (trans. David Wills, Chicago, 1995), p. 61.
[60] While a version of this story appears in the religions of Judaism, Islam and Christianity, I trace the Christian form of the story, with its strongly economic logic.

the absolute other. Responsibility in this sense involves a relationship to the other to whom we respond (or submit), to whom we are responsible. This 'form of involvement with the other . . . is a venture into absolute risk, beyond knowledge and certainty'.[61] This answer or responsibility is not something that can easily be generalized or universalized. When we respond to the other, we must betray all the other others while *at the same time* reaffirming the code which binds us to them. In making the decision to answer the call of the absolute other, we can only ever be responsible to the one who makes the demand. This chapter traces the ways in which WTO agreements structure this responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers.[62] It is the global market to whom the decision-maker must be responsible in this sense. This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.[63] WTO agreements require that the decision-maker imagine himself or herself in the position of Abraham, called to abandon public obligations (the familial tie to his son and wife for Abraham, the civic obligations to citizens and to values of transparency in the case of the decision-maker) to meet these demands of the market in the expectation of a reward in the future. This chapter asks: can such decision-makers be responsible (rather than simply 'accountable') to those they sacrifice in such an economy? Does the appeal to human rights or democratic governance offer a means of countering the demands of the market? Can the law repay the debts owed to those figures whose sacrifices remain outside the economy of risk and reward that these texts establish?

In her chapter, Judith Grbich takes up the concepts of sacrifice, abandonment and the fetish to pursue 'the processes of messianic economies which circulate as globalization and international finance law'.[64] Her writing opens up new possibilities and avenues for research into the relationship between human rights and trade, or blood and debt. This chapter is

[61] Derrida, *Gift of Death*, pp. 5–6.

[62] In thinking about international economic law as political theology, I am influenced by Jennifer Beard, 'Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology' (2003) 18 *Australian Feminist Law Journal* 27, and Judith E. Grbich, 'Aesthetics in Christian Juridico-Theological Tracts: The Wanderings of Faith and Nomos' (2000) 12 *International Journal for the Semiotics of Law* 351.

[63] On the reward of the righteous, see Matthew 10:34–40 (Revised Standard Version).

[64] Judith Grbich, 'Secrets of the fetish in international law's messianism', pp. 197–220 at p. 206.

part of a body of work in which Grbich explores the 'theological archive and the political economy archive' of European modernity.[65] Here, she builds on that work to develop a powerful enquiry into the futures of international law. Grbich argues that international lawyers are increasingly called upon to legitimize the excess of power.[66] It is in response to this impossible demand that some within the discipline have engaged with the messianic logic of international law, in an attempt to preserve 'some hope for a future'. Grbich uses this work as a starting point to begin to trace the intimate relationship between Christian forms of messianic thought and international law. In particular, Grbich attends to the poetics of international finance law, a key site for understanding the ways in which the image of other people's suffering has become linked in Western culture to 'the calculation of nation and value'. She suggests that, while she finds the work of Giorgio Agamben problematic, the intense sense of familiarity or uncanniness with which many readers respond to his theorization of abandonment comes in part from its relation to financial practices. The 'monied things of international finance law' are imagined as having authority to hold and measure financial entities, while the 'bare life' of the human being is banned from this domain, and 'abandoned to life at risk of death'.[67] Grbich draws on the linkage of the themes of abandoned being and of the 'secrets of the fetish' in the work of Jean-Luc Nancy,[68] to suggest ways in which we might understand the relationship between sovereignty, global monetary economics and bare life. Her engagement with the genealogies of fetish writings of Europeans in the sixteenth to nineteenth centuries builds on the work of William Pietz, who has attended to the material practices and economic logics which produced the European discourse on fetishism later taken up famously by Karl Marx and Sigmund Freud. According to Pietz, much European writing on fetishism forgets the 'economic explanation of fetishism found in the travel accounts that provided the factual evidence for Enlightenment

[65] Judith Grbich, 'The Problem of the Fetish in Law, History and Postcolonial Theory' (2003) 7 *Law Text Culture* 43 at 61. See also Judith Grbich, 'Tracing the Figure of the Native in Postcolonial Theory and Native Title Law: Enlightenment, Aesthetics and Charles Harpur' (2005) 22 *Australian Feminist Law Journal* 127 at 144, exploring the effects of the 'freezing of the symbolics of property and propriety in European aesthetic productions over the whole of the eighteenth and nineteenth centuries. The nineteenth century theorizing of law as separate from morals is almost the end of this cultural process, rather than its beginning.'

[66] Grbich, 'Secrets of the fetish', p. 197.

[67] *Ibid.*, pp. 198, 218.

[68] Jean-Luc Nancy, 'The Two Secrets of the Fetish' (trans. Thomas C. Platt) (2001) 3 *Diacritics* 3.

theories of primitive religion'.[69] These travel accounts were part of a colonial practice of engagement between European traders and West African societies. One of the most authoritative texts on African fetishism for European intellectuals was written by a Dutch West Indies Company official and trader, Willem Bosman.[70] Bosman was '[v]ery much the intellectual offspring of Grotius' and a believer in 'the universality not of any religion but of the "Law of Nations"'.[71] Grbich reads Bosman's text, and the eighteenth-century Dutch travel genre more generally, as generating moral fables, through which metropolitan readers were able to resolve the discomfort experienced as a result of the shifting credit forms and money practices then emerging in the Dutch republic. The anxieties generated by these practices, and the uncertainties produced by the colonial encounters with peoples who valued material objects in different ways, were soothed through the generation of travel accounts which disavowed the spiritual practices of those characterized as outsiders and explained Dutch credit practices in the language of Christian atonement and sacrifice. For Grbich, these 'secrets of the fetish' are guarded by international financial law and international humanitarianism. She draws on the recent work of Nancy, Agamben and Taubes on fetishism, messianism and abandonment to suggest possible directions for critical theorists seeking to find within the messianic tradition of international law the resources to begin again.

The chapter by Florian Hoffmann offers a response to the critics of human rights. It is addressed to the human rights activist, a figure who is uncertain as to the ground from which action is possible. This figure stands in the midst of critique. On the one hand are the critics who say that the human rights movement is part of the problem, and when the activist looks at the occupation of Iraq or the intervention in Kosovo or the good governance agenda of the World Bank, he or she thinks, well, maybe the critics are right. On the other hand, the centrality of human rights is under attack as security becomes the new universal in international law, through which the subjects of international law must speak in order to articulate their needs, desires and interests, and as human rights are increasingly curtailed in the name of counter-terrorism. After the post-Wittgensteinian and poststructuralist challenges to the plausibility of universal rationality, the activist has no firm foundations on which to base the certainty that

[69] William Pietz, 'The Fetish of Civilization: Sacrificial Blood and Monetary Debt' in Peter Pels and Oscar Salemink (eds.), *Colonial Subjects: Essays on the Practical History of Anthropology* (Ann Arbor, 1999), pp. 53–81 at p. 60.

[70] *Ibid.* [71] *Ibid.*

human rights provides a justification for action. To all of this, Hoffmann replies – human rights can and should motivate action on behalf of such a person. Yet the activist cannot simply rely upon the accounts produced by human rights institutions and professionals, according to which human rights are legally valid, universal and indivisible. Nor can the activist seek to avoid the critical challenge to notions of universal rationality and the commensurability of language and culture. Hoffmann suggests that the pragmatism of Richard Rorty provides part of the answer. For Rorty, conversations about rights do not depend upon transcendent notions of truth, rationality and understanding. Rorty's famous liberal ironist is capable of at once using the language of rights as a tool or instrument while knowing that this language of rights, like all language, is contingent. The liberal ironist knows that his or her vocabulary of rights is fragile and always subject to redescription, yet reasons that, at this point in history, the best way to respond to this fragility and contingency is to support the liberal project of separating the public world of justice from the private world of self-creation, the right from the good, and, in the process, the liberal 'we' from a differentiated 'they'. It is on this latter point that Hoffmann departs from Rorty, suggesting that Rorty oversimplifies both the 'we' and the 'they', the self and the other. As a result, Rortyan pragmatism could only ground 'proactive, cross-cultural human rights activism' if it were based upon 'at least discursive, if not political or military hegemony'.[72] Hoffmann views the formalism of Martti Koskenniemi as offering another way through. Koskenniemi's invocation of a culture of formalism which allows for an empty universality suggests to Hoffmann that it is possible 'to take a position and argue proactively for it – within the formalist framework – while avoiding substantive fixation'.[73] Yet formalism can only offer a 'simulacrum for universality' by treating the 'particular language game of which it is made up' as a 'placeholder for an unattainable unity'.[74] For Hoffmann, then, it is possible to be active in the name of human rights only by recognizing that there is no objective foundation for action. This theory of human rights action accepts 'the multiple validities of human rights, and the singular validity of their promotion'.[75] Hoffmann thus leaves us to consider the conditions of possibility of the 'singular validity' of human rights promotion, and the related questions of the arrival of rights and the nature of the practices by which the facts about rights

[72] Florian F. Hoffmann, 'Human rights, the self and the other: reflections on a pragmatic theory of human rights', pp. 221–44 at p. 241.
[73] *Ibid.*, p. 243. [74] *Ibid.* [75] *Ibid.*, p. 226.

are 'found' or written.[76] In light of this, critical theorists might in future attend closely to the genealogy of these material practices which are the stuff of the human rights activist.

Part III: The relation to the other

The essays in Part III explore the impossible demands made of those addressed by international law in its civilizing mode, and the intimate quality of the encounter mediated by international law with those *figured* as other. In doing so, these chapters problematize the easy distinction between public and private championed by the liberal ironist discussed above. They show that international law is bound up with the creation of the modern subject, suggesting the undecidability of the public/private distinction.[77] Where '[t]o be at home . . . is to have an identity, one based on security and permanence that state-produced anxiety and the state-produced compensation for that anxiety have gone a long way in helping create',[78] these chapters make us wonder just who is at home in the world produced by civilizing missions and wars on terror. In addition, these chapters interrogate the stakes of the claim that law or critique respond to, or decide in the name of, the other. As Derrida writes:

> To take a decision in the name of the other in no way at all lightens my responsibility, on the contrary . . . my responsibility is *accused* by the fact that it is the other in the name of which I decide.[79]

For Liliana Obregón, like Connal Parsley, 'there *is* no identity, there is only identification or self-identification *as a process*'.[80] For Obregón, the identity in question is that of the 'community of civilized nations'. In the Latin America of the nineteenth century, becoming civilized, or completing civilization, was an ongoing process of identification with which international law was inextricably tied up. The destination of this becoming of the Creole élites of Latin America was a 'civilization' which was differentiated from 'Europe', yet still one of its proper heirs. Obregón evokes the longing of these élites to be recognized by their European counterparts, and the ways in which the *letrados* or men of letters who

[76] On the arrival of rights, see further Anne Orford, 'Human Rights After Faith' (2006) 7 *Melbourne Journal of International Law* 1.

[77] Derrida, 'Remarks on Deconstruction and Pragmatism', p. 79.

[78] Kristin Ross, *Fast Cars, Clean Bodies: Decolonization and the Reordering of French Culture* (Cambridge, MA, 1996), p. 107.

[79] Derrida, 'Remarks on Deconstruction and Pragmatism', p. 85.

[80] Jacques Derrida, 'Following Theory' in Michael Payne and John Schad (eds.), *life.after.theory* (London, 2003), pp. 1–51 at p. 25 (emphasis in original).

headed up the newly independent nations sought to complete civilization in part through participating in and producing international law. The post-independence Creoles sought to identify themselves both as autonomous from Europe, but 'at the same time they believed themselves to be righteous inheritors of a European legal, cultural and intellectual legacy'.[81] Obregón traces the 'will to civilization' expressed in the writing of publicists such as the Argentinian Carlos Calvo, the Peruvian Manuel Atanasio Fuentes and the Colombian José Maria Samper. These men struggled in quite different ways 'to participate and be identified as part of the civilized world'[82] through an engagement with international law. Her account suggests the ways in which Europe and North America worked as an imagined addressee of many of their writings, and the complicated and at times ambivalent ways in which Creole élites imagined their relations with their European counterparts. For Fuentes and Samper, European and US interventions in Latin America were to be rejected, while the models that Europe and the US offered for appropriating indigenous lands and remedying the nation's needs through laws and force were to be adopted. For Calvo, international law was not 'a foreign and distant model imposed by Europe, but rather . . . part of a legal heritage which connected them to Roman law, the backbone of the *jus gentium,* and thus to one of the factors that Europeans acknowledged as the origins of "civilization"'.[83] Her chapter offers a nuanced account of the ways in which fantasies of identity organized around civilization and barbarism accompanied the arrival of international law in Latin America.

Frédéric Mégret takes up the themes of civilization, barbarity and international law to explore a different set of nineteenth-century fantasies. Mégret suggests that many contemporary international humanitarian lawyers would argue that there is no outside to the laws of war, and that everyone is brought 'within its protective, hyper-inclusive mantle'.[84] This then generates a particular reading of situations where someone is excluded from the protection of international humanitarian law, such as the infamous treatment of prisoners at Guantánamo Bay denied prisoner of war status by their US captors. While some US lawyers have argued that these detainees are properly outside the protection of international humanitarian law, this has been responded to with outraged virtue by the

[81] Liliana Obregón, 'Completing civilization: Creole consciousness and international law in nineteenth-century Latin America', pp. 247–64 at p. 254.
[82] *Ibid.*, p. 257. [83] *Ibid.*, p. 263.
[84] Frédéric Mégret, 'From "savages" to "unlawful combatants": a postcolonial look at international humanitarian law's "other"', pp. 265–317 at p. 265.

rest of the international humanitarian law community. However, Mégret argues that the history of this area of law is grounded upon exclusion – the figure of an 'other' outside the law 'haunts the very beginnings and evolution of the laws of war'.[85] In a detailed survey of the genesis of the modern laws of war through to the contemporary era of the war on terror, Mégret traces the exclusion of non-Western peoples from the benefits and obligations the law was meant to offer. For Mégret, it should not be forgotten that the European attempt to 'grapple with the problem of violence in war' through codifying the laws of war to govern the disciplined troops of the nations of Europe took place at the same time that Europe was 'unleashing unprecedented violence outside its borders' in the scramble for Africa.[86] Early international humanitarian lawyers were colonialists who often defended the theoretical or practical exclusion of 'non-civilized' peoples from the laws of war. Mégret challenges the conventional narrative according to which international humanitarian law is making progress towards universal inclusion within the law's reach. The tradition of international humanitarian law remains 'necessarily both inclusive and exclusive', in that the attempt to define the categories of those who are protected 'is necessarily exclusive of something if it is to be inclusive of anything'.[87] Thus, according to Mégret, the US lawyers seeking to justify the exclusion of al Qaeda members from the protection of international humanitarian law are true to the letter (if not the spirit) of that tradition. Mégret suggests that we should read international humanitarian law not only as a practice that constrains and protects (though it plays an important role in doing so), but also as a practice that regulates, normalizes, disciplines and projects power. Through the project of regulating modern warfare, international law has legitimized a particular vision of what it is to be a combatant, what it is to be at war, and thus what it is to be a sovereign state. The laws of war project a fantasy about what it is to be a subject at war, and by forcing non-Western peoples to engage with that fantasy, work as 'instruments of forced socialization of non-Western nations into the international community'.[88]

The chapter by Dianne Otto also explores the ways in which the other has been represented in international law. Her chapter registers an aspect of the institutional moment in which international lawyers and feminist scholars might understand ourselves. This is a moment in which feminists

[85] *Ibid.*, p. 267. [86] *Ibid.*, p. 270.
[87] *Ibid.*, p. 304 (emphasis omitted). [88] *Ibid.*, p. 308.

are having an effect on the theorizing and practices of international law and international relations. Feminism, or at least a version of it, is institutionalized as part of the academic and bureaucratic life of international law in the twenty-first century. Yet, as Otto's chapter shows, this emergence of feminists as disciplinary players and policy-makers also produces anxiety and melancholy for feminists. Otto asks what it means to incorporate women into international law, if in so doing the subversive potential or erotic charge of differentiation that founded the desire to encounter the other is thus erased or domesticated? What happens when a feminist theory which sought persistently to put into question notions of sovereignty, authority, mastery and control now seems poised to transmit a new tradition for which it is (or may be) the sovereign authority? Did feminists mean to capture 'woman' and 'gender' as secure identities in suggestions for law reform? Otto focuses on the designation of woman as other in the texts of international human rights law, and traces the inscription of women within these texts from the earliest instruments of the League of Nations, shaped by the imperatives of colonialism and the priorities of domesticity and motherhood, through to the present era of instrumentalization of women's rights as special or universal human rights. She explores the ways in which feminist strategies have been employed over that time in attempts to realize the promise of human rights. Otto shows that in representing women, and later gender, international law has continued to exclude that which is outside its system of representation. Woman as other is only ever represented by assimilating her to existing economies and languages – as wife and mother in need of protection, as the woman who is 'formally equal' to man in public life, and as the victim subject in need of rescuing. These characters are haunting – they display 'an uncanny ability to survive, despite the best efforts of feminist legal strategists'.[89] Otto attempts to resist the reinscription of these gendered roles and the consequent domestication of feminism, yet with a sense of uncertainty about whether this is possible. How to recover that which is lost when Woman is secured in discourse? In the closing sections of the chapter, Otto slips the bonds of law, in a celebratory passage which recaptures the energy of a movement driven by eros, the desire to encounter the other. In those closing pages, identities multiply, new worlds are imagined in which 'the full range of sex/gender possibilities would be opened to all human beings as never before and the dualistic models of gender equality would

[89] Dianne Otto, 'Lost in translation: rescripting the sexed subjects of international human rights law', pp. 318–56 at p. 321.

be superseded'.[90] Yet law and institutions step back in – as Otto says, 'I am jumping too far ahead'. To reject gender at this point is to lose 'the conceptual tools that are necessary to make legal sense of the "gendered human rights facts" of the present'.[91] In the present tense of the law, the project of feminist disruption of the categories of human rights law 'has barely begun'.[92]

The naming of the mutilated woman as other in the texts of law is the subject of the chapter by Juliet Rogers. Rogers explores how and where we find the word of international law incarnated, and whose flesh sustains the fantasies of Western sovereignty. Rogers focuses on the unprecedented enthusiasm with which legislation prohibiting practices described as 'female genital mutilation' has been passed during the past two decades 'in countries we might now call the coalition of the "willing"'.[93] For Rogers, this laying down of law is an attempt to ally the anxiety that the Western subject feels when confronted with the presence of practices 'in dialogue with another Other'.[94] Such practices appear to point beyond the sovereign authority of the positive law which recognizes the subject as subject – they suggest 'the presence of another's law' within the Western state. 'Female genital mutilation suggests a limit to the sovereignty of the subject and thus calls into question his capacity for Being before the law and for articulating the symbolic as "truth"'.[95] If, as the chapter by Douzinas suggests, the initial secularization of power in Western democracies 'does not guarantee openness' and that instead 'the people' has come to signify 'one further link in the chain of substitutions of the metaphysical principle of the One',[96] then female genital mutilation threatens to break this chain. Female genital mutilation brings the other too close – it is a reminder of that which cannot be enclosed, of that which escapes positive law. The internationalization of female genital mutilation legislation – which Rogers refers to as an 'international franchise' – serves to reassure the Western subject of his relationship to a 'universal, all-encompassing Other'. In the words of the Permanent Court of International Justice, '[l]egislation is one of the most obvious forms of the exercise of sovereign power'.[97] The making of female genital mutilation is the kind of 'frenetic legislative activity' which 'attests to the desire for a Father or law-maker'.[98]

[90] *Ibid.*, p. 355. [91] *Ibid.* [92] *Ibid.*
[93] Juliet Rogers, 'Flesh made law: the economics of female genital mutilation legislation', pp. 357–86 at p. 357.
[94] *Ibid.*, p. 361. [95] *Ibid.* [96] Douzinas, 'Speaking law', p. 48.
[97] *Eastern Greenland Case* (1933) PCIJ Rep (Ser. A/B) No. 53 at 30.
[98] Costas Douzinas, *The End of Human Rights* (Oxford, 2000), p. 329.

The 'mutilated woman' who appears through this law-making is 'a collection of symptoms of the Western individual', and enables the reproduction 'in fantasy, of an ideal subjectivity of the "non-mutilated" subject'.[99] Yet this reconstituted sovereign authority will continue to be haunted by that which it pushes away to secure a self and a community – the reminder of 'another economy and a relationship with another Other'.[100]

Part IV: History's other actors

> We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.[101]

> This is the theatre where today's 'native informants' collectively attempt to make their own history as they act (in the most robust sense of agency) a part they have not chosen, in a script that has as its task to keep them silent and invisible.[102]

The chapters in Part IV speak to the questions of agency, responsibility and history invoked by the quotes above. The chapters engage with the anxious sense of simultaneous importance and irrelevance experienced on the part of international lawyers in the context of the unfolding war on terror, and the impossibility of determining where law's speech exists in relation to the border separating action from inaction.

In his chapter, Antony Anghie refers to the first of the quotes above, the now infamous statement made by one of the advisers to US President George W. Bush claiming that the US are 'history's actors'. In this vision, history's actors are its victors. To *act* is to dominate and conquer (or, at least, to liberate). Those who criticize such actions are purely reactive, left to study the realities brought into being by the creators of history. Yet what lies between 'reality' and the student or judge of that reality? What is it that 'all of you' will be left to study? This dismissive statement makes it seem that history is not written, but rather that it is simply a record of what was done (and perhaps said). The writer of history is not a writer. In contrast, Anghie argues that it is precisely this question of what it means

[99] Rogers, 'Flesh made law', p. 358. [100] *Ibid.*, p. 386.

[101] Unnamed senior adviser to US President Bush, as quoted in Ron Suskind, 'Without a Doubt', *New York Times Magazine*, 17 October 2004, p. 51.

[102] Spivak, *Critique of Postcolonial Reason*, p. 85.

to write critically that is shifting in the 'new reality' of the world post-11 September 2001. In a beautiful closing passage, Anghie invokes the affective power of the word in ways that offer a different understanding of the capacity of language to move us.

For Hilary Charlesworth and David Kennedy, these chapters raise the question of what difference international law makes, and how it makes difference. How does international law differentiate between itself and its others? What do we mean by international law when we ask that question? Where do we look to find the others of a law that imagines itself as universal? And how does international law participate in making difference(s), making a difference to the politics of our time? Rather than imagine ourselves as 'wise and sometimes heroic counsellors speaking truth/law to power', Charlesworth and Kennedy urge international lawyers and scholars to understand ourselves as 'active participants in intensely political and negotiable contexts' and to 'confront [the] responsibility' that this involves 'without sheltering behind the illusion of an impartial, objective, legal order'.[103] They focus on the invasion of Iraq as the event or the scandal that has put these questions of responsibility and relevance at the forefront of public debate in many parts of the world yet again. For Charlesworth and Kennedy, if the demand that international law reinvent itself and reassert its relevance is always posed in terms of its ability to perform as either a formal constraint on, or an instrument of, power, law will always be found wanting. Yet to analyse international law in these black and white, with us or against us terms paints a picture of international law that is limited and misleading. Instead, they suggest we should ask what difference did it make that the invasion of Iraq was widely criticized as a violation of international law? Why was there so little consideration of international law as productive – of how international law might have contributed to the production of Iraq as a country that was ripe for invasion? How we understand the difference that is made by internationalizing Iraq (and to a much lesser extent the US) remains an open question. It is at this point that the histories and the legacies of international law that are explored in these chapters offer rich lines of inquiry.

The world of international diplomacy and institutions has long been haunted by its inability to halt the march of events to their fated conclusion. The description by John Maynard Keynes of his experience as a

[103] Hilary Charlesworth and David Kennedy, 'Afterword: and forward – there remains so much we do not know', pp. 401–8 at pp. 407–8.

negotiator of the Treaty of Peace concluding World War 1 suggests that these anxieties are in fact nothing new:

> The proceedings of Paris all had this air of extraordinary importance and unimportance at the same time. The decisions seemed charged with consequences to the future of human society; yet the air whispered that the word was not flesh, that it was futile, insignificant, of no effect, dissociated from events; and one felt most strongly the impression . . . of events marching on to their fated conclusion uninfluenced and unaffected by the cerebrations of Statesmen in Council.[104]

International legal scholars fear a double displacement – if the 'cerebrations of Statesmen in Council' and their international legal advisers are no match for fate, the writings of critical scholars about these cerebrations seem even less so. Yet paradoxically it is the death and suffering which internationalism seems unable to prevent which also gives to international law the air of importance at the same time as suggesting its irrelevance. As Keynes reveals, central to this has been the scene of writing and its relationship to fate and death – 'the air whispered that the word was not flesh'. Maybe it should come as no surprise that the events of World War 1 and their challenge to the self-image of European civilization should also have been experienced by Keynes as a challenge to the Christian philosophy of reading – 'the idea of the Book that comes to life, of the letter that delivers its spirit by the action of a body'.[105] In the aftermath of this war, was it still possible to imagine the world in terms of 'a sort of human theatre where speech [*parole*] becomes action, takes possession of souls, leads bodies and gives rhythm to their walk'?[106] The contemporary anxiety about the capacity to understand international law in terms of its relationship to action might be read as one form of working through the 'accumulation of death' which marked the inter-war period of which Keynes writes, and which haunts this time of terror.[107] At stake in the disciplinary preoccupation with the relevance of the speech of international law to a world of war, blood, debt and suffering is this relationship between word and flesh. Should we understand the relationship between word and action only in terms of 'the letter that delivers its spirit by the

[104] John Maynard Keynes, 'The Economic Consequences of the Peace' in *The End of Laissez-Faire/The Economic Consequences of the Peace* (Amherst, 2004), pp. 47–298 at p. 56.

[105] Jacques Rancière, *The Flesh of Words, The Politics of Writing* (trans. Charlotte Mandell, Stanford, 2004), p. 72.

[106] *Ibid.*, p. 4.

[107] On the 'accumulation of death' in the inter-war period, see Rose, *On Not Being Able to Sleep*, p. 88.

action of a body'?[108] Should we measure the effectiveness of international law through its ability to move the powerful to action or constrain and regulate their behaviour? Is there any other way to think about 'the theatre of relationships between the text and what's outside, between writing and the politics it establishes'?[109] In the second of the quotes above, Gayatri Spivak offers a more chastened view of this 'theatre of relationships'. She reminds her readers of what it is to be an agent of history for many within a global system organized in the ways these chapters describe. She reminds us that history's actors may not have chosen their parts, and yet have to play them even as they attempt to make their own history.

Or should we understand legal scholars and their ilk to be the true actors of history, the masters of the word who, like Foucault's annalists, memorialize the characters of king and presidents and shape the worlds of their readers? In response to the imperialist as shaper of reality, it is tempting to posit the writer as master of the text of history. Yet, while the chapters gathered here argue that to write is to bear responsibility, this is not to say that we control the destiny of the texts which we author. This sense of the uncertain character of the address of law emerged from the closing session of the conference at which these papers were presented. This session saw a discussion of the striking proliferation of open letters to heads of state which marked the practice of international lawyers seeking to register public dissent about the invasion of Iraq. One such open letter to the British Prime Minister Tony Blair, published in the *Guardian* newspaper, later formed the basis of a reflective piece on critical practice and international law published in the aftermath of the invasion.[110] Those invited to sign this letter were affiliated with 'three elite universities – Cambridge, London, and Oxford'.[111] In the closing session of the conference, a lively debate ensued around this practice of letter-writing. Those scholars who positioned themselves as outsiders to the discipline of international law expressed their incredulity at the thought of writing letters to prime ministers or heads of state, and explained that they had a more tenuous relationship to power. Other critical international lawyers described their feeling of depression when these letters began to appear and circulate. They saw it as a major setback for the critical international legal project that the invasion of Iraq was popularly discussed as illegal (as if somehow law were not involved in producing 'Iraq the problem').

[108] Rancière, *Flesh of Words*, p. 72. [109] *Ibid.*, p. 129.

[110] Matthew Craven, Susan Marks, Gerry Simpson and Ralph Wilde, 'We Are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363.

[111] *Ibid.*, p. 370.

As the discussion evolved, the question of the addressees of such letters became more complicated. Indeed, one *reply* to the English letter came from a scholar at 'a "new" (former polytechnic) university in London', who wrote to its authors asking why those 'from a broader range of institutions were not asked to sign'.[112] To whom are our acts as speaking subjects of law addressed? How can we be sure?

It is this image of the open letter, and the complicated question of its addressees, with which I will conclude. Perhaps we might think of the writing of international law as an open letter, or a postcard, which sets off 'to travel the world without a father to guarantee the discourse, and will turn right and turn left without knowing to whom it should and should not speak'.[113] In *The Post Card*, Derrida explores this 'impossibility that a unique addressee ever be identified, or a destination either'.[114] It is this that makes speech 'the true realm of eroticism' (rather than a means of access to that realm). Although there is no destination and no addressee, we keep trying 'to touch each other with words'.[115] Law's speech and the words of the critic are on their way to an encounter that lies ahead. Their promise lies in the impossibility of knowing to whom they will speak upon their travels.

[112] *Ibid.* [113] Rancière, *Flesh of Words*, p. 92.
[114] Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (trans. Alan Bass, Chicago, 1987), p. 81.
[115] *Ibid.*, p. 56.

PART I

Sovereignty otherwise

2

Speaking law: on bare theological and cosmopolitan sovereignty

COSTAS DOUZINAS*

Over the last few years, sovereignty has become a dirty word and an endangered concept. The conventional image of sovereignty as absolute, illimitable and indivisible has come under concerted attack on many fronts. In theory, we find it in the debates about humanitarian intervention and cosmopolitanism, the European constitution and federalism, human rights and judicial universal jurisdiction. We see it in the great premium placed on ethics and morality, in the emphasis on the effects of evil and affect of trauma, and in the normative turn in international law and relations. The dominant realist model is being gradually replaced by the so-called constructivists who place rules, morals and principles at the centre of international relations and politics. International lawyers have recently discovered the neo-Kantian programmes of Rawls and Dworkin, and their social democratic version in Habermas, at a point when their domestic proponents have started noticing the slightly unrealistic claims of these grand system-builders.

Globalization and localization have been eating away equally inexorably at the sovereign structure. Human rights, free market and good governance clauses are routinely imposed as preconditions for aid and trade agreements. Economic sanctions are used to protect citizens from their brutal governments. Finally, violence and war have been put in the service of humanity, human rights and the humanitarian agenda of the new world order. Our postmodern just wars have linked violence and occupation with demands for justice and morality. The apparent conflict between sovereignty and rights is being resolved in favour of morality, and humanity seems to be replacing sovereignty.

* This chapter benefited greatly from comments and criticisms made during the 'International Law and its Others' workshop. Thanks also to Megan Donaldson for editorial assistance. Stewart Motha has followed a parallel route and has been a great interlocutor in the sovereignty debate. This essay is dedicated to Shaun McVeigh.

But this negative picture of sovereignty has not gone unchallenged. In an extremely interesting recent book William Rasch offers a spirited defence of sovereignty and shows how many of its detractors have misunderstood its function.[1] Jacques Derrida addressed repeatedly the problems of sovereignty in the last years of his life. He emphasized how sovereignty is founded on theological ideas both in absolutist and democratic regimes. 'We did not have to wait for Schmitt', he states, 'to know that this politico-juridical concept [of sovereignty], like all the others, secularizes a theological heritage.'[2] Undoubtedly, this theological foundation is intimately connected with sovereignty's claims to absolute and indivisible power, its ability to suspend the law and introduce a state of exception, finally its link with war. For Derrida, sovereignty must be questioned philosophically and practically and the latter is happening

> in the name of the universality of human rights, or at least of their perfectibility . . . the indivisible sovereignty of the nation-state is being more and more called into question, along with the immunity of sovereigns, be they heads of state or military leaders, and even the institution of the death penalty, the last defining attribute of state sovereignty.[3]

But, at the same time, Derrida seems reluctant to join the ranks of the rabid cosmopolitans, who demand the immediate and comprehensive abandonment of sovereignty. The classical principles of freedom and self-determination are part of the tradition of sovereignty, he believes, and an all-out attack on sovereignty would jeopardize these great achievements of the Enlightenment. Human rights emerged and acquired purchase and protective power within the nation-state. Rights were paradoxically both the creation of the Sovereign and a main defensive weapon against its cannibalistic power. There is no easy way out of the recognition that there would be no rights and protections for citizens without the sovereign power and those state institutions, which are, at the same time, their greatest foe and antagonist. Derrida goes further:

> Nation-state sovereignty can even itself, in certain conditions, become an indispensable bulwark against certain international powers, certain ideological, religious, or capitalist, indeed linguistic, hegemonies that, under

[1] William Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political* (London, 2004).

[2] Jacques Derrida, *Rogues: Two Essays on Reason* (trans. Pascale-Anne Brault and Michael Naas, Stanford, 2005), p. 154.

[3] *Ibid.*, pp. 157–8.

> the cover of liberalism or universalism, would still represent, in a world that would be little more than a marketplace, a rationalization in the service of particular interests.[4]

The humanitarian interventions of the cosmopolitans address only a limited agenda of interest to the great powers. They totally neglect, indeed actively promote, forms of globalization that commit grave and irreversible violence against the excluded of the South and the poor and unrepresented of the North.

It would be interesting to speculate about Derrida's great interest in sovereignty.[5] Against the triumphalism of the liberals and the knee-jerk reaction of cosmopolitans, Derrida has consistently emphasized the aporetic nature of sovereignty. He reminds us of its auto-immune ability; the proximity of its absoluteness with the unconditionality of the ethical act at its purest;[6] finally, of the similarity between the indivisibility of sovereignty and that of the individual. Both the victim of sovereignty and the beneficiary of human rights, the modern individual was born as a mirror image of the Sovereign.[7] Derrida's negotiation of the aporia, in his calls for 'a democracy to come' or a New International, takes a well-known deconstructive form. We must both analyse and deconstruct the 'geopolitical axioms and the assumptions of international law, and everything that rules its interpretation, back to its European, Abrahamic, and predominantly Christian, indeed Roman, filiation (with the effects of hegemony . . . that this inherently involves)' and at the same time, never give up the 'universal, universalizing exigency . . . that tends irresistibly to uproot, to de-territorialize, to dehistoricize this filiation, to contest its limits and the effects of its hegemony (all the way to the theological-political concept of sovereignty[])'.[8]

But is this enough? What are the philosophical and practical reasons which have made sovereignty a prime example of the paradox? Are we

[4] *Ibid.*, p. 158.

[5] One of Derrida's last and still unpublished seminars was entitled 'The Beast and the Sovereign', and discussed at length Robinson Crusoe. It is summarized at http://www.hnet.uci.edu/cte/courses/Descriptns/HUM270s/S03Derrida.html (accessed 1 November 2005).

[6] Jacques Derrida, 'The University without Condition' in *Without Alibi* (ed. and trans. Peggy Kamuf, Stanford, 2002), pp. 202–37.

[7] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000), chapters 7 and 8.

[8] Jacques Derrida, 'Globalization, Peace, and Cosmopolitanism' in *Negotiations: Interventions and Interviews, 1971–2001* (ed. and trans. Elizabeth Rottenberg, Stanford, 2002), pp. 371–86 at p. 375.

not leaving too much both to the practical challengers of sovereignty and its philosophical detractors, if we do not examine this 'exigency' which is at the same time universal and singular? If the Schmittian analysis of sovereignty is coming to an end in the new cosmopolitan dispensation of Kosovo and Iraq, we need to go back, before its beginning, in an exploration of the metaphysics of sovereignty that will help us to understand its contemporary predicament.

Bare sovereignty

The tentative hypothesis of this essay is that the recent retreat does not mean that sovereignty has lost its power but rather its ability to make sense, according to the protocols of modern metaphysics. Carl Schmitt argued that the metaphysical image a society and epoch constructs for the world has the same structure as its political organization. The political organization that expressed modern metaphysics was symbolized by the centrality of sovereignty. Its alleged withdrawal, its loss of sense is closely related to the image our epoch is constructing for the world. If metaphysics is the clearest expression of an epoch's (self) understanding, our age is virulently post-metaphysical. It endlessly deconstructs all claims to essence and debunks existential meaning and value. In examining the emerging political organization, we gain an insight into the sense of the world. The withdrawal of sovereignty and its alleged replacement by humanity acquires its philosophical importance and allows us to examine the kind of person and social bond of our New Times. In order to start thinking about these momentous events, we must re-examine the metaphysics of sovereignty and humanity.

A space, terrain or collection of people becomes community when this space gathers itself in common. By gathering in common, the terrain becomes territory, the collection collectivity or community and the space of relationships society. A community comes forth as *polis*, empire or state by circumscribing itself in its interiority and demarcating its proper from an outside. Community's outside may be seen as open space (the New World to old Europe), as uncircumscribed relations (the barbarians beyond the borders) or as another foreign community (Sparta to Athens or France to England). This coming together is expressed through certain figures, which project the common in its singularity. They include a spatial demarcation, a proper name (Athens, Rome or

England) and an institutional organization (the constitution of Athens) which open the political as a space of being together. The *polis* launches itself when it sets the beginning and the ends of its common existence, when a community gives itself to itself formally in self-expression and self-constitution.

A community becomes political, a *polis*, when the relationships amongst its members are circumscribed, regulated. The maxim *ubi societas ibi jus* expresses the recognition that a collection of people becomes a people in common, when this or that law is declared as the common law, and transforms relations from open and unregulated to closed and encircled, ordered. Law is the way in which a group addresses itself and in so doing constitutes itself both as the people and as a network of interdependent singular persons. This setting of the common law as the expression and organization of community may take place through a long process of acknowledging and sanctifying a certain 'natural' order of things, the *dike* of the world, or through the enunciation of a new law and constitution through an act of taking hold of the space and the people.[9] But, in all instances, the setting and acceptance of a common law both brings forward and expresses the will to be together.

As Jacques Rancière has argued, taking classical Athens as an example, democracy came into existence when everyone and anyone became *polites*: both the addressor of law and policy and the addressee on issues of public concern, irrespective of their class, knowledge or qualifications. In such a setting, the law of community represents the community becoming law, a mutual address of all people to each other.[10] The mutual address, the reciprocal stating of the law, institutes the *demos*, the people as the ultimate bearers of power and its members as equal within it. The law becomes the address of the people to themselves, an address to each other. Law-making is the expression of being in common, of maintaining communication, both as a plurality of individuals and in their being together, in common. In this sense, law in its essence expresses an ontology in which Being is not a thing or predicate but the intertwining acts of a plurality of beings.

Since Rome at least, the name for this self-constitution has been jurisdiction. Solon introduces law to Athens, the constitutional assembly to

[9] Douzinas, *End of Human Rights*, chapter 2; Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Oxford, 2005), chapters 3 and 4.

[10] Jacques Rancière, *On the Shores of Politics* (trans. Liz Heron, London, 1995); Jacques Rancière, *Disagreement: Politics and Philosophy* (trans. Julie Rose, Minneapolis, 1999).

the nascent United States, and a new community comes forth. In this minimal and structural sense, jurisdiction is the name of the appearance of a community, the decision and determination to be in common. A community gathers itself as common or sovereign in jurisdiction, *juris dicere*: the speaking of law and law's word are the outward appearance of a community in its uniqueness. The act of setting the law as the common law is the presupposition of politics. It initiates and expresses community in its uniqueness but it also constructs the political as such. This event was later called sovereignty.

There is no community without jurisdiction, since it comes together in the speaking of the law. We can call this minimal expression of community, the zero degree of sovereignty or bare sovereignty. It expresses the coming together, the *cum* of togetherness, the *com* of community or the *con* of the constitution.[11] There can be no community without bare sovereignty, which means without common law and someone who enunciates it. Bare sovereignty is the setting of the origin and the ends of a community, the act or acts by means of which a community gives itself to itself. If community is a coming together, it must gather itself by asserting its bare sovereignty, as the outward expression and inner arrangement of its very facticity. This assertion often presupposes the positing of a mythical or heroic past or of a promised glorious future. But it is the expression of the being together itself, the recognition of the community's singularity and difference from other similar communities, that brings it into existence. Bare sovereignty is the coming together of jurisdiction, law and politics in community.

Jurisdiction (the expression of the emergence of a communal space and common identity), politics (the determination to be together) and law (the regulation of the interiority/exteriority of space and continuity in time) emerge at the same time; they are the synchronic expressions of commonality. *Polis* is the name, politics is the content, and law the form of community. The provenance and nature of jurisdiction has been neglected by legal and political philosophy. This chapter argues that an

[11] This coming together singularly and plurally is evident in the etymology of *constitution*, the primal law-founding jurisdiction. The Indo-European root **sta* is one of the most potent markers of the philosophical tradition. It appears in the Greek *stasis* (standing, stopping, rebellion) and its derivatives (hypostasis, anastasis), in the Latin *stance* and substance, constance, *vorstellung* etc. Constitution is the place or ground upon where people come to presence together (*com*). The constitution expresses the co-appearance and standing together of a people in their common space and time.

understanding of its structure may help explain some of the conundrums of sovereignty.

The metaphysics of jurisdiction

Let us start with the etymology of the term. Jurisdiction speaks the law: it is juris diction, the diction of law, law's speech and word. Juris-diction, law's speech, as a double genitive has two aspects, which are inescapably implicated in each other. It refers both to the diction that speaks the law, law's inauguration through words, and law's speech, what the inaugurated law says. And if the Romans believe that the law speaks, for the Greeks the word for jurisdiction is *dikaiodosia*, *diken didonai*, the giving of *dike*, of order and of the law. Jurisdiction is the gift of law (but who gives this gift?) and law's gift (but what does the law donate?). Who speaks and gives the law (*dicere juris*) and what does the law give (*juris dictio*)? If we were to accept Ulpian's contested opinion in the Digest that the word for law *jus* derives from *justitia* (justice), jurisdiction would be the diction of justice, justice's talk.

The law speaks and the law gives, the law gives its talk and this law-talk is associated with justice. The common metaphysical structure that regulates jurisdiction follows a schema according to which the most particular, the singular, a speech or utterance, offers the most general, law. The universal as ratio, concept or law conjoins the most fleeting, the saying of a word or the happening of an event. But which speech establishes its power to legislate in its act of speaking? Which utterance brings about this formidable result while uttering mere words? How does jurisdiction arise in its original form? These ultimate questions of jurisprudence point to the proper boundary between law and politics, the political grounding of law and the legal foundation of the polity, in other words to the heart of a political philosophy and of philosophical politics. According to Jean-Luc Nancy, what is at stake in the articulation of the singular and the universal is the linking of the juridical and the political that brings law to existence, allows law's emergence as law.[12] We are faced with the question of the nature of the decision or speech that makes law effective. This decision is an act of law. But, unlike law-making acts, which give effect to the generality of law, this act is singular and therefore belongs to the field of law's

[12] Jean-Luc Nancy, 'Lapsus Judicii' in *A Finite Thinking* (ed. Simon Sparks, Stanford, 2003), pp. 152–71.

application. And, unlike particular acts of law application, this is an act in which the law recognizes itself as such, acts out its original right as law reflexively and, in doing so, institutes itself.

The speech that gives law is a legislation or judgment. The nature of law-giving is most apparent in constitution-making, the inaugural act of the power to legislate. In all legislation but particularly in constitution-making, the political as decision, act or judgment attaches itself to law as the precondition of law's coming into being. But for the law to come to existence, it must declare itself to be the law of a specific community and attach to a particular polity. The juridical too links itself to the political, to the *polis* as its constituting provision. We have a double linking of a judgment that singularly institutes the law, of a unique act that pronounces legitimacy in general: it is a particular judgment about the generality of law and a general judgment about the particularity of a polity and its sovereignty. Jurisdiction contains the motif of a declaration that gives now and prospectively reproduces the power of law as always linked with a polity and a politics.

In jurisdiction, legal speech both constitutes and states the law, it introduces the constitution (an act of utter singularity, indeed the very definition of the unique and unrepeatable event) and presents its principles and norms (a return to the universality of law and the uniformity of its application). Two axes are implicated here and are rolled into one: the universal and the particular as well as the performative and the constative. Their cohabitation helps confuse the four poles of the two dyads. To get a glimpse at the structure of jurisdiction, we need to separate their respective positions.

Let me recall here a crucial semiotic distinction between two different speaking positions, that of the subject of enunciation and of the subject of the statement. In literature, the subject of enunciation is the author of the novel, while the novel's fictional narrator is the subject of the statement, (s)he who tells the story. The lack of distinction between the two positions, the confusion of the distinct subjects of the diction, permeates jurisdiction and is at its most apparent in constitution-making. The French Declaration of the Rights of Man and Citizen starts by claiming to derive from God and to speak on behalf of all humanity and its eternal and inalienable rights. 'All men are born free and equal' it states, but then proceeds to give the newly inaugurated rights to the only people it can legislate for, French citizens. The recently enacted South African Constitution starts 'We, the people of South Africa, [r]ecognise the injustices of our past; [h]onour those who suffered . . . [and] adopt this constitution'.

Now the subject of enunciation is the constitutional assembly: it is the body who creates the new institutions, structures and rights, but its statement is attributed to a totally different subject – God, humanity or the people. In both instances, the subject of enunciation, the constitutional legislator or the new sovereign, is utterly unique. It is the agent and result of revolution, the historical expression of triumphant political will; in other words a singularity. The revolution and its agent is the essence, one could say, of eventness, of the utter unpredictability and uniqueness of a history-making event. And yet this representative of the event speaks the law, both creative and unique, as all creativity has to be, by referring it back to another speaker, a putative higher authority, God or the people, of which it presents itself as a particular instance. The particular and the universal are rolled together as are the different subjects of enunciation and statement. One obvious explanation is that referral backwards or upwards to the universal acts as an ideological trope aiming to justify or legitimize the utter uniqueness of the action and diction. And yet, like many obvious explanations, I believe that it is not sufficient.

The confusion, the rolling together through the rhetorical figure of *metalepsis* (the part stands in for the whole) is implicit in the nature of all jurisdiction and not only in constitution-making after revolutionary upheavals. Enunciation is the general precondition for the existence of all discourse. Since Rome at least, the diction of *jus*, its public utterance, is the necessary prerequisite and constraint of all law. This constraint is not limited to law; enunciation is the general precondition of all discourse since, without its communication to at least one other person, discourse would remain a private matter. Discourse in general requires a speaking subject. Jurisdiction, following this constraint, demands

> the existential positing of a *judex*, of an unique individual who says the right, and who is unique not because he takes this power to himself . . . nor because people have decided to give it to him [but because] *only a single individual can speak.*[13]

If the law must speak in order to exist, the law needs a mouth and voice. We, the law's addressees, must hear law's word and accept law's gift. But, if the law needs a mouth, the mouth attaches to a face and a body. The law to speak must be one, only a unique individual can speak law. And it is because the law must have a mouth and a body that the great

[13] Jean-Luc Nancy, 'The Jurisdiction of the Hegelian Monarch' (trans. Mary Ann and Peter Cawes) in *The Birth to Presence* (Stanford, 1993), pp. 110–42 at p. 132 (emphasis in original).

legislators Moses, Solon, Lycurgus, Plato, Zarathustra enter the stage. One could generalize: this is the entrance door for the great representatives of sovereignty, God, King, the People. Juris-diction is individual because it is indivisible. The legislator or *judex*, the sovereign himself, is a function of law's speech, of the speaking requirement of law. Indeed, the great legislators are divine figures and God's substitutes. God's law-giving address in the monotheistic traditions personifies the unitary principle of jurisdiction and brings God into life through his addressing. The people addressed by God-lawgiver, on the other hand, become community by receiving the law and by recognizing in the law the ground of their commonality, and in God the unitary point of emergence of identity. The voice that speaks the law comes to personify the community in its sovereignty. This logical presupposition and historical expression of community, of any community, modifies bare sovereignty into its theological version. The theological element is not so much God's presence (or today absence) but the unitary principle of the speaking, law-giving voice which transforms sovereignty from an expression of plural beings together into that of a singular body politic, a One-All which mirrors in the people as addressees the singularity of the law-giver.

The most extreme philosophical defence of the principle of the *monos archon* (single ruler), the monarch, is advanced by Hegel in his *Philosophy of Right*.[14] Hegel argues that the content and aim of the state is the union of all. The ethical state realizes the principle of union as such. For Hegel, politics transcends collective life and other social relations established for the benefit of the partners and, in the same way, the citizen transcends the private individual of civil society. Sovereignty exists in the form of a subjectivity without foundation, a personality which enjoys complete self-determination. It is this transcendence, both metaphysical and empirical, that is incarnated in the monarch. He is 'the summit and base of everything'[15] in the state, the truth of its truth, the truth of 'union as such'.[16] The oneness and uniqueness of the monarch, the monistic *arche*, both presents the truth of the union of all in the state and is its empirical instantiation. The monarch is the superior individual of the state. He is the whole of the state, someone whose personal unity accomplishes the union of the state. The monarch is the state itself as individuality. This individuality encloses both the utterly unique biological person of the ruler and the whole of the relations of the state. The monarch as a real person is the truth of the union, its very existence. The unity of the state

[14] Georg Hegel, *The Philosophy of Right* (trans. T. M. Knox, Oxford, 1967).
[15] *Ibid.*, § 278. [16] *Ibid.*, § 279.

is personal and the sovereign person is unitary. Indeed, the state has legal personality and exists only if it is singular. 'The personality of the State is real only if it is a single person.'[17] The monarch incarnates the principle of sovereignty and affirms the essence of union by converting it into the unity of a real person.

But what creates the need for such a unique and universal person, what gives the monarch his two bodies and turns him into the secular *imitatio Christi*? It is the demand that the right be posited. '*Right is by its essence an actual positing* . . . The actuality of right is . . . its *sensible declaration* to the intelligence, and the *exercise* of its legitimate power.'[18] Hegel derives the need and nature of the singular, individual personification of sovereignty precisely from the requirement that law speaks. The position of law is jurisdiction. The right of the people, which is nothing else than the expression of the Spirit in the ethical state, must take empirical existence, speak through its positing in jurisdiction. 'The juris-*diction* of the monarch, on this account, is only the naming of right, of union as right.'[19] Right is the presupposition of the union of the people but it must be pronounced to become real and the monarch, the unique and sole ruler, comes into existence in order to voice this right. The long and tortuous metaphysical argument ends up with the same conclusion. The monarch is a function of jurisdiction, the historical mouthpiece of the Spirit as the announcer of the right of people. The sovereign person comes to existence because the Spirit as right must be actualized in the world:

> [T]he signature, the name, and the mouth of the monarch who says 'I will' (§ 279) constitute and are the *decision* that, even if it adds nothing to the content of the people's right, transforms the saying of the law and of the councils into the doing of a subjectivity.[20]

Hegel believes in the union between the right(s) of people and the type of law a polity introduces through its sovereign.[21] 'Concrete right is the absolute necessity of spirit.'[22] Hegel's principle of jurisdiction is close to what we called bare sovereignty. Law enacts right as a result of historical necessity; more accurately, law becomes law because it enacts what is due to people according to reason's injunctions.

[17] *Ibid.*, § 278.
[18] Nancy, 'Jurisdiction of the Hegelian Monarch', p. 119 (emphasis in original).
[19] *Ibid.*, p. 131 (emphasis in original).
[20] *Ibid.* (emphasis in original).
[21] Costas Douzinas, 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?' (2002) 29 *Journal of Law and Society* 379.
[22] Hegel, *Philosophy of Right*, § 28.

The experience of the last two centuries, however, undermines this optimistic philosophy of history. We have to accept today that rights are the effect and not the cause of law. If this is so, the figuration of king and right or of legislator and people takes a different inflection. It is the particular who speaks, the constitutional assembly, the legislator or the judge, but their utterance is figured in the name of a silent partner for whom they speak, God, King, the People or Law. The saying of law, juris-diction, is what brings together the universal and the particular and articulates their relation. Here we reach the original and basic structure of what one could call the theologico-political form of sovereignty. All legislators repeat the gesture of Moses in Sinai. Moses speaks and gives the law as a mouthpiece or a ventriloquist's dummy; in reality it is God who speaks and dictates to Moses his words.

Let me summarize the argument so far. The enunciation of law as the common law creates community. Jurisdiction as enunciation means, first, that there is an instance that speaks and, secondly, that this instance in order to speak must have a singular voice. This singularity speaks the law and its speech act is the performative par excellence: by speaking the law it brings together and creates the community out of an open space of uncircumscribed relations. There is no community without sovereignty, since sovereignty is the mode in which community comes together and acts on the world. The speaking of the law gives community a voice (which is another word for decision or judgment) and this same voice can un-tell or take back the law, or more prosaically suspend it in order to defend the existence or survival of what it has brought into existence. Every space, territory or community expresses itself in its sovereignty when an instance declares the law and gives the law its ends. This is the zero degree of sovereignty or bare sovereignty. Bare sovereignty is the expression of coming together of a community and there can be no community without sovereignty, which means without common law and someone who enunciates it. It is only when someone decides with finality that this or that law is the common law, that the collectivity becomes people in community and the space of relations becomes a territory. Sovereign jurisdiction brings forth community by giving it law.

But we have to dig deeper into this metaphysical structure that underpins all types of sovereignty. Bare sovereignty is the name of community opening to itself, in its self-institution or constitution evident in the exercise of jurisdiction. Bare sovereignty expresses, in other words, the autonomy of the social and political world. But all self-institution, all

processes in which the 'self is made to self itself', are infinite.[23] In classical Hegelian terms, the self is constituted by going out into the world and coming back to itself after this sortie. In the Odyssey of the spirit, Odysseus does not acquire identity before his return to Ithaca. Self is not given before its alienation, its negation by the object and others, and its reciprocal recognition; self does not exist without the return from exteriority. Similarly, bare sovereignty as the self-constitution of community is an infinite process. One could claim that the autonomy of a community is nothing more than its never-ending constitution, the infinity of its becoming.

And yet the infinite always returns to finitude, the boundless in history assumes a recognizable figure. Self-constitution is temporarily interrupted every time (which is all the time) a figure comes to personify the infinite and close it down. Whenever self-constitution is precipitated into some*thing*, every time a figure (God), person (King) or concept (the people) comes to occupy the place of self-constitution as the creator, law-giver etc., autonomy disappears in the heteronomy of a law given to rather than emerging from community. Finitude takes the form of someone or something, a person or concept substitutes for the temporal process of becoming community. In this sense, theological sovereignty is nothing else but the precipitation of bare sovereignty into the definite figure of a Sovereign. In this precipitation, the infinite process of self-constitution is displaced onto the mortal existence of the personifier. It becomes the transcendent, grandiose epiphany of the Sovereign, the incarnate God or the King's second mystical body. The infinity of openness to the world becomes the sacredness of its fake substitute. A community is not autonomous when this process of endless self-constitution is interrupted.

In this sense, the modern all-powerful Sovereign is the name bad faith has given to bare sovereignty, the process of self-constitution of community. This process is always interrupted by the various masks of the Sovereign but cannot be permanently suspended. The finite figure of each Sovereign will itself be interrupted by the infinite process of self-constitution. Indeed, the modern constitutional principle of popular sovereignty could potentially become its own continuous interruption. In democratic constitutional rhetoric, bare sovereignty comes from the people and addresses the people, the people constitute themselves in a process of self-interpolation. In Claude Lefort's felicitous phrase, in modern

[23] This was stated by Jean-Luc Nancy at his seminar in the *Adieu Derrida* lecture series at Birkbeck College, London, 5 May 2005 (tape with author).

democracy the place of power becomes empty.[24] And yet, this initial secularization of power and de-substantialization of the Sovereign does not guarantee openness. The 'people' or the leader can wear the garments of the infinite-become-transcendent as easily as Gods and Kings. Indeed, modern totalitarianism, by presenting the personification of infinity as the servant and representative of the people, incorporates the body politic into the mortal flesh of the dear leader more radically than any King ever did. And this is as much a problem for totalitarian regimes that explicitly adopt the shiny garments of mystical sovereignty as for their pale imitations by democracies for which 'the people' does not signify a continuous process of self-becoming, an empty place where the people address themselves, but one further link in the chain of substitutions of the metaphysical principle of the One.

Sovereignty and justice

But what type of common and in-common does law's enunciation bring forth? We argued above that law as the expression of community circumscribes social relations, turns them from open and undetermined into closed and self-sufficient. From Aristotle to Kant and Rawls, law defines the social as the terrain of external relationships, of agreements, contracts and restitution. But this exteriority of legality becomes particularly pronounced in modernity, the period in which it designates and supports autonomy as the metaphysical principle, subjectivity as the expression of freedom. This is also the period in which Sovereignty proper appears and bare sovereignty becomes subsumed and even foreclosed under the Sovereign's extravagant gestures. The counterpart of the all-powerful Sovereign is the legal subject envisaged in the discourse of rights. Legal rights construct the social as a set of relationships amongst autonomous legal persons who are devoid of or indifferent to values, or follow antagonistic values. If sovereignty is the logical and historical presupposition of community, because community must gather itself through the enunciation of its law to become such, the speaking sovereign is also the presupposition of subjectivity as legal personality. The legal person comes into existence as a *sub-ditus*, as she who hears or takes the word of law, the sovereign voice; she is the subjectum or subjected, the proper target and creation of sovereign domination. This subjection is the precondition

[24] Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (ed. and trans. John B. Thompson, Cambridge, 1986), p. 279.

of autonomy guaranteed by law and is realized in legal rights. The legal person is this or that person, any person within a sovereign community. It is a person to the extent that her relations with others are arranged as external, material and relative: either through legal rights, typically of a contractual nature, or as relations of obedience towards the sovereign voice. The law is the place of calculation, circulation and exchange and one could say that it is also the institutional terrain in which the metaphysics of subjectivity find their most prominent expression.

Rights are the best expression of the value of law as the relativization of value. We see this in Hegel's argument that rights support a conception of the subject as this or that person, a universal person, with dignity, respect and self-respect but without interiority or content.[25] We find it in Kant, who inaugurates the *nomophilia* of modernity by insisting that law and right take precedence over any conception of the good or virtue, and conceives law as a positive morality. We revisit it in Rawls, for whom liberalism supports subjectivity by being strictly indifferent to any substantive conception of content or substance.[26] Recently, we encounter it in various theories of legal formalism and proceduralism, according to which the value of law is precisely its valuelessness, its commitment to rules and procedures and its turning away from value. Legal rights express and support individual desire, an absolute desire for which everything in the world except itself is relative. They are the sign of the relativization of value in modernity, another name for the absence of value or nihilism. When a human rights lawyer recently stated that human rights are the values in a valueless age, she conceded *malgré elle* that human rights are the perfect expression of modern nihilism.[27] The value promoted by legal rights and autonomy is the value of desire or desire as ultimate value. The modern community of rights is indispensably nihilistic, both in the sense that it is based on the lack, the negativity of desire and in the sense that its end is its endless reproduction and expansion.

The community jurisdiction brings forth is not as yet complete; it has the contours of a circumscribed space of relations but not full identity. Similarly, the legal person, recognized in his desire but not in his substance, is still an 'empty vessel' as Hegel put it, 'a negativity blocked in on itself and deprived of dialectical fecundity'.[28] As we argued above,

[25] Douzinas, 'Identity, Recognition, Rights'.
[26] John Rawls, *Political Liberalism* (New York, 1993).
[27] Francesca Krug, *Values for a Godless Age: The History of the Human Rights Act and its Political and Legal Consequences* (London, 2000).
[28] Nancy, 'Lapsus Judicii', p. 162.

negativity and alienation must be filled, the community and the legal person must return to themselves from their foreign travels, absorb the negativity that surrounds them and add value to the sovereign speaking voice and formal rights. The community *qua* community has substance, history and tradition, and self as concrete human being has identity and recognition beyond those given by legal rights. The valuelessness of rights, in other words, must be accompanied by positive value and supplemented by meaning.

According to Jean-Luc Nancy, the mythical, the belief in the plenitude of value and fullness of meaning, has always shadowed and opposed Western nihilism. In Nancy's terminology, myth designates absolute value and value as absolute, as ultimate ground of community or indispensable *telos* of its politics and law. In modernity, one can argue, this mythical task belongs to justice. After the withdrawal of the pre-modern figures, classical *dike* as the order of the world and God as source of absolute transcendence, justice has filled the space of withdrawal of value. From Plato's *Republic* to Augustine's *City of God* and Marx's *Communist Manifesto*, justice signals the origin of a fallen world or the *eschaton* of a utopian or antinomian future. Justice is fullness of meaning in its absence, the presence of a lacking world. As origin or destination, as nostalgia or prophecy, the presence of justice has been absent, a *Deus absconditus* or a future world which is always still to come but which opens the space for absent justice. This absent meaningfulness, this lacking value is the essence of modern mythology; justice is the mythical *par excellence*. No wonder that when we speak of justice we always go back to an Antigone or a Prometheus. No wonder also that nostalgia and utopia are the only revolutionary phantasies of modernity. Without utopia, we are only left with nihilism *simpliciter*. If law is the absence of value except for the value of law, justice is the fulfilment of value as origin or destination but never as the presence of law.

If law inaugurates the common as a space of external relationships, justice gives the common the interiority upon which identification and recognition will be projected. Justice as absolute and absent value opens the symbolic space in which the figures of belonging such as nation, people, culture or, recently, multiculturalism and humanity appear, so that the community of the common law becomes this or that community, England or France, this culture or subculture, this lifestyle or that political commitment. The figure of absent justice returns us to Hegel's argument about the formalism of the community of morality (*Moralitat*) and the empty character of the legal person. But the opening of a symbolic space

of identification by (absent) justice alters bare sovereignty and introduces into its structure what one could call its second moment or theological form.

According to Carl Schmitt, the sovereign is he who declares the exception and metes out the excess and incalculability.[29] The function of jurisdiction is to bring the sovereign to life and give him voice and then, by confusing the person who speaks and the subject who states, to conceal sovereignty by confounding its creative, performative aspect with the declaration of the law and by excepting or excluding the sovereign's power of exemption.[30] Constitutional theory has been unconsciously but persistently performing this task in the last two centuries, by claiming that sovereignty can be subjected to legal rules, dissolved in administrative procedures and regulated by court judgments. But, more importantly, the configuration of individual and universal aims at creating a body politic which mirrors the individuality of the juris-dictator, a unified body, which, while plural and therefore silent, wills the law singularly and speaks through its foil and representative, the *judex*, legislator or judge. Jurisdiction, as originary power or foil for sovereignty, both establishes (performs) and confirms (states) the law. Both producer and witness, jurisdiction incorporates the contingent I of the sovereign into the community of a deeply rooted or under construction We.

Nietzsche said that morality is the absolutization and eternalization of temporary relations of power. We can argue similarly that the diction of law and its constraint that it be spoken by an individual presents the social as individual or undivided, the mirror image of law's speaker. The distance between he who performs (the legislator) and he who states (the people or law) is where the One and All are rolled together. The singular speaking voice, dressed in the colourful garments of value as absent justice and its substitutes, projects on community the figure of One, of a *pater communitatis*, of *communitas in imago dei*, in unity and homogeneity, as nationalism, populism, tribalism, fundamentalism. The unity of community mirrors the sovereign singularity and joins bare and theological into the modern figure of political sovereignty. Together bare and theological sovereignty, law and (absent) justice, open the space of

[29] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab, Cambridge, MA, 1985), p. 5.

[30] For the difficulties of lawyers and political philosophers with the state of exception see Giorgio Agamben, *Etat d'Exception* (Paris, 2003); *State of Exception* (trans. Kevin Attell, Chicago, 2005).

modern politics in two forms, as belonging and exclusion, and as domination, resistance and conflict.

We encounter a similar operation when we turn to the constitution of subjectivity. If the law guarantees the desire of the subject, if rights are what make us autonomous, it is only within a sovereign organization of community that individuals become legally endowed. The law as common law brings us to freedom as the instantiation of valueless desire. The substitutes of absent justice on the other hand allow the subject to fill in the garments of legal rights with the flesh and blood of belonging to nation, people, class or group which enrich identity with proper recognition. If the person relates to others as external to self, as hostile, indifferent or objects of calculation, and if he relates to the common as the superficial and artificial arrangement of legal rights or the expression of domination, belonging to the substitutes of absent justice allows us to acquire interiority and spirituality and substance to move from legal persons to full beings.

But the confounding of particular and universal and of bare and theological sovereignty can be unravelled. The particular claim to state a universal law is always an uncertain claim, uncertainty is its precondition. If the speaker, literally the dictator, was certain, jurisdiction would be asserted without anything else, without justifications and confused reasons, like when the robber commands your money or your life without anything else. The need to justify and offer fake reasons in order to *dicere juris*, indicates that the claim can fail. It is because the claim of the Sovereign can fail, because the gap between particular and universal or between performance and statement can be seen for what it is, as two separate moments that are not necessarily or automatically connected, that both violence and critique launch themselves in law.

Violence is the closing down or forgetting of the gap, critique the care for the distance, the cultivation of its memory and possibility. The closing down is violence *stricto sensu*. It appears in its sharpest form when a new Sovereign and its law are established through the overthrow and destruction of the old. But violence operates in a more mundane form when the I is forced to become part of the We, of a community or a communion where we find our essence through the identification with the spirit, the tradition or the history of that community. All such violent identification is mythological: it asserts a common being in which the law speaks to its subjects as One and All or as All in One. Forgetting the gap is the more common form in our liberal and democratic societies: judicial interpretation and judgment are precisely organized in a way that

conceals the original performance of the law in favour of its reasoned and coherent statement. And yet this forgetting is at its most fragile when the jurisdiction of a court or judge is challenged.

Jurisdiction always involves a clash of jurisdictions and is therefore open to contestation. Both the Nuremberg and the Yugoslav war crimes tribunals resorted to the sheer fact of their establishment by the victorious powers to get around the challenge to their jurisdiction. When jurisdiction is itself called into question then the original difference between creating and stating the law returns like the repressed. But then, as we know, this exceptional challenge to jurisdiction which had to take shelter in the political and violent act of its inauguration is the background of all adjudication. Every trial explicitly or implicitly addresses the power of the court to judge. It is in this sense that we should understand Benjamin's statement that there is something rotten in law.[31] What is rotten in every legal act and in every judgment is the violence at law's inception, the original performative diction which established the law and which, in the modern nation-state, takes predominantly the form of exclusion of other people and nations and races. This originary force is entombed in every legal act as a residue or excess, as the force which created law by cutting off an outside and then mirrored itself as the proper or inside, a force that shadows and guarantees the juridical, most obviously, when jurisdiction is contested, as the normative power or will of community to live together, speaking its own law. If jurisdiction tries to conceal its creation of law and figuring of community, it always returns and when challenged reveals the contingency of origins and the fragility of communal construction.

To summarize, sovereignty and community are the institutional expressions of modern metaphysics, while law and justice or nihilism and myth and their correlates legal person and subject organize politics. Bare sovereignty constructs community as common, while theological sovereignty gives it identity as belonging, domination and conflict. Sovereignty constructs community as togetherness through domination, as valueless freedom through essential belonging, and as legal and moral personality (subjectus) through the subjection of the subject (subjectum). Legality recognizes and valorizes individual desire only in accordance with a domination or subjection to the sovereign, who expresses both the commonality of a community of external relations and the oppression of its

[31] Walter Benjamin, 'Critique of Violence' in *Reflections: Essays, Aphorisms, Autobiographical Writings* (ed. Peter Demetz, trans. Edmund Jephcott, New York, 1978), pp. 277–300 at p. 286.

immanence. But similarly, bare sovereignty leads to the sovereignty of absent completeness and plenitude as its inevitable supplement which circles back again to a sovereignty of lack simple. In the same way that bare sovereignty and the law of external relations mobilize justice in order to become community and subjectivity, justice too can become nihilistic, when it abandons the remembrance or promise of absent value for absence simple. At this point, humanity emerges as the organizing concept of our symbolic space. Where does sovereignty withdraw and what are the ends of humanity?

The withdrawal is precipitated and advertised by our recent wars, the war on terrorism and the postmodern just wars. But we should immediately add that the return of war indicates that sovereignty is not retreating but losing its ability to make sense, to set the ends of community. In modernity the idea of end belongs to the sovereign and war is the ultimate expression of the sovereign end. The decision to go to war is the sovereign decision par excellence. Beyond its immediate aims, war's end is to accomplish the Sovereign's proper essence. The nature of the enemy in the war on terror may help us understand the Sovereign's changing essence. The enemy is both banalized as a mere criminal and absolutized as radical evildoer and our wars take the form of police action, of a war of law. As a criminal, the terrorist testifies to the emergence of a common law and, as evildoer, of a universal lingua franca of ethics and semiotics governing the entire world. The terrorist as criminal violates the one legal order and as evildoer repudiates our common ethics. The creation of this symbolic space is infinitely more important than toppling Saddam Hussein or catching a few al Qaeda members. This is the symbolic space of a global community organized according to the effectiveness of planetary technology, world capitalism and a legal system given to the circulation of causes and effects without end. In this sense, war may be the return to sovereignty, but of a bastard sovereignty without sovereignty, which acts without end, except the end of its endless circulation. In our world, war is called competition and police action, violence has taken a lawful, humane, civilized form, nesting everywhere and nowhere, linked to any number of ends but not to a supreme end. Finally, law's action veers between a sovereignty that has given up on determining its end and a humanity that cannot determine ends.

One can argue, therefore, that the withdrawal of sovereignty, its alleged subjection to legal and moral rules, and its replacement by humanity refer in the first instance to the withdrawal of bare sovereignty, the sovereignty of autonomous self-constitution. Theological sovereignty, on the other

hand, withdraws from the weak states and gets condensed in its imperial form. It is a sovereignty of absent value, a nihilistic theology that retains all the trappings of absolute power including absolute military, technological and economic superiority, which has as its end the endless circulation of exchange-value. And as bare sovereignty is the logical and historical presupposition of all community including a world one, what withdraws as the globalized community is ushered in is the space that came forth in the interstices of bare and theological sovereignty, in the threshold between citizen and subject, in other words politics. If sovereignty infused with value was predominantly that of blood and soil, the sovereignty which has as its value the absence of value, is the postmodern sovereignty of globalization and empire. Its justice is what we find when law and justice are collapsed into one. Justice becomes the administration of justice, the productivity or efficiency of law as regulator of external, material, relative relations, a bare and nihilistic justice.

The metaphysics of humanity, of the human added to legal rights in the form of human rights, cannot provide a postmodern principle of justice because humanity like rights is nihilistic. Absent justice, the mythological principle of modernity becomes relativized, it abandons the remembrance or promise of absent value for absence simple. At this point, the symbolic space of a new world order opens. Cosmopolitan sovereignty, the only type of global sovereignty, claims the garments of value (freedom, dignity, emancipation) but is realized in the ubiquitous violence of competition and war as police action and empty but ever-present legality. Law, as validity without significance, remains the only form of relationship. There can be no community at the global level and jurisdiction, rather than expressing autonomy and self-constitution of community, marks its heteronomy and decline. And, since nihilism and value solely as exchange value cannot finish community and subjectivity, the simulacra of value – extreme nationalism, terrorist fundamentalism, new ageism – appear no longer as the opposite and supplement of nihilism but as its mirror and bastard progeny.

From our perspective, humanity cannot act as the *a priori* normative principle, nihilistic or mythological, and is mute in the matter of legal and moral rules. Its function lies not in a philosophical essence but in its non-essence in the endless process of redefinition and the necessary but impossible attempt to escape external determination. Humanity has no foundation and no ends, it is the definition of groundlessness. But, if humanity has no ends, it can never become a sovereign value and war fought in its name will always be fake. If rights express the endless trajectory of a

nihilistic and insatiable desire, humanity's only sacred aspect is its ability to sacrifice endlessly in order to re-sacralize the principle of sovereignty as terrible and awe-inspiring or as its slightly ridiculous simulacrum. At this point, the new sovereign will have achieved its end and could even gradually wither away as humanity will have come to its final definition. But this would also be the withering away of humanity. The principle of just war will have finally won, in the proclamation of a perpetual peace drowned in endless injustice.

3

Law as conversation

IAN DUNCANSON

Absolutist and sovereign conditions of law

This chapter explores a concept that has been of some importance in international law, and recurs throughout this book, namely that of sovereignty. Is international law, as the Victorian positivists believed, something merely persuasive, law only by analogy, by virtue of its having behind it no sovereign *in a state*, the sign of whose volition its proper credentials require it to be?[1] Historically, the concept of sovereignty has been closely associated not only with the state, but with the practice of imperial expansion. Indigenous people encountered by marauding Europeans often ordered themselves without the elaborate institutions of sovereign government.[2] As a consequence they entered their conquerors' consciousnesses almost as hostile elements of the landscape, noxious pests to be exterminated. Their visibility to Europeans as a form of authentic humanity depended on assimilation to the habits of their betters.[3]

The failure of British sensitivity to the possibility of social orders based on convention and manners, mutually understood rituals, even taught ways of addressing others so as to avoid giving offence and endangering the peace of the community, seems especially odd. Their own experience of civil disorder in the seventeenth century, a series of clashes of rival certainties concerning religion and political organization, led writers from Locke and Shaftesbury in England, to the Scottish Enlightenment literati, men like Hume and Adam Smith, to search for cultural solutions to the problems of peace and stability. A whole way of life was developed, creating social spaces, manners of address and the

[1] Jeremy Bentham, *Of Laws in General* (ed. H. L. A. Hart, London, 1970), p. 1.

[2] Michael Mann concludes that, for the vast bulk of human history, people everywhere lived without states – 'human beings are social, not societal': Michael Mann, *The Sources of Social Power* (3 vols., Cambridge, 1986), vol. I, p. 14.

[3] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321.

choreography of bodies designed, not to produce consensus, but to allow differences to be negotiated without animosities permanently establishing themselves. The famous 'balanced constitution' was a part of this apparatus, along with the theatre, the coffee house and the endless periodicals instancing the importance of gentility.

If one examines the epistemological context, the Europeans' failure to 'see' the forms of Aboriginal social order, the oddness is still greater. In order to understand the nature of law and government in any given society, Smith, Ferguson and others felt that some conceptualization of its history, its economy and its geography was necessary. As Smith put it, '[t]he first thing that comes to be considered in treating of rights is the originall or foundation from whence they arise'.[4] This was the consideration that led to the four-stage model of societies, those predominantly of hunters, shepherds, agriculturalists and merchants, respectively. Aboriginal Australians would clearly have fallen into the first category for those who used the Scots' model, among whom were some of the early European settlers, who conceived of themselves as 'shepherds'.[5] In the dreaming of law, in other words, the British had available to them both a conception of law without much vertical hierarchy or a sovereign, and an empirical example that would have filled out much that Smith left vague.

However, even when the existence of hierarchical forms of government could not be ignored, European, and especially British, aggression led to their displacement and the subordination of their knowledges and customs. Australians have recently been made especially familiar with the idea of sovereignty without, perhaps, appreciating the imperial overtones of the current conservative federal government's brandishing the country's 'sovereignty' in order to justify breaches of its international obligations concerning indigenous and other human rights, and to reject United Nations criticism of those breaches.[6] As bit players in the US/UK interventions, Cecil Rhodes-style, in the Middle East, and as a mimetic claimant to take, as it sees fit, pre-emptive military action in its region, the Australian government has practically connected sovereignty to imperial expansion in an obviously traditional way.

[4] Adam Smith, *Lectures in Jurisprudence* (ed. R. L. Meek, D. D. Raphael and P. G. Stein, Oxford, 1978), p. 13.

[5] Judith Grbich, 'Tracing the Figure of the Native in Postcolonial Theory and Native Title Law: Enlightenment, Aesthetics and Charles Harpur' (2005) 22 *Australian Feminist Law Journal* 122 at 137.

[6] See the remarks of Julian Burnside QC at the Melbourne Rotary Breakfast, 17 February 2004, www.safecom.org.au/burnside-booklet.pdf (accessed 1 November 2005).

In the Shire-like obscurity of Tudor England, far from the spectacular South American conquests of Cortes and other servants of 'Ferdinand the Catholic'[7] that generated Vitoria's explorations of sovereignty,[8] an Anglophone connection between sovereignty and *imperium* was made in 1529 when the monarchy of Henry VIII rejected the jurisdiction of Rome: 'The word "empire" . . . was particularly favoured by Henry VIII after his breach with Rome . . . [and] called to mind the relative isolation of England through the centuries rather than its dominion over foreign territories.'[9] It was connected to a particular view of what was meant by sovereignty: not simply a realm not subject to authority from without, but a ruler not subject to authority within. A 'coterie of royal legists and rhetoricians . . . appropriate[d] the exalted concepts and values associated with princely rule by court humanists in High Renaissance Italy' and made possible a 'court humanism'[10] in the context of which Henry could claim, even in 1515, that 'kings of England in times past have never had any superior but God alone'; and later, '[we] of our absolute power be above the laws'.[11] However, domination of non-English territory there was. Henry's post-Reformation, 'imperial' assertion of sovereign independence from Rome was coeval with the continued English assertions of what can now be conceived to be a colonial *imperium* over Ireland, even if contemporaries understood the relation with Ireland to be one of feudal overlordship:[12]

[7] T. B. Macaulay, *Essay on Lord Clive* (London, 1920), p. 18. Macaulay's purpose in the essay, he said, was to demonstrate that the British conquest of India was more heroic than Cortes' 'victories . . . gained over savages'. Even so, Macaulay takes a route reminiscent of Vitoria's in claiming sovereignty over 'a people sunk in the lowest depths of slavery and superstition': Macaulay, 'Speech to the House of Commons 10th July 1833' in T. F. Ellis (ed.), *The Miscellaneous Writings and Speeches of Lord Macaulay* (London, 1889), p. 572.

[8] For example, his distinction between the means by which a sovereign is set up – the Pope by the Church, or the king by the commonwealth – and the source of the power exercised in their respective domains, which can only be God: Vitoria, 'On Civil Power' in Anthony Pagden and Jeremy Lawrance (eds.), *Vitoria: Political Writings* (Cambridge, 1991), pp. 1–44 at p. 16.

[9] Nicholas Canny, 'The Origins of Empire: An Introduction' in Nicholas Canny (ed.), *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* (Oxford, 1998), p. 1.

[10] Brendan Bradshaw, 'The Tudor Reformation and Revolution in Wales and Ireland: The Origins of the British Problem' in Brendan Bradshaw and John Morrill (eds.), *The British Problem, c. 1534–1707: State Formation in the Atlantic Archipelago* (London, 1996), pp. 39–65 at p. 62.

[11] As quoted in *ibid.*, p. 63.

[12] Perhaps we should see this as a transitional moment: the extirpation of local law and custom and evictions of Irish tenants certainly did not conform to traditional feudal ideas of 'good lordship' as discussed by D. M. Loades, *Politics and the Nation 1450–1660: Obedience, Resistance and Public Order* (Brighton, 1974), p. 11.

> [T]he distinguished English historian and abolitionist Henry Hallam (1777–1859), pointed out the racist affinity of the Spanish genocide of the Christian Moors and the English oppression of the Irish . . . The pre-eminent Anglo-Irish historian William Edward Hartpole Lecky (1838–1903) noted how the people of the English Pale in Ireland came to 'look upon the Irish as later colonists looked upon the Red Indians'.[13]

James VI of Scotland, Elizabeth I's nominated successor to the throne of England,[14] was also much taken with the imperial idea, referring to his post-1603 dual monarchy as 'great Brittaines imperial crowne' or the 'Empire of Great Britaine'.[15] What distinguishes the Stuart monarchy is the attempt by its members to unite four peoples in two islands into one political entity which then, of course, established 'plantations' in North America,[16] an imperial project if ever there was one, but also to continue the Tudor meld of sovereignty as untrammeled authority both without and within the realm. Salamonio, the Spanish Jesuit, opposing papal sovereign claims, produced 'the most remarkable tract to appear in connection with the crisis' that papal arguments provoked.[17] In his *The Sovereignty of the Roman Patriciate*, a 'theory of inalienable popular sovereignty is presented as the most suitable form of government for the city of Rome',[18] insisting that a sovereign, whilst superior to each of his subjects individually, is inferior to them collectively. Suarez, directly responding to James VI/I's conception of his powers, wrote of a right of resistance to a monarch where 'it becomes necessary for the preservation of the commonwealth itself'.[19] Both Salamonio and Suarez 'cut right across the doctrine of the divine right of kings' enunciated by James VI of Scotland,[20] according to which 'Kings are not only Gods Lieutenants upon earth . . . but even by God himselfe they are called Gods . . . Kings exercise a manner or resemblance of Divine power on

[13] Theodore Allen, *The Invention of the White Race* (2 vols., London, 1994), vol. I, p. 29.
[14] Referred to here as 'James VI/I'.
[15] As quoted in Canny, 'Origins of Empire', p. 1.
[16] Jane Dawson, 'Anglo-Scottish Protestant Culture and Integration in Sixteenth Century Britain' in Steven G. Ellis and Sarah Barber (eds.), *Conquest and Union: Fashioning a British State, 1485–1725* (London, 1995), pp. 87–114.
[17] Quentin Skinner, *The Foundations of Modern Political Thought* (2 vols., Cambridge, 1978), vol. I, p. 148.
[18] *Ibid.* [19] *Ibid.*, vol. II, p. 178.
[20] Mícheál MacCraith, 'The Gaelic Reaction to the Reformation' in Steven G. Ellis and Sarah Barber (eds.), *Conquest and Union: Fashioning a British State, 1485–1725* (London, 1995), pp. 139–61 at p. 150.

earth'.[21] Suarez, a 'monster' according to James, had his writings burned by royal decree in London.[22] 'A lawfull good King . . . having received from God a burthen of government, whereof he must be countable' acts according to law 'yet hee is not bound thereto but by his good will'.[23] The sovereign sits 'upon God his Throne in the earth'.[24]

Pre-empting Parliamentary claims, James VI/I warned the two Houses in 1609, 'doe not meddle with the maine points of Government; that is my craft . . . I must not be taught my Office.'[25] Pre-empting judicial interference, he instructed the justices assembled in Star Chamber in 1616 that he merely delegated his law-making power; he did not relinquish it. He told them he knew of their love of arcane dogma but, 'if your interpretation be such, as other men which have Logicke and common sense understand not the reason, I will never trust such an Interpretation'.[26]

Quest(ion)ing sovereignty

It was the work of the seventeenth century to try to prize apart the components of sovereignty that the Tudors and Stuarts had so assiduously sought to keep soldered together: the political independence of the realm, the sovereign foundation of the law, and the meta-legal position of the sovereign founder. In retrospect, it seems to me, these components *are* inextricably connected, but perhaps differently than we thought. Together, they amount to what Giorgio Agamben has called the 'exception': the state of emergency in which executive authority can be subject to no challenges from without or within since efficiency must be paramount in the definition, recognition and resistance to infidels, heathens, extremists and the wielders of international terror.[27] Sovereignty in its dangerously

[21] James VI/I, 'A Speach to the Lords and Commons of the Parliament at White-Hall' in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge, MA, 1918), pp. 306–25 at p. 307.

[22] On the burning see Charles McIlwain, 'Introduction' in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge, MA, 1918), p. lxiv.

[23] James VI/I, 'Basilikon Doron' in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge, MA, 1918), pp. 3–52 at p. 18.

[24] James VI/I, 'The Trew Law of Free Monarchies' in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge, MA, 1918), pp. 53–70 at p. 54.

[25] James VI/I, 'Speach to the Lords and Commons', p. 306.

[26] James VI/I, 'A Speach to the Starre-Chamber' in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge, MA, 1918), pp. 326–45 at p. 326.

[27] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998).

revivified twentieth-century sense seems connected to the notions of the self-determination of peoples that emerged particularly in the aftermath of World War I with the dismemberment of the Habsburg and Ottoman Empires and the territorial shrinkage of what had been the empires of the Kaiser and the Czar. Self-determining sovereignty was an apparently liberating doctrine of citizenship, but one which then immediately cut its exclusionary teeth on a diet of displaced persons – non-citizens – representing the death 'of the juridical person in man'. Writing of the preconditions of the Nazi camps, Arendt sounds an eerily contemporary note for those who notice the 'refugee' camps of displaced Palestinians, the camps at Woomera or Port Hedland, US-administered Iraqi prisons or Guantánamo Bay:

> the process by which men are prepared for this end [i.e. dehumanization and what could then follow], and the methods by which individuals are adapted to these conditions, are transparent and logical . . . The impetus and what is more the silent consent to such conditions are the products of those events which in a period of political disintegration suddenly made hundreds of thousands of human beings homeless, stateless, outlawed and unwanted, while millions of human beings were made economically superfluous and socially burdensome by unemployment.[28]

Writing of contemporary Australia's approach to refugees, William Maley, Director of the Asia-Pacific College of Diplomacy, indicates that little has changed: 'much of the [Australian] bureaucracy has become indifferent to considerations of common humanity'.[29] Our legal and political doctrines have reached an impasse that excludes such notions. League of Nations mandates, following Allenby's victories over the Turks in the Middle East, presaged what was to follow the new world order that followed the war to end wars: the first aerial gas attacks on civilians (by the Royal Air Force in Iraq). The League of Nations era, Füredi observes, asserted the ideal of national self-determination, but denied its authenticity when it was claimed by 'anti-colonial politicians . . . in the condition of economic backwardness'.[30] The claim of such subjects was 'not the principle of nationalism as such but . . . illegitimate pretensions'.[31] 'Development' was the precondition of self-determination, hence

[28] Hannah Arendt, *Origins of Totalitarianism* (New York, 1968), p. 145.
[29] William Maley, 'Refugees' in Robert Manne (ed.), *The Howard Years* (Melbourne, 2004), pp. 144–66 at p. 162.
[30] Frank Füredi, *The New Ideology of Imperialism: Renewing the Moral Imperative* (London, 1994), p. 6.
[31] *Ibid.*

national sovereignty, thus citizenship as defined by the victorious powers after World War I. Sovereignty eliminates the human by recognizing only citizens:

> Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.[32]

In an era in which the sovereignty of (at least powerful) states is asserted to justify the exertion of force, directly or by proxy, on any political orders of which they disapprove, thereby provoking what they claim to be averting – terrorist acts upon civilians involving, perhaps, nuclear or biochemical weapons – it could be fruitful to explore a normative order whose primacy does not depend on Benthamite principles.

The abandonment of an understanding of law and state that depended upon something other than a form of Benthamism resulted in the loss of the American colonies. Although colonies differed in the technicalities of their status, one can generalize and conclude that, by customary usage and expectation, colonists settled their disputes according to common law, and colonial assemblies secured their own supply.[33] The abrupt insistence of George III's administration on the sovereignty of Westminster, by force if required, was unnecessary. Force may have succeeded in the short run, but for the military intervention of France and the hostility of every European navy. However, a British occupation would have achieved nothing but further bloodshed, and an eventual face-saving withdrawal from some but perhaps not all of the American colonies would surely have generated instability in the region. The possibility of such an outcome has lessons for those who deny that the grounds of sovereignty may often imply certain limits on its exercise.

Politeness

Post-Glorious Revolution England may not seem a promising basis for the exploration of the possibility of negotiating difference peacefully without

[32] Agamben, *Homo Sacer*, p. 128. See Greg Palast, 'Voters Claim Abuse of Electoral Rolls', *Observer* (London), 31 October 2004, p. 4, on the processes used in the US to prevent the registration of (chiefly African-American) citizen-voters prior to the 2004 presidential election. The person who is not afforded the status of 'citizen' is not counted.

[33] See Richard S. Dunn, 'The Glorious Revolution and America' in Nicholas Canny (ed.), *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* (Oxford, 1998), pp. 445–67.

Leviathan. It was not a peace-loving nation. In the words of an anonymous foreign observer, 'before a well brought-up boy learns that there is a God for him to love, he learns that there is a Frenchman for him to hate'. It was a state organized as no other at the time, despite its comparatively meagre resources and small population, for war, supported by a patriotism that permeated its inhabitants. The War of Jenkins' Ear, for example, was forced on a reluctant Walpole in 1739, not just by merchants aggrieved at Spanish resistance to the plunder of its commerce, but by the country as a whole, and began the end of his Prime Ministership.[34]

Reviewing the oft-made claim that the Peace of Westphalia, which ended the Thirty Years' War, was the basis for the modern nation-state as the unit of inter-national relations, Benno Teschke argues that none of the Westphalia signatories was a modern state.[35] The trajectory often associated with Westphalia, the transition from feudal economic and political organization in Europe into something like a system of modern centralized statehood[36] was, he remarks, nothing of the sort. The commodification and division of labour, which is 'free' and formally equal to its employers, and the bureaucratic, fiscal and legal apparatuses that seem to govern impersonally, distanced from the direct extraction of surplus value, increasingly characterize England after the mid-seventeenth century, Teschke writes, emphasizing the importance of competitive production rather than circulation relations among the owners of capital. This was the sign of modernity.

Westphalia regimes, he tells us, may have for centuries had capital and some of its forms of credit engaged in commerce, but production relations remained tied to formal status and tradition, and internal customs and tax farming had yet to be dissolved in the capitalist processes of production in which, in Marx and Engels' famous phrase, 'all that is solid melts into air'. The depiction of England – and, importantly, of Scotland, too, after the Act of Union 1707 created the largest tariff-free zone in Europe – as a population of 'polite and commercial people'[37] misleads if it diverts our attention from production. It is also singularly inappropriate

[34] John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (London, 1989), p. 174.

[35] See Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of International Relations* (London, 2004).

[36] See, with some reservations, Perry Anderson, *Lineages of the Absolutist State* (London, 1974).

[37] Paul Langford, *A Polite and Commercial People: England 1727–1783* (Oxford, 1989).

if one considers the unparalleled ferocity unleashed by Britain on an increasingly global scale after the accession of William of Orange in 1688.

The Warwick School of historians have reminded us, moreover, of the *impolite* invasions of the customary rights of working people by their rulers, employers and landlords;[38] and, of course, commerce was only half of the economic story even during an era in which, as we know, production was for the most part yet to be concentrated in the factories that led to the self-conscious production also of a working class.[39] However, it is important not to neglect the fundamental role of politeness in maintaining overall stability *within* the diverse realm, in the face of enormous structural change and a perpetually insubordinate populace.[40] In failing to notice the importance of politeness, I think we have been misled, this time by Thompson's emphasis on the 'rule of law'.[41] 'Absolutist sovereignty', Teschke writes,

> [i]n striking contrast to modern sovereignty, was proprietary in character, personalized by the ruling dynasty, and rooted in absolutist pre-capitalist property relations.[42]
>
> The modern notion of sovereignty is predicated on an abstract, impersonal state, existing apart from the subjective will of its executive.[43]

Thompson's point is, of course, that a ruling class with divergent interests, also confronting a rowdy and politically conscious labouring, if not yet self-conscious working, class requires a social technology of regulation that, in needing to seem impersonal and impartial, actually imposes a degree of impersonality and impartiality on itself. Yet, there remains some truth in the assertion that 'the executive of the modern state is but a

[38] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, 1975); Douglas Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975); Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London, 1991). See also K. D. M. Snell, *Annals of the Labouring Poor: Social Change and Agrarian England 1660–1900* (Cambridge, 1985).

[39] Maxine Berg, Pat Hudson and Michael Sonenscher (eds.), *Manufacture in Town and Country before the Factory* (Cambridge, 1983); E. P. Thompson, *The Making of the English Working Class* (Harmondsworth, 1968).

[40] John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge, 1976); Kathleen Wilson, *The Sense of the People: Politics, Culture, and Imperialism in England, 1715–1785* (Cambridge, 1995).

[41] Thompson, *Whigs and Hunters*, pp. 258–69.

[42] Teschke, *Myth of 1648*, p. 217. [43] *Ibid.*, p. 171.

committee for managing the common affairs of the whole bourgeoisie'.[44] Marx's formulation, like Thompson's point, allows that having affairs in common far from precludes, but even *requires*, the continual adjustment of agreements about how that commonality is to be maintained. And in the interstices of these negotiations, the affairs of others might achieve some recognition. Formal equality is not simply a trick; freedoms to act are not one-way streets.

Again, there is a contrast with the formal status differences inscribed in a legal system in which power rules directly; but we have not, with either Thompson's or Teschke's model of sovereignty, entered the world that seems to conjure an abstract sovereign whose will is the basis on which law rests, the world in which, for Austin, lecturing in the late 1820s, international law is not 'law properly so called'.[45] This version of the rule of law, polished in the gilded age of empire, is not one to which either writer returns us: or to the Tudor or Stuart worlds in which James VI/I might fall 'into that high indignation as the like of which was never known'[46] at the precursor of Marx's quip, that the king believes the people obey him because he is the king, whilst actually he is king because people obey him.

The modern state of the immediate post-Revolutionary period was created, I have suggested, by those who had witnessed the merger of sovereignty with authority and laboured hard to find an alternative. The chaos of conflicting religious and political truths in the mid-seventeenth century had permitted the rise of political radicalism that threatened property. 'I am unsatisfied in . . . how it comes about that there is such a propriety in some freeborn Englishmen, and not others', Rainborough, colonel and chief spokesman for the radicals during the Army Debates, asks, ominously.[47] The clash of 'fundamentalisms', a term with which we are, alas, still familiar, and which is probably not anachronistic for the seventeenth century, led from Pride's Purge of the Long Parliament, to the Commonwealth and the Cromwellian Protectorate. This was a peace bought with a large and expensive army, a charge on the very 'propriety' for the sanctity of which the landlords, if not the radicals, had fought their

[44] Karl Marx and Friedrich Engels, *The Manifesto of the Communist Party* (Harmondsworth, 1967), p. 82.

[45] John Austin, *Lectures on Jurisprudence* (2 vols., London, 1879), vol. I, Lecture I.

[46] Letter from Boswell to Milborne, quoted in W. Holdsworth, *History of English Law* (12 vols., London, 1924), vol. V, p. 431. If a comparison between Marx and Edward Coke, at whom James' anger was directed, seems strained, the point is Coke's alleged suggestion that the King was subject to law, implicitly that he was king by virtue of law.

[47] A. S. P. Woodhouse (ed.), *Puritanism and Liberty: Being the Army Debates (1647–9) from the Clarke Manuscripts* (London, 1938), p. 64 (editor's emendations omitted).

Stuart government. It is these landlords' solution to the chaos and the more draconian and expensive solutions to it that Thompson notices in his otherwise puzzling postscript to a study, after all, of a law-based assault on the customary usages, largely on the poor, often by the *nouveaux riches* beneficiaries of the new forms of financial wealth that had underpinned two decades of victorious war against Louis XIV. Beneath the law is something else, but certainly not the will of a sovereign.

Social reality

> What we call 'social reality' is in the last resort an ethical construction; it is supported by a certain *as if* (we act *as if* we believe in the almightiness of bureaucracy, *as if* the President incarnates the Will of the People, *as if* the Party expresses the objective interest of the working class . . .). As soon as the belief (which let us remind ourselves . . . is definitely not to be conceived at a 'psychological' level: it is embodied, materialized, in the effective functioning of the social field) is lost, the very texture of the social field disintegrates.[48]

What is the texture of the social field, the process of ethical construction via a set of 'as ifs' that becomes visible as an alternative to what some late-sixteenth-century English people regarded as the abyss of social disintegration? Having glimpsed the meta-legal experiments, by the Stuarts and by Cromwell, the men of 1688 – and before, if we think of Locke and the first Earl of Shaftesbury, and their opposition to the prospect of a Catholic king with predictably Absolutist intentions[49] – were hardly to seek a model of integration in the writings of Hobbes. But the alternatives Hobbes had, not long since, set out had a famously brutal logic: '[M]en by themselves . . . outside of civil society, can have no moral science because they lack any certain standard against which virtue and vice can be judged and defined.'[50] The clamour of opposing, equally legitimate and therefore nugatory rights, he located in the state of nature. Men are not necessarily good judges of their own best interests, nor naturally sociable, but they do have a rational fear of each other, each not knowing the intentions of the other, a fear which is empirically manifest in their closing their doors when they sleep and carrying swords when abroad, for fear of intruders

[48] Slavoj Žižek, *The Sublime Object of Ideology* (London, 1989), p. 36.

[49] John Miller, 'Crown, Parliament, and People' in J. R. Jones (ed.), *Liberty Secured? Britain before and after 1688* (Stanford, 1992), pp. 52–87.

[50] Thomas Hobbes, *Man* (ed. Bernard Gert, New York, 1970), p. 69.

and thieves, even in partially-governed societies.[51] If Hobbes' account of disorder seemed so resonant of recent experience, it seemed also to have no *conceptual* resolution, only the pragmatic alienation he recommended, of all rights claims to one, or one body above the fray, who 'cannot be bound to the civil laws, for this is to be bound to himself; nor to any of his citizens'.[52] For the quality of his justice and the beneficence of his regime, he could be answerable only to God, for to permit secular questioning was to risk returning to the very problem of social chaos, the solution to which Leviathan was intended to be: 'By the social compact, the subject has "made away all power of judgeing and caring for the common good".'[53] Thus:

> To the care of the sovereign belongeth the making of Goode lawes. But what is a good lawe? By a good lawe I mean not a just lawe; for no law can be unjust. The law is made by the Sovereign Power, and all that is done by such a power is warranted and owned by every one of the people, and that which every man will have so, no man can say is unjust . . . a good law is that which is *Needfull* for the *Good of the People* and withal *Perspicuous*.[54]

If this abstract confrontation with reality threatened more controversy than it was likely to resolve, there were alternatives. One alternative lay in the inalienable rights of man. The existence of such rights had been canvassed by the Agitators during the Army Debates at Putney, where delegates of the New Model (Parliamentary) Army – some quite radical – assembled to discuss the principles that might govern England after the civil war.[55] But this turned out to be large enough to encompass almost

[51] Thomas Hobbes, *The Citizen* (ed. Bernard Gert, 1970), p. 113.

[52] *Ibid.*, pp. 183–4.

[53] Mark Goldie, 'The Reception of Hobbes' in J. H. Burns and Mark Goldie (eds.), *The Cambridge History of Political Thought 1450–1700* (Cambridge, 1991), pp. 589–615 at p. 610, quoting Thomas White (1655).

[54] Thomas Hobbes, *Leviathan* (ed. T. B. Macpherson, Harmondsworth, 1977), pp. 387–8.

[55] Woodhouse, *Puritanism and Liberty*, pp. 1–95. The texts of the debates survived because of the invention of an early form of shorthand, and were discovered accidentally early in the twentieth century. The New Model was an educated and idealistic military, and the history of their reasoned radicalism led to Winston Churchill's suspicions of the proposal for an Army education programme to forestall soldiers' boredom prior to the Normandy invasions of 1944. The programme was nevertheless set up. The military mock 'Cairo Parliament' of 1944, which resolved an end to private ownership of the means of production, and was dissolved by the Army hierarchy in an echo of 1649, and the subsequent 'khaki election' of a Labour government, may have proved Churchill's suspicions correct. See Angus Calder, *The People's War: Britain 1939–45* (London, 1969); Neil Grant, 'Citizen Soldiers: Army Education in World War II' in New Formations Collective (eds.), *Formations of Nation and People* (London, 1984), pp. 170–87.

anything, including, as it turned out, slavery; and fragile enough more recently to vaporize when confronted with the slippage between humanity and citizenship, if we follow Agamben and his discussion of Hannah Arendt on the plight of the refugee.

> [T]he kind of relation that exists between *homme* and *citoyen* still remains unclear. From this perspective, Burke's *boutade* according to which he preferred his 'Rights of an Englishman' to the inalienable rights of man acquires an unsuspected profundity.[56]

Burke's insight may contain *pace* Agamben, a profundity of which Burke and many of his contemporaries were perfectly aware. It is true that, a century before, Locke wrote at first in abstractions about the origins of government and its purposes, from which he then deduced a notion of its limit and the breach of trust that would justifiably provoke a right to resistance.[57] But the trust, by the date of the *Treatises*, was not an abstract and vague matter of hope and of generalized faith in the beneficence of those in whom the government of things, or potentially people, was lodged.[58] Associated with 'ingenious conveyancers such as Sir Orlando Bridgeman',[59] the trust had become a popular way of accumulating property after 1660. As a legal instrument it had clearly by Locke's time lost its moral overtones as somehow reflecting the Chancellor's function of doing equity. Lord Keeper (as he became) Bridgeman stressed the importance for property of adhering to the authority of precedent, Lord Nottingham declaring in a 1672 case 'that the conscience of the Chancellor is not his natural and private conscience, but a civil and official one'.[60] The trust also

[56] Agamben, *Homo Sacer*, p. 127.

[57] John Locke, 'Second Treatise' in *Locke: Two Treatises of Government* (ed. Peter Laslett, Cambridge, 1963).

[58] For this reason, John Dunn's discussion of 'trust and political agency' in the context of Locke's writing might not always be helpful: see John Dunn, *Interpreting Political Responsibility: Essays 1981–1989* (Princeton, 1990), chapter 3.

[59] David Sugarman and G. R. Rubin, 'Introduction: Towards a New History of Law and Material Society in England 1750–1914' in G. R. Rubin and David Sugarman (eds.), *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Abingdon, 1984), pp. 1–123 at p. 11. Sugarman and Rubin are concerned principally with later developments in which the trust and the settlement not only made the retention and accumulation of great landed estates possible (in the case of the settlement, and for an assessment of the later effects of Bridgeman's work, see Barbara English and John Saville, *Strict Settlement: A Guide for Historians* (Hull, 1983), pp. 15–16), but facilitated capital accumulation after the South Sea Bubble discredited company flotations: see Malcolm Balen, *The Secret History of the South Sea Bubble: The World's First Great Financial Scandal* (London, 2003); Sugarman and Rubin, 'Introduction', pp. 43–7.

[60] T. F. T. Plucknett, *A Concise History of the Common Law* (London, 1948), p. 654.

became a way of safeguarding a wealthy wife's property from the depredations of an unscrupulous husband, thereby allowing her some freedom, so that, given Locke's expansive conception of property to include that in one's person, it is not surprising that he drew upon its attractions as a legal device to describe a model of government.

Locke stands Hobbes on his head: where Hobbes deduces, from a supposed sovereign origin of law, that sovereign's necessarily being above the law which he gives and maintains, Locke argues that 'a Man, not having the Power of his own Life, *cannot*, by Compact, or his own Consent, *enslave himself* to anyone', a condition that, of course, includes the installation of despotic or unchallengeable power over him.[61] A beneficiary of a trust is governed by the trustees, but only within the terms of the instrument drawn up by the original donor; moreover, in spite of those terms, beneficiaries may, if they agree, join to break the trust and distribute its assets, a process involving the deliberation and compromise that became so important in later decades.

But if, despite that, the bare notion of a right of resistance to government of unspecified humans provides us with as little guidance and as much scope for self-serving (even if, to begin with, well-meaning) responses as does the notion of human rights when it is connected only contingently with the vocabulary of citizenship – as where we confront, in Arendt's example, refugees – Locke foreshadows more guidance, but prudential rather than messianic. We have experience, little of it good, of the utopian destinations of revolutionary promises, 'liberations from above', and not only in the various dictatorships of the PRC or the former USSR.[62] We also continue to experience the reduction of people to

[61] John Locke, 'Second Treatise', para. 23 (emphasis in original); see also A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, 1993), p. 50, citing also paras. 135 and 172.

[62] See Gerard Wright, 'Politics of the Pulpit', *The Age* (Melbourne), 9 November 2004, A3, pp. 4–5. Two Letters to the Editor, perhaps coincidentally published on Armistice Day and reflecting on the devastating US attacks on the Iraqi city of Fallujah, designed to save Iraqis from themselves, may be to the point. Noting the parallels with Vietnam, Chris Gymer recalls 'the famous phrase coined by a US officer in Vietnam: "we had to destroy the town in order to save it"': *The Age*, 11 November 2004, p. 12. Farheena Ahmad writes that, quite properly, great courage and expense was applied to the identification and subsequent commemoration of those who died in New York on 11 September 2001. 'However', she observes, 'it would seem that when determining Muslim dead, one need only be precise to the nearest thousand . . . There is no effort to assess exact numbers, let alone names.' See also Madeleine Bunting, 'The Silence of Fallujah', *The Age*, 10 November 2004, p. 17: 'This assault against the defenceless civilians who live in the besieged Iraqi city will go unreported . . . The silence from Fallujah marks a new and agonising departure in the shape of 21st century war.'

bare humans in the form of scare campaigns about inundations of local inhabitants by external hordes or internal minorities. Purity is opposed to contamination, grotesque to proper bodily form, strength to weakness in the discourses of, for example, immigration control and eugenics, and suspicion fostered against ethnic minorities. Draconian treatment of bare humans is justified on the grounds of protecting the proper citizen (from terrorists or imbeciles), but also because the objects of the treatment deserve no better.[63]

Education

Locke and his contemporaries did not only write of the human, or 'man' as an abstract being. Locke was convinced that claims of the Hobbesian kind – that absolute and unassailable sovereignty is all that stands between order and chaos, and that, therefore, prudent subjects must accept it – 'is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*'.[64] He was convinced that citizens possessed of the right to resist will 'have the sence of rational Creatures' when they contemplate resistance. A 'busie head' or 'turbulent spirit', the 'common Enemy and Pest of Mankind', will not prevail.[65] The 'examples of particular Injustice, or Oppression of here and there an unfortunate Man' will not move 'rational Creatures' to the extremity of removing their government,[66] though the possibility of such an extremity might well modify the conduct of government.

Laslett's re-dating of the *Treatises*, which were once considered to have been written to justify the Whig cause, after 1688, of course gives some clues about the source of Locke's confidence in 'the sence of rational Creatures'. The book-buying and reading records of Locke 'show that between 1679 and 1682 Locke was more interested in publications on political theory and natural law than ever before or after'.[67] In 1676, he also had other concerns. In that year, Mrs Anne Grigg writes to Locke about her son, being educated at home until ready for boarding school, and who, she says, often mentions Locke as his friend. In 1677, Locke is thanked by one Dr Thomas for helping with his sister and her 'troublesome child' the previous winter. The future Earl of Shaftesbury in 1680 expressed gratitude for Locke's assistance with his grandson, the future third Earl,

[63] Stephen Jay Gould, *The Mismeasure of Man* (rev. ed., New York, 1996), p. 28.
[64] Locke, 'Second Treatise', para. 93. [65] *Ibid.*, para. 230. [66] *Ibid.*
[67] Peter Laslett, 'Introduction' in *John Locke: Two Treatises of Government* (ed. Peter Laslett, Cambridge, 1963), pp. 3–120 at p. 56.

part of whose inheritance from Locke was a powerful influence on the cultural preoccupations of the post-Revolutionary period. The list of Locke's interest in education goes on.[68] For him,

> [e]ducation literally humanizes the child by bringing him to reason and virtue, the defining marks of man and of that community of mankind which was so important for Locke . . . virtue is important for gentlemen; [Locke's concern for education] also had the deeper and more dynamic motive that virtue was the very fabric and basis for humanity.[69]

He was clearly fond of children, at least those of his own class, and they of him. In the *First Treatise*, he rejects the patriarchalist opinion that fathers, or parents, enjoy absolute authority over their children, arguing instead that parental authority is limited to that which proceeds from the duty to act in children's best interests.[70] His systematically articulated *Thoughts* of 1693 arose from the advice he was requested to offer the Clarke family about the education of their children. He would have been familiar with contemporary manuals on child rearing and the resemblances of his work to the thought of the German Monarchomach, Althusius (1557–1688), seem too close to be coincidental.

> According to the German Monarchomachs, politics and society rest on the principle of voluntary association, of *consociatio*. Althusius defines *Politics* as 'the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them'.[71]

Society is conceived by Althusius and a writer in similar vein, Clemens Timpler, as a web, more especially as a web of smaller associations in which none is sovereign, governed by the practice of active cooperation and consensus, conversation and civility. Etiquette, trivialized by the English jurists of the nineteenth century, is to these writers of the utmost importance. Indeed, Althusius, in his book *Civilis Conversationis*, 'devotes a whole chapter to the art of civil eating'.[72] Sitting together throughout the entire meal, observing the conventions of table manners and gastronomic

[68] John W. Yolton and Jean S. Yolton, 'Introduction' in John Locke, *Some Thoughts Concerning Education* (ed. John W. Yolton and Jean S. Yolton, Oxford, 1989), pp. 1–70 at pp. 6–8.
[69] *Ibid.*, pp. 25, 39.
[70] Locke, 'First Treatise' in *Locke: Two Treatises of Government* (ed. Peter Laslett, Cambridge, 1963), paras. 70–7.
[71] Martin van Gelderen, 'The State and Its Rivals in Early-Modern Europe' in Quentin Skinner and Bo Stråth (eds.), *States and Citizens: History, Theory, Prospects* (Cambridge, 2003), pp. 79–96 at pp. 86–7.
[72] *Ibid.*, p. 87.

ordering, and consuming food and alcohol in moderation, were essential in forming peaceful social bonds.[73] The nineteenth-century historian Jacob Burckhardt

> found the roots of the values of the Enlightenment not in French or Prussian absolutism, but in Dutch and English revolutions: 'The groundwork for this way of thinking', he argued, 'had been laid by the uprising of the Dutch in the sixteenth century and the English Revolution in the seventeenth'.[74]

Locke's recommendations for the education of a gentleman conform closely with this ideal of a society of unforced civility in which accord is preserved not because everyone agrees with everyone else, but because everyone is familiar with ways of disagreeing that will cause least offence, thus least sense of shame and dishonour, thus least danger of disintegration. He has practical advice about fresh air and exercise, diet and bowel movements, about not indulging the whims of minors through fear of 'crossing' them and thus appearing unloving but unwittingly storing up selfishness and impatience with restraint – we might say forming an inability to defer gratification. He has much to say about habits. The inculcation of good habits by encouragement, 'kind words', produces in later life agreeable manners that are performed naturally. Rules may be forgotten or deliberately flouted, but the habit of a sociable disposition lies below the horizon of consciousness.

Articulacy in conversation, without dominating, wit which is not at another's expense, learning without the aim of exposing another's lack thereof are social lubricants of an environment in which disagreement does not lead to offence and may, indeed, be productive. Locke was, after all, a scientist among his many accomplishments, and appreciated the positive contribution of disputation to the advancement of knowledge. The seemingly trifling matters of competence on the dance floor, grace in one's carriage, modest attention to one's attire and appearance all formed, too, for Locke, vital prerequisites for managing difference peacefully and constructively. Seized by an impetuous boor, the *Second Treatise* could be a social and political disaster. Such a person would read the situation he faced badly and begin his response too soon, even if his resistance to authority could ultimately be justified. Failing, by his lack of grace and appearance of good judgment, he would fail to persuade others and, finally, fail in his cause. If Locke was indeed a radical, a conclusion for

[73] *Ibid.* [74] As quoted in *ibid.*, pp. 92–3.

which there may be sound evidence,[75] his message was that tactful, modest and polite radicals produce the best results. Where political change is difficult, violence and repression may be pre-empted by rhetoric and refinement. The man who can make use of the right to resistance is, then, no abstract creature of nature, confronting a stereotyped opponent, but a highly specified person who has analyzed a particular situation, and is possessed of sufficient learning to gauge and engage with his opponent constructively.

Manners

> To enlightened minds, the past was a nightmare of barbarism and bigotry . . . Enlightened opinion repudiated old militancy for modern civility. But how could people adjust to each other? Sectarianism must cease . . . rudeness had to yield to refinement . . . This accent on refinement was no footling obsession with petty punctilio; it was a desperate remedy meant to heal the chronic social conflict and personal traumas stemming from civil and domestic tyranny and topsy-turvy values.[76]

Porter goes on to quote Voltaire's observation that, at the Royal Exchange in London, 'the Jew, the Mahometan and the Christian transact together . . . the Presbyterian confides in the Anabaptist . . . the Churchman depends on the Quaker's word. And all are satisfied.' A roseate view, of course, belonging to the tradition of Montesquieu's *Persian Letters* – a message to the French – but hopeful without being utopian or evangelical in the revolutionary or messianic sense we have once again lately learned to distrust. It draws on the Lockean conviction that human civility can be humanely inculcated, and on the view of the third Earl of Shaftesbury, Locke's protégé, that 'the scene of gentlemen in polite conversation [was] a model for discursive and cultural activity and authority'.[77]

> The paradigm of politeness offered an alternative to the reliance on traditional authoritative institutions for ordering the discursive world, because it sought processes within the babble, diversity, and liberty of the new discursive world of the Town that would produce order and direction.[78]

[75] See Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton, 1986).

[76] Roy Porter, *The Creation of the Modern World: The Untold Story of the British Enlightenment* (New York, 2000), pp. 21–2.

[77] Lawrence E. Klein, *Shaftesbury and the Culture of Politeness: Moral Discourse and Cultural Politics in Early Eighteenth-Century England* (Cambridge, 1994), p. 9.

[78] *Ibid.*, pp. 11–12.

To this accent on politeness, Lord Kames offers another. Dedicating his *Elements of Criticism* to the new king, George III, in 1761, he reflects on the fresh dangers of discord – ones to which George's ministers might well have attended more conscientiously – less from an excess of enthusiasm, but from an excess of luxury.

> A flourishing commerce begets opulence; and opulence, inflaming our appetite for pleasure, is commonly vented on luxury and on every sensual gratification; selfishness rears its head . . . infecting all ranks.[79]

He develops his theme later in the same volume under the heading, 'Custom and Habit', where he recommends the encouragement of aesthetics. Men (he is, of course addressing men, since he distinguishes the pernicious desire to enjoy a woman from that of wishing to cultivate affection for her) are naturally inclined to seek gratification. He distinguishes habits, which he associates with animal satisfactions and the possibility of intemperance, from custom which, over time, may lead us to the higher 'relish' for beauty.[80] 'The venting [of] opulence on the Fine Arts', Kames urges George, 'riches so employed, instead of encouraging vice, will excite both public and private virtue'.[81]

The coffee house was the repository of both social accommodation and the kind of pedagogy that informs Kames' work. Those who did not aspire to be gentlemen or important financiers doing business at Lloyd's coffee house appreciated the news, informed debate and commerce available to travellers at the 'penny universities' that provided coffee, newspapers, liquor and lodging. Neither Klein nor the other recent historian of Augustan British refinement, John Brewer,[82] contends that the urbane ideal of the coffee house, with its restrained conversation and mannered interaction, represented an actuality, but they stress the importance of the ideal for the shaping of the social order. And if the gentlemen's magazines in which civic sophistication was esteemed by the likes of Addison and Steele did not eliminate the rake any more than Thompson's 'moral economy' eliminated the occasional riot, historians have found in them both the reflection and the production of greater social peace. By the mid-eighteenth century,

[79] Henry Home of Kames, *Elements of Criticism* (2 vols., Edinburgh, 1817), vol. I, p. vii.
[80] *Ibid.*, chapter 14. [81] *Ibid.*, p. vii.
[82] John Brewer, *The Pleasures of the Imagination: English Culture in the Eighteenth Century* (London, 1997).

> clubs of apprentices and artisans marked political anniversaries 'by the breaking open of a hogshead of beer [rather] than by the breaking of heads. Feasting, entertainment, and present-giving replaced rapine and violence'.[83]

And, most importantly, social cohesion was maintained.

There are a number of things to add to this much more processual than sovereign practice underlying the rule of law identified by Thompson in the appendix to his text on the Black Acts[84] – or underlying the constitution, if we want to follow the vocabulary that informs, say, Blackstone. The latter, we recall, locates an English sovereign in Parliament,

> [t]his being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.[85]

Commonly, since the eighteenth century, the phrase 'entrusted by the constitution' has been ignored, but clearly Blackstone envisages a prior authority on which the 'absolute despotic power' depends. His discussion of natural law – 'no human laws are of any validity if contrary to this: and such of them as are valid derive all their force and all their authority, mediately or immediately from this'[86] – is often now seen as mere lip service to convention, but there seems no reason not to suppose that Blackstone saw natural law as part of the constitution that entrusted the sovereign with this despotic power. The impression is strengthened at the end of his discussion of Locke's right of resistance, a doctrine still then widely held: '*so long . . . as the English constitution lasts*, we may venture to affirm that the power of Parliament is absolute and without control'.[87] Arguably, this was Locke's point: the constitution is the trust.

Conversation and scepticism

In Barker-Benfield's words, 'the failure to cultivate one's taste was a failure to discipline one's pursuit of pleasure, and it could lead to ruin'.[88] This vital participatory dimension of sociability is supplemented in Brewer's texts by

[83] G. J. Barker-Benfield, *The Culture of Sensibility: Sex and Society in Eighteenth-Century Britain* (Chicago, 1992), p. 91, quoting Keith Thomas, *Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth and Seventeenth Century England.*

[84] Thompson, *Whigs and Hunters*, appendix.

[85] William Blackstone, *Commentaries on the Laws of England* (4 vols., Oxford, 1765), vol. I, p. 156.

[86] *Ibid.*, p. 41.

[87] *Ibid.*, p. 157 (emphasis added).

[88] Barker-Benfield, *Culture of Sensibility*, p. 207.

a continued emphasis from contemporaries on the need for performance. The coffee house was, of course, important in enhancing 'discernment . . . comparison of objects, distinction of causes', guiding 'the speculation of the merchant' and 'prompt[ing] the arguments of the lawyer',[89] but changes in men necessary to avert earlier disasters were thought to require the presence of educated and refined women. Hence the significance of the promenade, the park and the theatrical performances at which the fashionable were, equally, audience and performers, and novel kinds of publication – reporting either the internal dialogues of Robinson Crusoe, the adventures of young men and women or the private remarks of Dr Johnson – which turned conversational performance into drama.

This enormous upsurge of discursive sociability seemed to Hume a vital if fragile compromise between social disintegration and personal despair. This is obviously not the place to explore his analysis of the origins of the contemporary constitution,[90] but given his atheism, his conclusion that religious bigotry had a happy if uncertain outcome in the mixed constitution which the Revolution helped to secure made him uneasy about its future; and given his being Scottish, he felt the need to remind the English, upon whose future modern Scotland depended, how fortunate they had been, and how cautious they ought to be with the system they barely understood. Like Smith's, his satisfaction at the looming disaster in America was not unconnected with the lesson in understanding that the defeat of English wrongheadedness might provide.

Reason, for Hume, was little more than experience and the very imperfect observation permitted us by our perceptions. He was not prepared, like Kant, to assume subjective continuity and wholeness as the necessary unity of the manifold nature of our perceptions for anything more rigorous than the mundane conduct of ordinary life 'as an agent':

> what we call a *mind*, is nothing but a heap or collection of different perceptions, united together by certain relations, and suppos'd, tho' falsely, to be endow'd with a perfect simplicity and identity.[91]

[89] *Ibid.*, p. 92, quoting Brewer, 'Clubs, Commercialization and Politics' in Neil McKendrick, John Brewer and J. H. Plumb, *The Birth of a Consumer Society: The Commercialization of Eighteenth-Century England* (London, 1982).

[90] See David Hume, *The History of England* (1777 ed., 6 vols., Indianapolis, 1983), vols. V, VI.

[91] David Hume, *A Treatise of Human Nature* (2nd rev. ed., ed. L. A. Selby-Bigge, Oxford, 1978), p. 207 (emphasis in original).

Our knowledge of the past, however thorough, is no warrant for any projections into the future,[92] nor can our descriptive knowledge of the present, however conscientiously documented, provide us with an ethical guide for the future – the famous is/ought divide. As to the first, he was prepared to insulate mundane life from philosophy with some celebration of its comforts – hence the importance of his treatment of it for us.

> [S]ince reason is incapable of dispelling these [sceptical] clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of back-gammon, I converse, and am merry with my friends; and when after three or four hour's amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any further.[93]

As to the second, he completely foreshadows the tentative nature of science as we have come to accept it as an enterprise from the writings of Bachelard and Kuhn, leaving little scope for dogmatic recourse to meta-languages in discussions of how the world is.[94] If we cannot move unproblematically from description to prescription – partly because we cannot be as certain as we would like about descriptions of the world, but partly because logic does not permit it; if, as Hume would put it, reason lacks the power to determine ethical decisions, we must take responsibility for them. But how are we to do so without returning to the chaos for which Leviathan was meant to be the solution, each person insisting on his or her personal good with no possibility of arbitration among them?

Hume's answer is crucial if one is to see the early eighteenth century as a model of legality that is not based on Leviathan:

[92] Hume, *Treatise of Human Nature*, pp. 267–8; David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* (2nd ed., ed. L. A. Selby-Bigge, Oxford, 1902), pp. 33–9, 149–65.

[93] Hume, *Treatise of Human Nature*, p. 269. We could see Hume's famous practice of avoiding the epistemological and social chaos to which scepticism points, in Lacanian terms, as his *objet petit* a.

[94] See Paul Hirst, *Durkheim, Bernard and Epistemology* (London, 1975).

> The more we converse with mankind, and the greater social intercourse we maintain, the more shall we be familiarized to these general preferences and distinctions, without which our conversation and discourse could scarcely be rendered intelligible to each other.[95]

As Phillipson puts it, for Hume, '[t]he roots of our ideas of justice were, like any other, first formed in "company and conversation" and . . . embedded in convention'.[96]

> Hume's discussion of the manner in which we enter into conventions to establish a moral and political culture lies at the heart of questions about the nature of rationality in Hume's thought.[97]

Hume's own embeddedness in politeness, Phillipson suggests, is mistakenly overlooked. Disorder arises from the intolerable impossibility of certainty in questions of knowledge and justice, an impossibility whose intolerability seems soluble by the imposition of authority. A more polite solution – recalling the etymological connection of politeness with the concepts of the *polis*, police and polity – arises through conversation, compromise and negotiation, and the kind of convention that enables rowers in a boat to form a common enterprise by virtue of perhaps implicit understandings born of familiarity and long practice of cooperation.[98]

This civility is important in considerations that extend to regulative efforts that exceed the single nation-state. Linda Colley has reminded us that 'Britain' is an artificial construction that required hard work to produce and reproduce over time.[99] Already in the early 1700s, Pope can write, of Hampton Court,

> Here Thou, Great *Anna*! whom three Realms obey,
> Dost sometimes Counsel take – and sometimes *Tea*.[100]

And he presumably did not count the principality of Wales, a separate nation, in his three realms. In contemporary understanding the realms extended to include the Atlantic seaboard of North America, where free-born Englishmen settled; and,

[95] Hume, *Enquiries*, p. 228. [96] Nicholas Phillipson, *Hume* (London, 1989), p. 49.
[97] *Ibid*., p. 148. [98] Hume, *Enquiries*, p. 306.
[99] Linda Colley, *Britons: Forging the Nation 1707–1837* (New Haven, 1992), pp. 5–6.
[100] Alexander Pope, 'The Rape of the Lock' in Cynthia Wall (ed.), *The Rape of the Lock* (Boston, 1998), III:7–8.

> [d]espite the lack of coherence in central policy, the eighteenth-century 'empire of the sea' and the wars that threatened, maintained and extended it created a *network* that, halting and imperfect, was also remarkably efficient in allowing people, gossip, connections, ideas and identity to travel and be transformed.[101]

Positive inconsistency

Law without Leviathan is not, of course, simply law by analogy, or law that creates obligations that are merely optional, as the legal positivists, following Bentham, seem to have believed. If we were Lacanians, we would say that, like the Big Other, whose desire is our utmost desire to have and to be, Leviathan does not exist. Those who believe that constitutions have inherent meanings to be found in the disinterred intentions of founders (usually, significantly, again, were we Lacanians, Founding Fathers, those possessing the Phallus), and those who believe that (at least pre-EU) the UK Parliament was a kind of Leviathan, certainly worship Hobbes' 'mortall God' but, as Hume would have understood this, there is a politics behind their religion. It is a transparent enough politics, but it may be more interesting to notice the supernatural beginnings among the ambiguities of Bentham's fear of ghosts. There is, of course, a clue in Bentham's design of the Panopticon, a circular prison in the center of which is a tower. In the design, the prisoners are perpetually visible, whilst the tower may or may not be occupied by an inspector who may or may not be observing each penitent's sincerity, an in-specter not of their world.

The model incorporates, so Božovič argues, Bentham's dread of ghosts, inspired by a cruel servant's trick in his youth.[102] What makes us afraid of ghosts, Božovič writes, is that they represent 'the intrusion of something radically other, something unknown and strange into our world'.[103] Only if we knew for sure that they did exist could we cease to be afraid of them, or fear them in a different way: 'Bentham knew from his childhood [that] ghosts – fictions – exert a powerful, unanswerable address'.[104] His sovereign is in thrall to the 'felicific calculus' of utility, a miasma that cloaked those not of the labouring poor from the horrors of the workhouse

[101] Kathleen Wilson, *The Island Race: Englishness, Empire, and Gender in the Eighteenth Century* (London, 2003), p. 16 (emphasis in original).

[102] Miran Božovič, 'Introduction' in *Jeremy Bentham: The Panopticon Writings* (ed. Miran Božovič, London, 1995), pp. 1–27 at p. 21.

[103] *Ibid.*

[104] Peter J. Hutchings, 'Spectacularizing Crime: Ghostwriting the Law' (1999) 10 *Law and Critique* 27 at 42.

before the works of Dickens, horrors that, one might say appropriately, haunted working people until as recently as my grandparents' generation. It underwrote, with its social engineering credentials,

> a widespread belief among the British political elite . . . that the successive failures of the potato were a divine judgment against the traditional Irish economy and literally a heaven-sent opportunity to modernize it *à l'Anglaise*.[105]

Is it not appropriate that doctrines so rational and so secular seem so intimate with the supernatural and the divine? Beyond Bentham, we find John Austin, deeply affected by German scientificity in social analysis, proclaiming a doctrine of sovereignty not so different from that of Bentham, its political location in either Parliament or the pre-reform British electorate – his lectures were delivered before the 1832 Reform Act – only to discover, to his own horror, that sovereign power might have an empirical dimension in the people, the working class, even women, all on the verge of successfully demanding the vote. Austin removed himself from scientific analysis to tradition, to the importance of feudal inheritances in maintaining the balance of the constitution. The spectre of working class or even women voters was too much, if sovereignty was at stake, and perhaps even alchemy would have seemed preferable to science.[106]

Like their progenitors, later prominent theorists of the view that the normative dimension of law has, by logical necessity, an origin, discoverable by empirical means, continued to seek this origin beyond the boundaries of politics, convinced that their 'objective' inquiries were not going to lead them where they did not want to go, or compel them to unpalatable conclusions. Dicey takes an extraordinary route, guided by the astute social navigator, Leslie Stephen, to reassure his readers that no harm will follow from the total sovereignty of the UK Parliament. The Sultan of Turkey would not overthrow Islam, since men who become Sultans are not the kind of men who would; the Pope would not introduce revolutionary reforms because popes do not emerge from the kind of background that would make such a thing seem possible: 'Louis XIV could not, in all probability have established Protestantism; but to imagine Louis . . . as

[105] James Donelly Jr, 'Mass Evictions and the Great Famine: The Clearances Revisited' in Cathal Póirtéir (ed.), *The Great Irish Famine* (Dublin, 1995), pp. 155–73 at p. 171.

[106] Joseph and Lotte Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto, 1985), chapter 8.

wishing . . . a reformation . . . is nothing short of imagining him as being quite unlike the *Grande Monarque*'.[107]

Equally, 'Members of Parliament are not usually men of outrageous views', a form of reassurance that Heuston suggests was 'not entirely convincing', especially in the context of Dicey's tortuous and ultimately unsuccessful attempt to demonstrate that sovereignty of the kind he believed he detected was consistent with the principles of the rule of law.[108] Moreover, whilst Dicey may have been able to persuade himself in 1885 of the acceptability of MPs' behaviour, this persuasion was undermined in 1913, 'when the [Irish] Home Rule Bill was about to become law'.[109] Dicey was an 'ardent Unionist'. The abstract doctrine of the sovereignty of Parliament dissolved: 'in desperation [Dicey] jettisoned the Constitution and pledged himself to armed resistance . . . he signed the Ulster Covenant'.[110] In practice, clearly the doctrine enunciated in the 1885 lectures reflected, not an empirical discovery dictated by an objective logic, but an occulted political preference, which the doctrine seemed to guarantee.

There is a similar process of occultation in the positivism of H. L. A. Hart, still perhaps the most influential writer in Anglo-Australian jurisprudence. The sovereign origin of law is located in his principal text in the practices of officials and certain private persons recognizing the ultimate rights and obligations governing their juridical authority.[111] The text is driven, despite two attempts to evade it, to the conclusion that this investment of sovereign authority carries some dangers to the ordinary citizen if we think of that citizen's normal strength of belief in 'social reality', the 'as if' which, for Žižek, constitutes 'the very texture of the social field' in material terms.[112] For Hart, finally, this could lead the citizen, in his words, like the lamb to the slaughter, and we know from history right up to the present that this is frequently the outcome. So why does he commit himself to such a disastrous doctrine? The answer is to be found less in Hart's failure to recognize the performativity of his own text, constituting social reality for the citizenry, than in the perception of his own experience of Englishness in its official form.[113] As a wartime civil servant himself, the

[107] Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (2nd ed., London, 1886), pp. 74–5.
[108] R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed., London, 1964), p. 2.
[109] *Ibid.* [110] *Ibid.*, p. 3.
[111] H. L. A. Hart, *The Concept of Law* (Oxford, 1961).
[112] Žižek, *Sublime Object*, p. 36.
[113] Brendan Edgeworth, 'H. L. A. Hart, Legal Positivism and Postwar British Labourism' (1989) 19 *University of Western Australia Law Review* 275.

best that could be expected of officialdom was a paternalist safeguarding of the British public from, first, an external foe; and, secondly, the internal social needs identified by figures like Keynes, Beveridge and Tawney. The worst was incompetence, the entire theatre summed up by Paul Addison as 'Colonel Blimp being pursued through a land of Penguin Specials by an abrasive meritocrat, a progressive churchman and J. B. Priestley'.[114]

Conclusion

The particular success of the early Atlantic Empire as a kind of *polis within* was only partly the consequence of the threat of what lay without: First Peoples, the French, and the waning power of Spain. It was also a lesson learned from the disorder of forgetting civility. The 'grandeur of law' as Burke put it was forgotten as lawyers either forgot, or gained a hegemony over juristic thought without ever having known, its necessary connection with what constituted its authority, lessons taught by Locke, Shaftesbury, Hume, Burke and others. Writers about law in the tradition of Bentham have done a double disservice. They have returned us to a secular version of something like the Stuart constitution, serving the performative function, not only in academe, but in the media, politics and public life in general, of reducing the citizen to a subject at risk of Hart's slaughterhouse. They have also given us the 'Westphalia Myth' as Teschke has termed it, the idea that states are disconnected entities that cooperate at their convenience, and feel free to act as global bullies where they feel strong enough to do so in relation to particular or general rivals.

This is not the place to examine the contexts in which the new ideas came to have an appeal. But here again, it may be that the British Empire has a moral. The practice of seaborne empire, an empire of semi-independent jurisdictions, with similar legal systems and representative institutions – although Scotland substituted its Parliament in 1707 for representation at Westminster – lost its appeal for certain members of the British ruling classes sometime after the mid-century. Clive's victories in India, Ranajit Guha suggests, put into the thoughts of East India Company officials, men made powerful when they returned home by the wealth their depredations in India had given them, justifications for rule that originate in Hobbes: sovereignty by conquest.[115] Here was another

[114] Paul Addison, *The Road to 1945: British Politics and the Second World War* (London, 1977), p. 189.

[115] Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (2nd ed., New Delhi, 1982).

model of empire, at odds with the empire of free people, an empire of domination ideologically sustained by the imperial administrators' mania for imposing uniformity. This model was a shadow increasingly looming over the remainder of empire in the thoughts of men such as Grenville, Townshend and, perhaps for a time, Lord North. It may be one increasingly familiar to those who consider international law.

4

Corporate power and global order

DAN DANIELSEN*

Although international lawyers thinking about global order generally focus on the interplay of nation-states and international institutions, international law as a discipline has also long sought to account for the significant role played by non-state actors, particularly corporations, in the system of global governance. From the Dutch and later the British East India Companies to the modern multinational enterprise, the enormous impact of corporate actors on the shape and content of national and transnational regulation and the significant effects of corporate activity on local and global social welfare have challenged the narrative of a world exclusively governed by states. International law has treated corporations as a subject for regulation, as an influence on regulation, and has worried that corporations might be a force that escapes regulation. Perhaps to preserve the unique sovereign character of nation-states and intergovernmental institutions, international lawyers have been hesitant to treat transnational corporations as state-like creatures. In any event, we have not traditionally thought of corporations as *producers* of regulation or as governance institutions.[1]

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[1] Though it is beyond the scope of this essay, it would be interesting to explore some of the possible implications for public international law doctrine of treating corporations

In this chapter, I suggest that our understanding of transnational regulation and global governance would be enriched were we to think about corporations not as the 'private' other to the 'public' nation-state, but rather as legal institutions performing public regulatory functions with public welfare effects not unlike nation-states. At the same time, I suggest how a focus on the role of corporate activity and decision-making in global governance can expose new sites for political contestation and new strategies for intervention by regulators, policy-makers and activists seeking to harness and shape corporate power more effectively for the public good.

To explore the question, 'How do corporations govern globally?', we need a typology of specific modes through which corporate actors create and shape local, national, regional and transnational regulatory regimes.

The fact that corporations influence regulation by applying political and economic pressure to affect the legal rules and administrative decisions made by local, state and transnational regulators is well known. Corporations pressure regulators through the provision of information, the creation of studies and polls, the organization of industry associations and interest groups, the generation of campaigns to shape public opinion, and political contributions. They might seek to induce regulators to create or alter regulation to better accommodate their corporate activities by offering to invest in a regulatory jurisdiction. They might also apply regulatory pressure when they threaten to disinvest or actually move to another jurisdiction to take advantage of more favourable regulation elsewhere. When corporations pressure regulators in these ways, we customarily still think of the *public* institutions as the regulatory and governing bodies, although the stronger the corporate pressure, the more it might make sense to see the public institution as an agent of, rather than an obstacle to, corporate regulatory power.

as quasi-public regulatory institutions, acting sometimes in concert and sometimes in conflict with states. Such a conception would seem to call for a re-examination of international law doctrine ranging from the generation of customary law to state responsibility to conceptions of sovereignty and jurisdiction, not unlike the one that emerged in the twentieth century around the creation of international institutions. While international law scholars managed to accommodate the legal personality of international institutions as sub-sovereign creations of the will of sovereign states, the corporation is rarely conceived of by international lawyers as the expression of sovereign will. Rather, it is usually insulated from scrutiny under international law precisely because of its 'private' rather than 'public' character. For more on the corporation as a regulatory institution, see Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance' (2005) 46 *Harvard International Law Journal* 411.

The significance of corporate decisions as an autonomous regulatory force is somewhat more pronounced when corporations shape regulation through acquiescence in a particular rule scheme. The power of corporate acquiescence is easiest to see in circumstances where the applicability or jurisdictional reach of a particular rule is contested. In this context, acquiescence by some corporations may strengthen the perceived legitimacy of a particular rule scheme and perhaps de-legitimate another. In so doing, it may empower or embolden the regulatory authority to apply the rule to other actors. Acquiescence by one corporation may dissuade other corporate actors from resisting or avoiding the rule scheme. It might also suggest to the regulator how the rule is likely to be perceived by other corporate actors and whether the rule is likely to result in adverse effects like encouraging corporate actors to evade the rule by conducting operations in other jurisdictions.

Corporations also exercise a kind of regulatory authority when they interpret rules to apply or not apply in particular cases. This form of corporate regulatory power is particularly pronounced where the applicability of a particular rule is not clear and there is no single regulatory or judicial authority to declare a definitive or binding interpretation of the rule as is so often the case in the transnational context. We might imagine these decisions as preliminary – subject to confirmation or contradiction by regulatory authorities and courts. In practice, however, corporate rule interpretation and behaviour often defines de facto the margins and meanings of legal rules. Such interpretations may also encourage other corporate actors to take similar positions. While these corporate interpretations might eventually result in an adverse reaction by corporate competitors or regulators or both, if the corporation's interpretation of the rule made manifest through its behaviour is not challenged by competitors or regulators, the corporate interpretation of the rule becomes the de facto rule until such time as the rule is changed or challenged by corporate or regulatory action. Even in circumstances where the rule at issue is clearly applicable, corporations may decide to ignore the rule because enforcement of the rule is unlikely or the benefits of ignoring the rule outweigh the likely adverse consequences of its breach. Given that rule compliance is overwhelmingly voluntarily controlled and few rules are actually enforced primarily through regulatory or police action, this type of corporate regulatory power can be particularly important.

Perhaps it is easiest to see corporations as regulators when they create their own rules through business practices, contractual arrangements or

private dispute resolution mechanisms such as informal bargaining and retaliation or international commercial arbitration. They may also supply their own standards for conduct or operations (e.g. wage rates, worker safety, environmental practices) when local regulations either do not exist or do not require such standards. In some circumstances, corporations may elect to 'internationalize' certain standards to multiple jurisdictions for corporate convenience or efficiency even when not required to do so. Some examples might include a situation where the benefits of using uniform manufacturing standards outweigh the potential benefits of taking advantage of lower standards in jurisdictions that would otherwise permit them or where common labour or production standards facilitate efficiency amongst corporate buyers and sellers, such as in the case of the ISO 9000 standards.

When corporations create or shape the content, interpretation, efficacy or enforcement of legal regimes, and, in so doing, produce effects on social welfare similar to the effects resulting from rule-making and enforcement by governments, corporate actors are engaged in governance. Now, if the transnational regulatory and social welfare effects of corporate decisions and actions are similar to the effects produced by 'public' regulatory institutions, then an important challenge for the global governance regime would be finding ways of opening the decisions and actions of corporate regulatory institutions to greater transparency and the kinds of political debate and contestation to which 'public' regulatory institutions are subject.

Generally, policy-makers and activists seeking to influence 'public' governance institutions focus on the mechanisms by which these institutions are themselves governed. They expect the internal authority structures, decision-making processes and deliberative procedures of regulatory bodies to have a significant impact on the policy outcomes they produce. The legal regime that is addressed most directly to the structure and decision-making of corporations is corporate law. While the particulars of corporate law vary from jurisdiction to jurisdiction, it is generally concerned with the creation, operation, rights, duties and liabilities of corporations, as well as the rules, structures and practices that organize decision-making and power within corporations. 'Corporate governance' is generally understood to be about the relationship between shareholders and managers *within* an individual firm and the allocation of power, rights, duties and decisional authority to manage that relationship. But situating this regime of corporate law and governance within the broader context of the transnational regulatory regime and global governance gives it a new significance.

If corporate decisions are significant in shaping the transnational regulatory regime, then the internal governance mechanisms and strategic decision-making processes for corporate actors should be of interest not only to investors and managers, but to any constituency affected by corporate power. In fact, we might find that corporate law functions not unlike other so-called 'constitutional' regimes such as EU law or the global trade regime – shaping behaviour not only within corporations but also amongst the state actors and international institutions that contribute to the complex transnational regulatory regime through which we are governed globally. Where national corporate governance rules shape corporate decision-making in the global governance arena, we might expect changes in those rules to influence the global governance effects of that decision-making.

National corporate governance rules that require labour representation on the executive boards of corporations, such as the co-determination right in Germany, provide a well-known and suggestive example. In a recent study, Mark Roe, in his book *Political Determinants of Corporate Governance*, argues that corporate governance rules such as co-determination rights, taken together with a pro-labour political culture in Germany, have had a significant impact on executive compensation schemes and the types of other incentives shareholders of German companies have been able to make available to corporate management to encourage profit-maximizing behaviour.[2] As a consequence, Roe argues that German managers are more likely than their US counterparts, who do not have labour representation on their executive boards and do not have a pro-labour political culture, to take actions that will expand the firm and protect workers' jobs even at the expense of the firm's competitive position in the market and shareholder value.[3] If this is true within Germany, it does not seem a stretch to imagine that the presence of labour representatives on corporate boards might also affect corporate decisions in areas such as executive and worker compensation and benefits, worker tenure and workplace safety in the other jurisdictions where German corporations do business. If the decisions and actions of companies from rich, developed countries like Germany play a significant role in setting labour policies, wage rates and worker safety standards around the globe, then corporate governance rules mandating worker representation on corporate boards, like co-determination in Germany,

[2] Mark J. Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (Oxford, 2003), pp. 21–8.
[3] *Ibid.*, pp. 71–2.

might well affect corporate decision-making on issues of significance to workers and thereby influence the global welfare of workers more generally.

Of course, mandating labour representation on corporate boards might not be good policy or necessarily lead to better social welfare outcomes globally. Labour representation might turn out to be ineffective or we might find that labour representatives on executive boards in rich countries, fearing foreign competition from low wage labour, make decisions that protect their welfare at the expense of foreign workers. The important point here is to recognize that national corporate governance policies do produce global governance effects and that a better understanding of those effects could provide new avenues for academics and policy-makers to shape transnational regulatory policy and global social welfare.

Governance rules regarding management representation in the context of foreign corporate investment in developing countries provide another example of how national governance rules might shape transnational social welfare and policy. When multinational corporations invest in developing countries by establishing operations there, many developing countries require that these foreign companies secure a local minority interest partner in the local operating entity. A typical structure might involve a foreign parent company setting up a local subsidiary and offering a minority interest, say 40 per cent, to the local partner or to the government of the developing country itself. Under local corporate governance law, this structure typically would give the local investors access to the decision-making process of the local subsidiary but not to the parent company. Similarly, in most corporate governance regimes where multinational parent corporations are incorporated, a local minority shareholder in a subsidiary would have no standing to challenge the actions of the parent corporation, because the minority shareholder is not a shareholder of the parent corporation. This is true notwithstanding the fact that most policy decisions regarding the subsidiary's operations will, for all practical purposes, be made by the foreign parent, including decisions on such matters as the frequency or amount of capital investment, dividends and profit distributions, whether to open or close a plant, and worker safety and environmental standards. It becomes immediately apparent that lack of input by local interests in the decision-making processes of parent companies might have significant consequences not only for the local partners but also for the developing country and those in society affected by the operations of multinational corporations.

This situation might be altered in various ways through changes in corporate governance rules. Corporate statutes in the home jurisdictions of parent companies might be changed to give minority interests in foreign subsidiaries some right of access to information to participate in decision-making or to sue the managers of the parent companies for negligent decisions producing adverse effects on foreign subsidiaries. Developing countries might adopt rules requiring foreign parent corporations, as a condition of investment, to give minority shareholders some input into management decisions at the parent level that affect local subsidiaries. All these legal mechanisms might open new channels for local interests to affect the parent's decision-making.

Of course, each legal mechanism might also produce more adverse consequences than it alleviates. And, there may be ways through other regulatory means to effect similar results with fewer bad effects. Corporate governance is not necessarily the best or most appropriate way to address the possible inequalities between multinational corporations and developing countries. At the same time, if we acknowledge that corporations have a significant governance impact on health, safety, the environment, wage rates and economic development in developing countries, then it would seem irresponsible not also to recognize that we might alter the balance of power between parent companies and local subsidiaries, and between multinational corporations and developing countries, by changes in the corporate governance rules that give local interests in the developing country more voice in corporate decision-making. Such an acknowledgment adds to the transparency of the regulatory effects of corporate decisions under the existing corporate governance frameworks and opens the possibility for contestation and political engagements about the costs as well as the benefits of those frameworks.

In short, corporate governance rules that affect representation on executive boards can shape the kinds of decisions corporations make and the global effects of those decisions. The examples that follow suggest how global governance and social welfare can be also be shaped by corporate governance rules that have nothing to do with representation in management decisions.

Take, for example, corporate governance rules regarding the fiduciary duties of managers to their corporations. Let us imagine that a large multinational corporation called World Corp has decided to build a manufacturing plant in a small developing country called Bandu. Let us imagine further that Zutopia, the large, rich, developed country where World Corp is incorporated, has adopted a corporate governance rule insulating

corporate managers from liability for all claims arising from losses to the corporation resulting from business judgments not involving gross negligence, wilful malfeasance or a conflict of interest.[4] As a consequence, corporate managers of Zutopian corporations know that, for all intents and purposes, they will be insulated from liability to shareholders for business decisions, even if those decisions result in significant losses to the corporation, so long as the decisions do not involve conflicts of interest or self-dealing on the part of the managers.

Imagine further that World Corp's new plant, as part of normal manufacturing processes, will generate significant amounts of industrial wastewater. For a variety of reasons – perhaps lack of resources or to attract foreign investment – the Bandu government has not yet passed any regulations regarding the disposal of wastewater from manufacturing plants. Under the domestic law of Zutopia, the wastewater from World Corp's plant would be deemed 'toxic' and require special processing for disposal if the plant were located in Zutopia. However, to date, the environmental regulation of Zutopia has not been interpreted by Zutopian courts to apply to the foreign operations of companies incorporated there.

Under these circumstances, the board of World Corp might reasonably conclude that dumping the plant's toxic wastewater directly into a nearby river that serves as the water supply for the region would not violate Bandu law and probably would not violate Zutopian law. The boards of directors might well also reasonably determine that avoiding wastewater treatment in the plant would reduce costs and increase profitability. Though the

[4] In the US, the home jurisdiction of most of the world's largest multinational enterprises, the corporate governance regimes of every state provide a remedy to shareholders for corporate losses that result from self-dealing and diversion of corporate funds on the part of corporate managers (breaches of the duty of loyalty) but insulate managers from liability for negligent errors in business judgment, incompetence and mistake regardless of the size of the loss (breaches of duty of care). This practice of insulating managers from all but the most egregious breaches of duty of care is most often expressed in the application of the so-called 'business judgment' rule. While the exact parameters of the business judgment rule vary from state to state, it generally provides a presumption that managers have acted in good faith and with the best interest of the corporation in mind in respect of all corporate decisions and actions not involving a conflict of interest or other self-dealing. This presumption makes it significantly more difficult for shareholders to succeed in a challenge to a corporate decision or action as a breach of the managers' duty of care. One important effect of this rule of corporate governance is to shift the risk of loss resulting from management error, bad business decisions and incompetence onto shareholders and perhaps society more broadly. It is commonly asserted, however, that this risk-shifting is justified because the business judgment rule insures that managers are not unduly or inefficiently deterred by the threat of personal liability from taking risks that maximize shareholder wealth and ultimately social wealth.

possibility of tort liability in Bandu for harm from toxic wastewater disposal exists, the risks and possible damages seem relatively small. A tort suit in Zutopian courts for harms caused by disposal of toxic wastewater in Bandu might be possible, but significant obstacles regarding jurisdiction, distance and expense may limit the practical likelihood of these suits arising in response to any but the most catastrophic of harms.

After determining that the overall legal risk of corporate liability for not treating the plant's wastewater is likely to be very small, the attention of the board of directors of World Corp might turn to assessing the likelihood of personal liability to the corporation if the board's decision not to treat the plant's wastewater did in fact result in substantial losses to the corporation. This assessment would turn, in large part, on the corporate governance rules of Zutopia. If Zutopia, for example, had a corporate governance rule of strict personal liability for business decisions by board members that resulted in death or significant harm to human health, the board of World Corp would be substantially less willing to approve the dumping of untreated toxic wastewater into the water supply in Bandu. If the rule in Zutopia was personal liability for negligent business decisions resulting in a loss to the corporation, World Corp's board might still be more reluctant to make such a decision, assuming the risks of the toxic wastewater were reasonably well known, and common practice in the industry in developed countries, including Zutopia, was to process the wastewater before disposal. If Zutopia's rule is the business judgment rule, it seems reasonable for the board to conclude that its members would be immune from personal liability for their decision on wastewater disposal regardless of the size of any resulting loss to the corporation. This is because the board could reasonably assert its good faith belief that its cost saving decision was in the best interest of shareholders at the time it was made, did not appear to violate applicable law and did not involve a conflict of interest. Even if the board were found to be negligent in respect of its decision to abstain from all wastewater treatment at its plant in Bandu, it would still avoid liability under the corporate governance regime in Zutopia.

We can now begin to see how the regulatory and social welfare effects of corporate governance rules play out in the transnational context. The lack of government regulation in Bandu of toxic wastewater disposal and Zutopia's unwillingness to extend its environmental regulation to foreign operations of Zutopian corporations, combined with Zutopia's rules insulating managers from liability for negligent business decisions, enable a corporate decision not to treat wastewater in the Bandu plant. Of course, the fact that this decision could be made without legal liability does not

determine that it will be made. The World Corp board might adopt high, modest, low or no wastewater treatment standards for reasons of corporate efficiency, convenience or humanitarian concern. The key point here is that, in circumstances where there are few or no state-created regulatory standards, decisions made by companies like World Corp would produce a de facto rule on wastewater for Bandu with all of the attendant social welfare effects. We also can see that as transnational corporations contribute to the de facto regulatory regime for things such as environmental safety through their business decisions and actions, an important part of their decision-making calculus might include the consequences under the fiduciary principles of the corporate governance rules in their home jurisdictions for making a decision abroad that results in substantial loss to the corporation. Thus, changes in the fiduciary duty rules might well result in changes in the kinds of decisions corporations make and consequent changes in the regulatory and social welfare effects of those decisions.

Deciding whether, as a matter of global policy, changes to the fiduciary duty rules in some rich, developed countries in the hope of improving social welfare conditions in some poor, developing countries is a good idea would require a complex analysis of the expected national and global welfare benefits of such changes versus the national and global welfare costs, as well as a sophisticated understanding of corporate behaviour and regulatory strategy. Such an analysis would inevitably pit national sovereignty concerns against global welfare ones, and require transnational political dialogue and engagement of the type rarely seen in the context of what might traditionally have been understood to be a national regulatory issue like corporate governance. Yet, once the transnational regulatory and social welfare effects of national corporate governance regimes are on the table for analysis by scholars and policy-makers, it becomes difficult for advocates to support the status quo regime without at least attempting to address its potential global downsides. Thus, what was once an issue of national policy becomes one of global policy and what was once an issue involving the interests of shareholders and managers becomes one involving the interests of a much broader global community. It might be the case that the current regime of fiduciary duty rules in the developed world is 'optimal' from the standpoint of global social welfare, but at least exploring its effects through a focus on corporate decision-making subjects those effects to broader political debate and possible contestation.

Corporate governance rules affecting the power of corporate managers to defend against hostile takeovers by third parties in developing countries provide another example of a corporate governance regime with

significant global governance effects. Some development economists have argued that the ability of developing countries to capture gains from trade for national development through reinvestment is in no small measure affected by industry concentration and local control. From this insight, some have suggested the importance of promoting large, locally owned 'national firms' as a development strategy.

The basic argument is that countries with large, concentrated industries will be able to capture a larger share of the gains from trade than countries with more diffuse or disaggregated firms and industries. As one might imagine, firm and industry size and concentration is often significantly higher in rich, developed countries than in developing countries in almost every industry sector. If these theorists are correct regarding allocation of gains from trade, it would be critical for industries in developing economies to achieve a certain size and concentration *before* entering the competitive global economy if they hope to obtain a reasonable share of the gains from global trading.

Development policy-makers influenced by these ideas have sought to encourage the development of national firms through the use of tariff and subsidy programmes, antitrust law, preferential tax policy and other national regulatory efforts. Traditionally, less emphasis has been placed on corporate governance rules in the development context, though they are also significant determinants of the size, ownership and global competitiveness of firms.

By contrast, a strict neo-liberal prescription for economic development would encourage early opening of developing country markets to global competition through the abolition of trade barriers and other practices that support local industry, and a shift to export-led industrial growth capitalized by foreign direct investment. The corporate governance analogue to this development programme is often a package of 'best practice' corporate governance rules that, among other things, do not permit restrictions on markets for 'change of control' of local companies. Advocates of this corporate governance regime argue that rules that permit corporate managers to resist hostile takeover, like trade barriers, promote inefficiency, discourage innovation, facilitate corruption and entrench non-performing management to the detriment of shareholders and economic growth more broadly.

If a developing country as a matter of policy sought to develop and retain national firms and industry concentration to compete and extract gains from trade more effectively in the global economy, in addition or as an alternative to tariff and subsidy policy, antitrust rules and tax policy,

it might make sense *not* to adopt corporate governance rules that permit hostile takeovers, at least by foreign investors. Permitting hostile takeovers may result in foreign rather than domestic ownership of emerging firms – whenever local firms begin to reach a size that could affect the competitive position of foreign firms in the global market, they would be acquired by foreign competitors. The rules may also result in reducing local firms into franchise supply subsidiaries of larger foreign parents, thereby limiting proprietary local knowledge and skills development and the likelihood of spin-off entrepreneurship and significant capital reinvestment in local operations.

In addition, corporate governance rules, like those regarding markets for change of control, by shaping the ownership, size and bargaining power of firms, may affect the content of firm decisions as well as the regulatory and social welfare effects of such decisions. For example, locally owned national firms might have more of a stake in things like the quality of the local environment, the strength of the local economy, the education and training of local labour pools and national economic development through capital reinvestment than foreign owned firms or subsidiaries of foreign parent companies. Weaker, more dependent local firms may, in turn, lead to weaker local regulators who must balance the risk of alienating foreign interests against local policy concerns. Over time, weaker regulation and government oversight might lead to increased economic and regulatory power by foreign firms, which, in turn might lead to even weaker local regulators and deteriorating social welfare.

Of course, before deciding on a policy with regard to corporate governance and hostile takeovers, one would need to consider the possible risks of limiting markets for change of control. Such risks might include reduced foreign investment, capital shortages, management corruption, underperforming assets and slower growth. It is also possible that a prohibition on both foreign and domestic hostile takeovers may limit the efficient consolidation of local companies and thereby slow the development of national firms. What is important to see here is that governance rules regarding, in this case, markets for change of control, can affect the size, structure, development and goals of corporate actors, the bargaining power of those corporate actors vis-à-vis other corporate actors in the global economy, and the economic and regulatory bargaining power of the states in which those corporate actors are located.

Given the potential magnitude of these effects, it is worth thinking about why the neo-liberal regime of 'best practice' corporate governance has not met with more resistance in developing countries or transitional

economies in recent years. One possible explanation is the near-total dominance of the neo-liberal view of the transnational economic sphere as a vast, relatively unregulated globalized market in which the efficient allocation of resources and gains from trade will be most effectively accomplished by the mostly unimpeded workings of market forces. At least at the level of theory, one should expect that the relatively unimpeded play of competitive forces among private actors in a marketplace so large as to preclude effective domination or exclusion of competitive market entrants should result in increased global welfare. In other words, if competition is nearly perfect in large markets such as the US or the EU, one should expect an even more perfect competitive situation in the larger, less regulated global economy. From this perspective, the best national regulatory strategy would be to get out of the imperfect local market and into the more perfect global market as soon as possible. A substantial regulatory step in this direction is to eschew all idiosyncratic or protectionist regulations, tariffs, subsidies and administrative practices and adopt 'best practice' regulatory frameworks that facilitate the operation of global market forces and the laws of comparative advantage.

This image of the transnational economic sphere differs quite dramatically from the one I have suggested here. Far from being a single, deregulated space of mostly unimpeded competition, the transnational economic sphere is characterized by multiple, overlapping and sometimes contradictory regulatory regimes, complex and multilayered market segmentation and dramatic variations in power and market dominance among nation-states and corporate actors. In such circumstances, one might expect many more, rather than fewer, market failures in the transnational sphere than in large, relatively integrated markets like the US or the EU. Further, in the neo-liberal conception of the transnational economy, competition among private economic actors acting largely in the absence of public regulation results in an efficient allocation of resources and gains from trade. By contrast, in the conception of transnational economic life drawn here, corporations are not only market competitors but active regulators shaping and creating transnational regulation. As such, there is no reason to think corporations would be any less likely to regulate in ways designed to entrench their market advantages to the detriment of competition than local, national or transnational 'public' regulators. In such circumstances, the need for identifying means like corporate governance rules for shaping the content and effects of corporate regulatory power seems particularly acute, even if the goal were a desire to facilitate the functioning of competitive markets.

In light of the global governance effects of corporate activity, there would seem to be more at stake than ideological or theoretical confusion if international lawyers, academics and policy-makers continue to treat corporate actors as 'the regulated' or 'the governed' and nation-states or intergovernmental institutions as 'the regulators' or 'the governors'. Such incomplete or counterfactual characterizations may well result in significant misunderstandings about the way the transnational regulatory regime actually functions and consequent mistakes in policy-making with perhaps disastrous effects on global social welfare. Indeed, the transnational legal order can only really be understood if we examine the ways in which 'private' corporate action (or inaction) and 'public' state or institutional action (or inaction) constitute, transform and interact with each other to create a transnational governance regime. Looking at the legal rules alone only gives us part of the story. To get a fuller picture of global governance, we must begin to map the decisions of corporate actors with the same attention, specificity and rigour that international lawyers and academics have applied to state activity. Mapping the cumulative effects of corporate activity may well be as significant to understanding the actual functioning of the transnational regulatory regime as mapping the national, regional and transnational legal rules themselves.

At the same time, however, the power and regulatory impact of transnational corporation decision-making notwithstanding, our exploration of the impact of national corporate governance regimes on that power and decision-making suggests that corporations, as legal institutions, might be more susceptible to regulatory intervention through national law than is frequently supposed in the literature about corporate regulation and globalization. It seems worth exploring further whether corporate governance rules designed to affect generally the structure and methods of corporate decision-making might provide a fruitful site for intervention by activists and progressive policy-makers to supplement more traditional means of regulating corporate conduct such as labour standards or environmental regulations. If, for example, it could be demonstrated that fiduciary duty rules have a significant impact on corporate decision-making regarding worker safety or environmental standards in developing countries, it seems possible to imagine that it might be more efficacious and efficient to seek to change the fiduciary duty rules in the relatively few home jurisdictions of most transnational corporations than to seek to obtain worker safety or environmental regulation in developing countries across the globe.

As international scholars and policy-makers of transnational governance, we have much to learn from the ways in which transnational corporations engage, strategize, manage, shape and exploit the complex, multiple, overlapping layers of local, national, regional and international regulation that comprise the transnational regulatory regime. Many years as a transnational corporate lawyer taught me that, while corporations frequently complain about the lack of clarity and regulatory consistency in the transnational regime, they do not, as a whole, seem to suffer in varied, complex, ever-changing regulatory environments. Rather, much of transnational business 'success' is measured by how well companies negotiate the constraints and opportunities of these environments, and much of business 'strategy' is about the management or arbitrage of differences between regulatory jurisdictions to business advantage. We transnational scholars often despair at a global governance regime that seems to lack a constitutional or institutional framework to order what looks to many of us like chaos. In my experience, transnational corporations view the same backdrop of regulatory complexity, contradiction and multiplicity not as a problem but as a fact to be engaged with and strategized as they pursue their profit-making purposes. Perhaps, if we as transnational scholars could begin to see the decentralized and non-harmonized complexity of the global governance regime as a terrain filled not only with obstacles and pitfalls but also with benefits and opportunities for the pursuit of our political and social welfare purposes, we might greatly enhance our creativity and effectiveness in shaping global power for the public good.

5

Seasons in the abyss:* reading the void in *Cubillo*

CONNAL PARSLEY†

Two voids

On 11 August 2000, O'Loughlin J of the Federal Court of Australia delivered a summary of his reasons for decision in the matter of *Cubillo and Anor* v. *Commonwealth*.[1] The judgment was much anticipated. Inevitably, it would be a sign of the times, setting the timbre of Anglo-Australia's voice on the burgeoning issue of the 'stolen generation' of indigenous Australians. But when O'Loughlin J announced, in respect of the forcible removal of Lorna Cubillo from her family in Phillip Creek, that no documents seemed to be available to reveal the reasons for her removal, he did so using words which would resonate; let's face it, not in the ears of every Australian, but certainly in the hearts of those few affected or concerned. In what was to be the next case in a lengthening line of mismatches between indigenous and Anglo-Australian law,[2] O'Loughlin J's choice of words presented his listeners with an absence: 'There is a huge void. We know that Mrs Cubillo was taken away but we do not know why.'[3]

* With apologies to Slayer.

† I would like to thank everyone who has assisted me with this paper in their great variety of ways: Luke Brown, Megan Donaldson, Costas Douzinas, Federal Court staff in Melbourne, Trish Luker, Peter Rush, Michael Schaefer, Anna Szorenyi, Maureen Tehan, and Ash Woodward. I would like to thank in particular Catherine Mills, Anne Orford and Juliet Rogers for their generous reading and comments. All errors, omissions and unpursued lines of argument remain mine.

1 (2000) 103 FCR 1; (2000) 174 ALR 97 ('*Cubillo*').

2 It is worth noting that Irene Watson and other indigenous writers maintain that this is how we should see Australian indigenous law at the hands of Anglo-Australian law – as existing not *within* the latter's interstices and recognition spaces, but as entirely autonomous of it and in conflict with it. See for example Irene Watson, 'There Is No Possibility of Rights without Law' (2000) 5(1) *Indigenous Law Bulletin* 4. Note also the scholarship of Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (2003), available from http://pandora.nla.gov.au/tep/37519 (accessed 1 November 2005).

3 *Cubillo*, 174 ALR 97 at 111 (summary of reasons does not appear in Federal Court Reports).

Picked up immediately by the Aboriginal and Torres Strait Islander Commission (ATSIC) newsroom as the title for a story reporting the result of the case,[4] this very same dictum became a more general rubric through which to describe the experience of reading the nigh-on-500-page judgment. Emptiness, disbelief, disappointment. This was the judgment of an excessive and garrulous law which nevertheless left the applicants with, in their words, 'a huge void'. O'Loughlin J's void of a documentary not-knowing (a familiar void in the wake of Said's writings on the conditions of a colonial documentary history, and now his untimely departure) was thus, in one textual move, converted by movement of a repetition, into its opposite. Like Derrida's iterable sign, O'Loughlin J's 'huge void' of documents was immediately broken from its context, engendering a new possibility. 'The technical nature of the decision', said the ATSIC report, 'leaves another huge void and no redress for a burning sense of injustice.'[5] No longer the void constituted from the absence of text,[6] but the void for indigenous Australia within and in fact *because of* the text.

On the other hand, said O'Loughlin J, the position with respect to the other applicant, Mr Gunner,[7] was 'quite different'.

> In his case, there were several pieces of documentary evidence concerning his leaving Utopia. Mr Kitching's memory has faded and Mr Giese, through ill-health, was unable to give evidence. However, the documents that were available point strongly to the director, through his officers, having given close consideration to the welfare of the young [Mr Gunner]. Most importantly, there was his mother's thumbprint on a form of request that asked that [Mr Gunner] be taken to St Mary's and given a western education. I have concluded that [Mr Gunner] went to St Mary's at his mother's request.[8]

[4] ATSIC News Room, 'There Is a Huge Void' (September 2000), http://pandora.nla.gov.au/pan/41033/20060106/ATSIC/news_room/atsic_news/September_2000/huge_void.html (accessed 1 November 2005).

[5] *Ibid.*

[6] It should be noted that, despite O'Loughlin J's finding that there was 'a huge void' of documentary evidence surrounding Lorna Cubillo's removal, and 'a total absence of any documentary records' (*Cubillo*, 103 FCR 1 at 148; 174 ALR 97 at 247), oral evidence was presented over the course of the litigation which tended to establish, at least, that her removal was without the consent of her family (see for example *Cubillo*, 103 FCR 1 at 144, 152; 174 ALR 97 at 244, 251). O'Loughlin J speculates that the absence of records (kept of course by the Commonwealth) may be due to their destruction by Cyclone Tracy in 1975 (*Cubillo*, 103 FCR 1 at 148; 174 ALR 97 at 247).

[7] During the course of the preparation of this chapter, one of the applicants, Mr Gunner, died. He will be referred to as 'Mr Gunner' throughout, which has occasioned some editing of quotations.

[8] *Cubillo*, 174 ALR 97 at 111 (summary of reasons does not appear in Federal Court Reports).

This form of request, 'signed' with the thumbprint of Mr Gunner's mother Topsy Kundrilba, served as key documentary evidence in support of the proposition that Mr Gunner's mother willingly parted with her son. This phenomenon has received a significant and diverse treatment from all walks of legal scholarship, with Irene Watson telling indigenous Australia in 2000: 'Don't Thumb Print or Sign Anything!'[9]

Stolen generations

The *Cubillo* case was not the only litigation on the 'stolen generations' of Australia's indigenous people.[10] It was, however, something of a test case for about 700 other potential plaintiffs. Such litigation concerns the Australian Government's policy of removing so-called 'half-caste' Aboriginal children from their families, in what Robert Manne has called 'the racist belief . . . that "part-white" children had to be "rescued" from the primitive, godless and degraded Aboriginal world'.[11] The total number of children removed under this policy is unclear. In 1994, the Australian Bureau of Statistics estimated about 17,000, but Robert Manne in his detailed work of scholarship puts it at between 20,000 and 25,000.[12] Many of these 'removals' were in New South Wales and Western Australia. In the Northern Territory, the jurisdiction most relevant to the *Cubillo* case, Manne estimates that fewer than 1,000 children were removed between 1910 and 1970, although he does state that 'half-caste' children were systematically removed.[13]

The legal basis on which children were removed varied throughout Australia and over time. Taking Queensland as an example, the removal of children was undertaken originally without any official authorization, then from the end of the nineteenth century by legislation specific to Aborigines, or else by general 'welfare' laws.[14] Although assimilative legislation was enacted after the National Welfare Conference of 1937,[15] it was not

[9] Watson, 'No Possibility of Rights without Law', p. 4.

[10] See for example the chronology of litigation landmarks set out in Chris Cunneen and Julia Grix, 'Chronology: The Stolen Generations Litigation 1993–2003' (2003) 5(23) *Indigenous Law Bulletin* 14.

[11] Robert Manne, 'In Denial: The Stolen Generations and the Right' (2001) 1 *Quarterly Essay* 1, 3.

[12] *Ibid.*, p. 27.

[13] *Ibid.*

[14] Diana Henriss-Anderssen, 'The "Stolen Generation" in Queensland: A Critical Perspective' (2002) 11(2) *Griffith Law Review* 286 at 292–301.

[15] *Ibid.*, pp. 298–9.

until 1965 that assimilation of Australia's indigenous people became the official Queensland government policy.[16]

For its part, the *Cubillo* case concerned only two particular removals perpetrated under Northern Territory legislation from 1918 and 1953: the removals of Lorna Cubillo and Mr Gunner.[17] Their statement of claim alleged that they had been 'forcibly removed from their families and detained in institutions against their will pursuant to a state-sanctioned policy whereby "part-Aboriginal" children were removed from their families'.[18] The relevant legislation at the time conferred upon the Director of Native Affairs the power to remove and detain part-Aboriginal children 'if in his opinion it is necessary or desirable in the interests of the [child]'.[19] Lorna Cubillo and Mr Gunner made no attempt to undermine the validity of this legislation or its policy framework. Instead, they argued on the facts that there had been an improper exercise of power because their best interests were not taken into account, and also a breach of statutory duty by the Director in failing to look after their custody, maintenance and education as required under the legislation. For these and some other enumerated breaches, damages were claimed. Since the manner of the exercise of power, and the subjective intention of those carrying out the removals, were in question, the case turned on the presentation of a massive amount of evidence, both oral and documentary.

In the result, O'Loughlin J dismissed all of the substantive claims, finding that the Commonwealth had not breached its 'duty of care' to the claimants. He even dismissed the application to extend time under the Northern Territory's statute of limitations[20] – an application which needed to be allowed in order to achieve success on any of the substantive points.

The form of consent

The 'technical nature of the decision' is nowhere better embodied than in the documentary evidence, mentioned above, which precluded

[16] *Ibid.*, pp. 301–6. Note that Manne criticizes the *Bringing Them Home* report into the stolen generations for not distinguishing between the 'pre-war eugenicist and post-war assimilationist chapters of child removal': Manne, 'In Denial', p. 30. Manne argues that as a result the plausibility of the discussion in that report on the relationship between child removals and genocide was weakened.

[17] For a thorough case note, which is necessarily long, see Jennifer Clarke, 'Cubillo v. Commonwealth' (2001) 25 *Melbourne University Law Review* 218.

[18] As summarized in Cunneen and Grix, 'Limitations of Litigation'.

[19] Aboriginals Ordinance 1918 (NT), s. 6(1).

[20] Limitations Act 1944 (NT). See *Cubillo*, 103 FCR 1 at 443; 174 ALR 97 at 542–3.

O'Loughlin J from finding credible Mr Gunner's version of events surrounding his removal. I refer again to the 'form of consent' purportedly 'signed' by his mother Topsy Kundrilba. The wording of the form is this:

> FORM OF CONSENT BY A PARENT
>
> I, TOPSY KUNDRILBA being a full-blood Aboriginal (female) within the meaning of the Aboriginals Ordinance 1918–1953 of the Northern Territory, and residing at UTOPIA STATION do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son [. . .] GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance. MY reasons for requesting this action by the Director of Native Affairs are:
>
> 1. My Son is a part-European blood, his father being a European.
> 2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
> 3. I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
> 4. By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel at Alice Springs.
>
SIGNED of my own free will	)		TOPSY	
this	)	her		mark
day of 1956	)			
in the presence of	)			
			KUNDRILBA	

The form is 'signed' with the thumbprint of, allegedly (far from apparently), Topsy Kundrilba – in the space bounded by her name and the words 'her mark'. The form is not witnessed, nor is it dated.

O'Loughlin J made explicit reference in the judgment to his possible doubts about, and the fallibilities of, the document. Certainly there was evidence presented which questioned the extent to which the undated, unwitnessed form should be relied upon. This included evidence that Topsy Kundrilba had screamed hysterically while her son was forcibly removed,[21] and, significantly, that she did not speak English.[22] O'Loughlin J refers to these doubts about the plausibility of Topsy having given her

[21] *Cubillo*, 103 FCR 1 at 252–3, 256; 174 ALR 97 at 351–2, 354–5.
[22] *Cubillo*, 103 FCR 1 at 261; 174 ALR 97 at 360.

full and informed consent:[23] he acknowledges that there is no way of knowing if the thumbprint was in fact the mark of Topsy Kundrilba,[24] nor whether the obviously complicated legal and institutional language could have been adequately communicated to Topsy (considering that she spoke no English).[25] He resolved the matter, nevertheless, with the following statement:

> But it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as Topsy the meaning and effect of the document. I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.[26]

O'Loughlin J suggests, in this finding, that as long as there is *any* possibility 'not beyond the realms of imagination' that Anglo-Australian officials removing children from their families were 'dedicated' and 'well-meaning', then no further investigation into the notion of consent need be made.[27] The trial judge demonstrated, then, a certain unwillingness to go behind the fact of the 'signed' form in order to ascertain its value, assuming instead that its significance was paramount. In the ensuing discussion, I intend to show that this decision is a remark about, and a re-marking of, the being of sovereignty.

[23] For a thorough exploration of the question of 'consent' in *Cubillo*, see Hannah Robert, 'Unwanted Advances: Applying Critiques of Consent in Rape to Cubillo v. Commonwealth' (2002) 16 *Australian Feminist Law Journal* 1. Note, however, that many of those associated with the litigation consider the issue of 'forcible' removal and the putative 'consent' of parents to be less crucial to the case than the media and other commentators have made out. The problematic of consent has captured the social and political imagination, yet it played a relatively minor role in submissions at trial. First, the form is difficult to read as a relevant 'consent', because on its wording it is not a consent to removal of the child – and certainly not a total and permanent one. Secondly, in some instances mothers reportedly handed their children over, but in the context this does not make such children any less stolen than those forcibly removed. Forcible removal was not the only species of removal practised under the relevant litigation, and it was not necessary to show that force was used in order to bring a removal within the ambit of the particular claims brought – although this test case did focus the presentation of evidence on people who were forcibly removed.

[24] *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344. Other documentation used at trial included a 'Form of Information of Birth' for Mr Gunner, which was dated 17 May 1956, and which stated Mr Gunner's birthdate to be 19 September 1948. This form bears a thumbprint which was used to verify the thumbprint on the form of consent. However, in that both forms were ostensibly printed in the same year, the value of this verification is questionable.

[25] *Cubillo*, 103 FCR 1 at 243; 174 ALR 97 at 343.

[26] *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

[27] Robert, 'Unwanted Advances', p. 12, notes that this seems to suggest a criminal rather than civil standard of proof.

The thumbprint, hermeneutics and consent

Faced with the morass of detail in the 500-page trial judgment (and subsequent litigation), many commentators, for the reasons above, have with good cause taken up the issue of the 'thumbprint evidence' either in itself or as a gambit for general analysis. Even those who have attempted a dispassionate summary of the findings in the case have on this topic irrupted into an open question: how can we conceive of consent, in the context of such an unstable and unequal communicative environment?[28] Certainly, the thumbprint, with all its attendant illiteracy and criminality, resists easy interpretation as an act of full volition. How can we know that Topsy *intended* to press her thumb to the form, and thus perform the sealing-off of any claim to contest its substance – especially in light of the oral evidence to the contrary? How meaningful then, is the mark made by her hand, and therefore the form on which the mark is made?

The popular language in which this debate is framed, the language I have just used – of intention, meaning and the knowability of Topsy's will in a particular interpretive context – finds a resonance in the hermeneutics of Hans-Georg Gadamer. Casting the hermeneutic question, as Gadamer does, as one of 'avoiding misunderstanding' by 'bridging . . . personal and historical distance between minds', Gadamer hopes we can reveal the secrets of the mind which produce any textual object of understanding[29] – here, the thumbprint. He might have us historically reconstruct the world in which this thumbprint had an original meaning or function, even as we acknowledge that what is said to us, for us, in a new context, will 'always [be] more than the declared and comprehended meaning'.[30] And this seems instinctual. Certainly, it is alternate evidence about the context of the 'signing' which provides us with the means to probe under and behind the thumbprint to a 'reality' which might have been more faithfully represented in the findings of the trial judge.

[28] See for example Cunneen and Grix, 'Limitations of Litigation', p. 21.

[29] Hans-Georg Gadamer, 'Aesthetics and Hermeneutics' in Clive Cazeaux (ed.), *The Continental Aesthetics Reader* (London, 2000), pp. 181–6 at pp. 181, 183. It should be noted that Gadamer distinguished between 'vestiges', which are largely non-linguistic 'fragments of a past world that . . . assist us in the intellectual reconstruction of the world of which they are a remnant', and 'sources', which are part of a linguistic tradition and 'serve our understanding of a linguistically interpreted world' (at p. 183). Perhaps this distinction is less important to the discussion here than it might seem, considering that Gadamer believed that many things are hybrids of the two categories (at p. 184) – certainly documents would be a hybrid form – and also considering that this distinction fares poorly under the account of arche-signification offered by Jacques Derrida.

[30] Gadamer, 'Aesthetics', p. 184.

Gadamer's dialogical conception of language, in which it is the 'goodwill' of the participants which creates the possibility for 'being other' (that is, sharing a space for communication with an other)[31] seems to falter under the pressure of the context we seek to interrogate here. The documented linguistic impossibility of a 'shared space' between Topsy Kundrilba and the Director of Native Affairs emerges to everyone who reads the text of the form, as a matter of intuition. Perhaps this is hinted at in Gadamer's reference to a historical text saying more than its declared and comprehended meaning. And yet, is what is at issue in the treatment of the thumbprint evidence *really* the ability to reconstruct a hermeneutic world-context by which, from the vantage point of a trial some decades later, we can *understand* why Topsy Kundrilba might have pressed her thumb to the form, and what she was thinking at the time? Of course not, because this is not how or why signatures work.[32] In a sense, signatures exist so that the very difficulty of this exercise is circumvented. Signatures are always ready, by the simple virtue of their punctual ever-presence, to put in force a state of affairs which relies for its existence on the creation of a border between the will of their maker and the document which is made; between *a* past and *the* present; but always a past which was once a fully-present present. This process, as I intend to lay out, involves a hierarchy of priorities – a hierarchy which inheres in the Western metaphysics of language and of sovereignty.

Derrida, the signature, the abyss in signification

Jacques Derrida's account of the signature will be a certain opening to the point I wish to make about *Cubillo*: specifically, that the void identified in the 'technical nature of the decision' underwrites all of the priority decisions made in regard to the 'thumbprint evidence', and that this 'performs' a sovereign entity, or more precisely a being of sovereignty and a sovereign Being; thus, a void at the heart of sovereignty.

For Derrida, the signature is a species of the linguistic sign. It participates in and is constituted by the features of what is known as 'writing'. On the way to establishing, amongst other things, that writing breaks from 'the horizon of communication as the communication of consciousnesses or

[31] Hans-Georg Gadamer, 'Text and Interpretation' in Diane P. Michelfelder and Richard E. Palmer (eds.), *Dialogue and Deconstruction: The Gadamer–Derrida Encounter* (Albany, NY, 1989), pp. 21–51 at p. 26.

[32] To be fair, Gadamer himself might have said that 'that is not the language of the signature', that is, that the signature communicates the language of the signature.

presences',[33] Derrida sets out the 'essential predicates in a minimal determination of the classical concept of writing'.[34] The first is that a written sign is a

> mark which remains, which is not exhausted in the present of its inscription, and which can give rise to an iteration both in the absence of and beyond the presence of the empirically determined subject who, in a given context, has emitted or produced it.[35]

The second is that the written mark 'carries with it a force of breaking from its context'; that is, breaking with 'the set of presences which organize the moment of its inscription'.[36] These presences include the presence of the inscriptor, the 'entire environment and horizon of their experience', and, above all, the *intention* of the inscriptor which would, as Derrida puts it, 'animate' the inscription.[37] The third, which is perhaps less immediately relevant in the context of the performative signature, as we shall see in a moment, is that the written mark contains within it the force of breaking *internally* from its place in a syntagmatic chain such that it can be combined productively within other chains in a language.[38]

These points are foundational to understanding how the thumbprint signature can be read as a writing, or mark-making, which takes effect and asserts its presence on its readership. But it is Derrida's presentation and alteration of the arguments of J. L. Austin on the 'problematic of the performative' to which I now turn. Considering the signature as a performative act of meaning, a performance of the pure will of the signatory, Derrida states that 'performative' language is opposite to an 'assertion'. Whereas a constative utterance (assertion) attempts a true or false description of something in the 'real world', or 'outside of language'; a performative utterance involves not some transmission of meaning, but something that is done 'by means of speech itself'.[39] This phenomenon has an obvious legal dimension to its character, and all lawyers are familiar with the performative through its frequent incarnations as 'hereby', or 'shall', or the signature itself. The signature means nothing but pure intentionality, and enacts not a transmission of meaning, but the force of an original operation – the production of an effect.

This of course represents a challenge to the most settled structuralist concept of signification: that all of language is signs, which are composed

[33] Jacques Derrida, *Margins of Philosophy* (trans. Alan Bass, Chicago, 1982), p. 316.
[34] *Ibid.*, p. 317. [35] *Ibid.* [36] *Ibid.* [37] *Ibid.* [38] *Ibid.* [39] *Ibid.*, p. 321.

of a double – signifiers and their signifieds. The disappearance of the signified in the performative produces what Husserl might have called a 'crisis of meaning'.[40] In the performative use of language, the 'I thee wed', or the signing of a form, there is no referent but only the will itself these uses designate. Now, Derrida remarks that, for Austin, the value of the original 'context' of the utterance is of crucial importance in understanding its effect; that the 'conscious presence of the intention of the speaking subject for the totality of his [sic] locutory act' will affect the act itself.[41] As such, Derrida reads Austin to mean that, once more, even in the context of the performative speech act, communication becomes the communication of an intentional meaning, and it is this meaning and not another which breaks through and achieves transmission. Although it is clear that, for Derrida, the 'will' of the intentional speaker can no longer be the force governing the scene of interpretation of performative 'writing', and that for constative utterances the will has no structural role to play in terms of the most generalizable structure of signification, one more distinction between Austin and Derrida's reading of him is necessary here.

Austin's text concerns itself with the possibility that a performative utterance, trying, as it does, to achieve something in the 'real world' by use of language, may fail in its endeavours. Although Austin had freed his analysis of the performative from the value of truth or falsity, Derrida argues that Austin's analyses 'permanently demand a value of *context*'.[42] That is, Austin establishes contextual or circumstantial criteria which are necessary for the successful operation of the performative – for example, that the act of naming a ship be carried out by the person appointed to the task.[43] In fact, Derrida refers to six criteria for performative success as set out by Austin, and comments that Austin's enterprise is remarkable in that it recognizes the possibility that a performative utterance may fail in its purpose, and even that failure is somehow an *essential* risk, and yet, to quote Derrida directly,

> with an almost *immediately simultaneous* gesture made in the name of a kind of ideal regulation, [Austin makes] an exclusion of this risk as an *accidental, exterior* one that teaches us nothing about the language phenomenon under consideration.[44]

[40] *Ibid.*, p. 319. [41] *Ibid.*, p. 322.
[42] *Ibid.*, p. 322 (emphasis in original). [43] *Ibid.*, p. 323.
[44] *Ibid.* ('*immediately simultaneous*' emphasis in original; '*accidental, exterior*' emphasis added).

Derrida's reading here can be contrasted with Shoshana Felman's.[45] Felman reads Austin's text as in fact itself performing or admitting of its own failure, which then demonstrates a ground (a failing, slipping ground) for the performative. For Felman, Austin's performative is brought into a relation not to a ground, but exactly to a loss of ground – thus situating failure within the walls of its condition.[46] Similarly, for Derrida, this possibility of failure is constitutive. He asks: '[w]hat is a success when the possibility of failure continues to constitute its structure?',[47] and, in a gesture, he includes the 'void' hitherto lying outside of 'meaningful' language within the grounds of language itself:

> Therefore, I ask the following question: is this general possibility necessarily that of a failure or a trap into which language might *fall*, or in which language might lose itself, as if in an abyss situated outside or in front of it? . . . In other words, does the generality of the risk admitted by Austin *surround* language like a kind of *ditch*, a place of external perdition into which locution might never venture, that it might avoid by remaining at home, in itself, sheltered by its essence or *telos*? Or indeed is this risk, on the contrary, its internal and positive condition of possibility? this outside its inside? the very force and law of its emergence?[48]

According to Derrida, this void within language inheres in the very structure of what a sign (as iterable, breakable from its context) is. Spoken signs are no exception, relying for their force and emergence *as signs* for general use in language on the possibility that any particular will of a particular speaker may be absent – the danger of an abyss in every utterance. This structural remark about 'arche-écriture' (the 'graphematic' structure of locution)[49] will have significant implications for O'Loughlin J's reading of the form of consent and its signature, and for the conception of sovereignty which emerges from it. But permit now a brief diversion from the sovereign horizon of this discussion – a diversion which is yet a continuation of Derrida's reasoning, and which is also a kind of conclusion to the question of the signature.

Of course, the result of a performative failure, in any sense, whether it be in Austin's parasitic or abnormal sense of the signature, is that we

[45] I am grateful to Anne Orford and Catherine Mills for each drawing this contrast and similarity to my attention.

[46] Shoshana Felman, *The Literary Speech Act* (trans. Catherine Porter, New York, 1983), pp. 66–7.

[47] Derrida, *Margins*, p. 324. [48] *Ibid.*, p. 325 (emphasis in original). [49] *Ibid.*, p. 322.

(finally) pay heed to the potential void within this sign. The signature and everything it authorized becomes 'void', transactions are set aside, legal documentation becomes worthless and unable to sustain any relation to life. Only then will a void, the rigid opposite of meaning and signification, blossom from the mark which is otherwise present and ready to signify. But Derrida makes clear that the sense of the signature is that it captures an assumption about the making of the mark in an intentional present. Although it is necessary that the signature be able to function in the absence of the signer, the signature marks and captures a 'having-been present in a past now', which becomes a 'now in general' ('*maintenance*') – the 'transcendental form of nowness'.[50] This is 'stapled' to the present in the form of the signature.[51]

The art of the signature, though, is to present an illusion of being an absolutely originary event – a representation of a singular and pure will which appears readily, yet which Derrida reminds us is, in a sense, split.

> Is there some such thing? Does the absolute singularity of an event of the signature ever occur? Are there signatures?
>
> Yes, of course, every day. The effects of signature are the most ordinary thing in the world. The condition of possibility for these effects is simultaneously, once again, the condition of their impossibility, of the impossibility of their rigorous purity. In order to function, that is, in order to be legible, a signature must have a repeatable, iterable, imitable form; it must be able to detach itself from the present and singular intention of its production. It is its sameness which, in altering its identity and singularity, divides the seal.[52]

It is through this commonplace of interpretation that Derrida's work on the signature shows the structure of signification and the privileging of the presence of the sign. Even if second-guessing a judge's philosophy of language and evidence is an impossible task (and perhaps makes for irritating reading), it seems from O'Loughlin J's comments on the 'signed' form that he might not entirely subscribe to Austin's ideas of the performative – and instead agree with Derrida that, as a matter of evidence, the signature endures as a singular performance *despite* the crisis of transmission of any kind of hermeneutic 'context'. Remarking on the potential fallibilities of the form as an indication of Topsy Kundrilba's state of knowledge, or of her comprehension of the content of the form, or even of whether it was her thumbprint that marked the page, recall that

[50] *Ibid.*, p. 328. [51] *Ibid.* [52] *Ibid.*, pp. 328–9.

O'Loughlin J eventually stated that he had 'no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document'.[53] O'Loughlin J is finally *unwilling* to consider the prospect of a *failure of communication* – a reading of the Commonwealth's form whereby it signifies nothing but its own lack of mandate to claim consent; performs nothing beyond its own potentially effete presence. As we have seen, this force is one which contains *within it* a void necessary to the structure of signification, and the form thereby produces within itself another void, a fully *present* void, or a void *despite presence*, to match that absence of documentary evidence which marked Lorna Cubillo's removal.

Finding sovereignty

I have said that O'Loughlin J's own performance, the momentary reinstitution of certain hierarchies and privileges of, for example, the reliability of written over oral evidence, and of presence over absence, is a performance of sovereignty. Of course, in two senses, the performance of sovereignty operates because of what I reluctantly call 'pragmatic' considerations. First, O'Loughlin J is bound by a set of rules, procedures and principles in operation in the Federal Court (the less 'pragmatic' perspective being that these rules and procedures are designed by and for the culture of their institution; institution as a putting-in-place, but also institution as the place of having-been-put-in-place).

The second 'pragmatic' way in which O'Loughlin J's findings on the form operate as a performance or re-marking of sovereignty is the structural inevitability of the absence of documentary evidence supporting Mr Gunner's position, or more precisely the inevitability and apparent neutrality attaching to the fact that the Commonwealth, as if it could have been any other way, was able to provide better written support for the Anglo-Australian sovereign position. This has been called by Ransley and Marchetti a 'hidden whiteness', reflecting the idea that the supposedly 'neutral' procedures and categories of litigation in fact contain the values of the white Australian legal culture – to the extent that, for example, the witnesses for the Commonwealth were or appeared to the judges to be better educated, well adjusted and reliable.[54]

[53] *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

[54] Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 1(1) *Griffith Law Review* 139 at 146–8.

But there is a third, less pragmatic sense in which O'Loughlin J's findings on the form are a 'performance' of sovereignty – a sense which provides the previous two with their ontological backdrop. The figure of the sovereign in the performative utterance has been taken up by Judith Butler, who remarks that a performative speech act is understood as a 'speech act with the *power* to do what it says'; a speech act 'modeled on the speech of the sovereign state'.[55] The cadence of this understanding is addressed by the structural version of what Derrida and others have elsewhere handled as an ontotheological question. But the advantage of using the structural account is that it succeeds in elegantly describing an instability *inherent* in the process of all signification; in the structurally necessary *inclusion* of 'failure' in the concept of communication and its sovereignty – a very much *internal* void or abyss at once dwelling within and also enabling signification *and the Being of meaning in general.* That failing enabling is the subject of my analysis.

Although readers of Giorgio Agamben's work on sovereignty (especially the more recent *Homo Sacer* and its sequel *State of Exception*) will recognize here an easy link to his own writing on the nature of sovereignty as *constituted* by its own ban or exception of itself, its own suspension (an internal void);[56] it is through his earlier *Language and Death* that I will trace this relation between the Being of sovereignty and the abyss at the centre of the sign and of signification. In doing so, I interrogate the conditions instituted by the language of the form together with the signature on the form, proposing that, instead of regarding the instance of sovereignty and the phenomenon of the thumbprint (and its interpretation) as structurally equivalent or *metaphorical* with relation to each other, they should be regarded as *metonymically* linked; as producing each other as parts of a

[55] Judith Butler, *Excitable Speech* (New York, 1997), p. 77.

[56] Herein I have mainly avoided the dialectic spatial metaphor of inside and outside as a direct tool through which to understand the sovereign relation at play in the interpretation of the form of consent. This is partly in response to Gaston Bachelard's detestation of the geometricization of the linguistic tissue of the philosophy of being and non-being. But Agamben criticized Derrida's (if that word is appropriate – a most reverent criticism I think) attempt to surpass metaphysics, indicating that 'all' he managed to do was state better than anyone else that this is impossible – that metaphysics is always already grammatology in that 'the *gramma* (or the Voice) functions as the negative ontological foundation': Giorgio Agamben, *Language and Death: The Place of Negativity* (Minneapolis, 1991), p. 39. I have found it unhelpful in this context to relate the limit-concept of an inclusionary exclusion necessary to sovereignty, to this discussion, noting only that my conclusion will surely be as Agamben's work sets out – that sovereignty in this tradition is constituted of its own ability to exclude and to suspend itself: a void within.

kind of logical/syntactic metaphysical chain.[57] The aim of this approach is to try and show that the metaphysics of presence which enable sovereignty produce in *Cubillo* both the object for analysis (the thumbprinted form) and the analysis of that object (O'Loughlin J's faithful application of the priorities of the form). As such, I attempt to draw attention to a sense in which there is a 'paper chain of white Anglo-Australian men congratulating white Ango-Australian men on their judgments in decisions regarding Aboriginal peoples' lives'.[58]

The pronoun in the form and the form as pronoun

The question at which we have arrived is that of how sovereign being takes place through the form, its signature, and its interpretation at trial by O'Loughlin J. How does the language of the form 'take place' for sovereignty? A potential opening place for this question is Giorgio Agamben's *Language and Death.* The language of this analysis is grounded in the question of the ability of language to refer – which is a convenient language considering the problematic of the signature unfolded so far. As such, I begin by noting Agamben's argument concerning the logical implications which arise from the grammatical structure and categorization of those favoured referring words, nouns.

In *Language and Death*, Agamben remarks that 'at a crucial point in the history of metaphysics – the Aristotelian determination of the *prote ousia*', pronominal forms of referring were distinguished in nature or essence from all other forms of noun.[59] Whereas the common noun attempts to signify that which it names, the pronoun (for example, 'this' or 'that') takes as its dimension of meaning a 'dimension-limit of signification, the point at which its [signification] passes into *indication*'.[60] This marks the attempt by human language to grasp being: an attempt which through Aristotle and Hegel is mired in a constitutive negativity. Instantaneously, the 'this' that would be grasped becomes the 'not this'. Of course, Derrida too was aware throughout his analysis of the signature that the signature is always, despite being a 'this', firmly a 'not-this' which was once a 'this'

[57] See for example Roland Barthes' reference in 'The Metaphor of the Eye' to 'the two major categories (operations, objects or figures) that the science of linguistics has recently taught us to name: arrangement and selection, syntagma and paradigm, metonymy and metaphor': Roland Barthes 'The Metaphor of the Eye' (trans. J. A. Underwood), as reprinted in Georges Bataille, *The Story of the Eye* (London, 2001), pp. 119–27 at p. 20.

[58] Robert, 'Unwanted Advances', p. 1.

[59] Agamben, *Language and Death*, p. 16.

[60] *Ibid.*, p. 17 (emphasis added).

(where 'this' is the will of the mark-maker). But, according to Agamben, in Latin grammar, pronouns were thought to signify 'pure being in itself, before and beyond any qualitative determination [*substantiam sine qualitate*]';[61] thus the pronoun came to conflate with the 'sphere of *pure being*'[62] identified in medieval ontotheology as the '*transcendentia: ens, unum, aliquid, bonum, verum*'.[63] The nature of the transcendentals, shows Agamben, is that they are 'already received in every received object and predicated in every predication . . . they accompany . . . every entity without adding anything real to it';[64] thus, a kind of condition of being. The link between the pronoun and the *transcendentia* is determined by the medieval grammarians through reference to the ancient Greek grammatical concept of *deixis*.[65] It is structured and enacted through the *demonstratio*, which represents a supplementary gesture of indication which must accompany the pronoun in order for it to be retrieved from the nullity of the void.[66] Due to the impossibility of finding 'an objective referent' for words like 'here' and 'now', they are defined 'only by means of a reference to the instance of discourse that contains them'.[67] The fact that *deixis* is contemporaneous with discourse means that pronouns are language itself; conceived of as 'empty signs' which become full only when put into the service of a particular discourse.

This enables the step to understanding something of the operation of the signature on the legal form. Of course, the pronoun 'I' on the form is given meaning, or fulfilled, only by the completion of the form. It is obvious that the form is in existence prior to the application of the signature, and is yet without significance unless the signature occurs, rendering the form and everything on it part of the broader discourse of Topsy's will as relevant to litigation in what was then a future. But there is something less evident here. This first plane of *deixis* (the signature as a demonstration of the 'I') has something else which is necessary for its existence. Is the fulfilment of 'I' by the signature really the only modality of *deixis* in the form? Intuitively, no. The grammatical language of the form is at once that of the first person singular ('I', 'do hereby request', 'my . . . reasons . . . are'), but it is also haunted by a spectral discursive presence which is covertly signified less in the pronouns of the form and more in the form as a pronoun. This is a different, silent and yet necessary pronominal usage which is more transcendental in the sense of embodying a greater

[61] *Ibid.*, p. 20. [62] *Ibid.* (emphasis added).
[63] Essence: unity, something, the good, truth.
[64] Agamben, *Language and Death*, p. 21. [65] *Ibid.* [66] *Ibid.*, p. 22. [67] *Ibid.*, p. 23.

sense of the proximity to the *transcendentia*; that is the aspect of 'that which is always already said in every utterance by the very fact of saying it'.[68] It is not the pronoun 'I', but the pronominal sense of 'one' as in 'an individual'; or perhaps the pronoun 'you', as a shorthand for the institutional gaze upon Topsy Kundrilba as 'a parent' under the Aboriginals Ordinance. This is the Althusserian interpellative address which, as Butler reminds us, 'may arrive without a speaker – on bureaucratic forms, the census, adoption papers, employment applications'.[69]

This dimension is addressed by Charles Yablon, writing of the legal form: 'This is a form. It has no substance. It is filled with blanks. It is unsigned. It has no names, no places, no times. It is for no one. But it is not for no one. It is for you.'[70] So, while the 'signature' on the legal form gives a meaning to the pronoun 'I' in the form's wording, it also enforces a second pronominal sense – the sense in which Topsy Kundrilba is or was addressed by the form; an unspoken and far from apparent 'you' which is the term of address 'given form' by the form. The covert shifter which *is* the form, is the manner in which the sovereign *relation* takes place; and is the manner in which a sovereign discourse refers to its own taking place.

The form taking place

Here it is crucial to note the concept of Voice in Agamben's work. I have already said that it is the sovereign relation which looks institutionally on Topsy Kundrilba as 'you', which enables the overt place of *deixis* ('I') to ground itself. This needs to be unpacked further along two coexisting, mutually reinforcing trajectories. One trajectory is the manner in which the act of signing and the present mark enforced as the *maintenance* of the event constitutes Topsy as a subject who is *capable of signing*. But the second trajectory here is that the Being of sovereignty is established precisely through the lack of overt reference to the conditions of existence of the form as discourse; such that the form (linking with the first trajectory) presents itself as an emanation of will from its signatory. The second trajectory is taken up first.

As Agamben wrote, the conversion at play in the pronoun as an instance of discourse has for more than 2,000 years been called 'being'.[71] That is,

[68] *Ibid.*, p. 21. [69] Butler, *Excitable Speech*, p. 34.

[70] Charles M. Yablon, 'Forms' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (London, 1992), pp. 258–62 at pp. 258–9.

[71] Agamben, *Language and Death*, p. 25.

language's attempt to fully grasp presence and being, to indicate pure being unsullied by the mediation introduced by the common noun. Where the attempt of discourse is to signify the very conditions of its own being (that is, the conditions of discourse), it is silent; or, ironically, formless,[72] and yet present in every saying as the condition by which saying can occur. What has been introduced here as a matter of the pronominal is redescribed by Agamben as a substitution of the 'gramma' (the letter of language), for the will of the speaker to signify (through Aristotle this is known as 'voice').[73]

Agamben, in reference to the *removal* of voice as a condition, *the* condition of discourse, considers voice as a threshold between pure sound-as-sound, and sound embroiled in or overshadowed by signification. He adopts a capitalization ('Voice') to distinguish this sense of Voice as no-longer-pure-sound and not-yet-meaning, from the sense of voice as pure sound, an *animal* voice. It is only Voice and not voice which could 'open the sphere of utterance', or 'refer to the instance of discourse as such'.[74] The fact of language taking place relies on 'the Voice, as the supreme shifter that allows us to grasp the taking place of language, [which] appears thus as the negative ground on which all ontology rests'.[75]

Now it is possible to relate Derrida's structural account of the legal signature on the legal form (an account in which the form is mentioned not at all) to this development. In fact, the significance of O'Loughlin J's unwillingness to read the thumbprint on the form as anything other than an ever-ready presence of performative force extends slightly beyond the structural account presented above (which showed so well an order of priorities privileging the present and the presence of the thumbprint). In fact, what can now be understood is that the Voice is that which is not apparent and yet always ready (following Agamben) as the *possibility of signifying*, which is experienced indistinguishably from the act of actual signification such that (as Derrida might say) the negative foundation of (or void within) the process of signification is *concealed from the participant in discourse*.

The form itself is then the sovereign Voice, the possibility of saying, which by definition is structured to appear as laden with presence and signification, and which must appear as a present presence. So the

[72] This is presented by Agamben in a quotation from the *Regulae theologicae* of Alain de Lille, concerning the issue of a noun being put in service of designating 'the divine essence, pure being' (*Language and Death*, p. 28) – resonating for Agamben with the Hebrew sense of the 'secret and unpronounceable name of God' (p. 30).

[73] *Ibid.*, p. 33. [74] *Ibid.*, p. 35. [75] *Ibid.*, p. 36.

possibility of signifying is precisely a *faith in presence* which is exercised as a performance of interpretation by O'Loughlin J. The pronominal 'you' *which is the condition by which the form speaks to the signatory* (by which the form institutes a sovereign mode of speech (jurisdiction) over the signatory), also supplies an economy of signification and relation. It is the un-apparence of this phenomenon which is the transcendental condition of the legal discourse in which Topsy Kundrilba's will is constructed: that which is already said by virtue of saying. Sovereignty is, on these terms, a discourse, a condition for discourse, a construction of identities for discourse, and a manner of interpreting those identities. Sovereignty then *accrues from* the order of priorities of the form; and the form is to sovereign language and sovereign Being what the 'ordinary' pronoun is to Being in general; which is to say that sovereignty is an extreme discourse of Being in which all the ontotheological priorities and illusions of truth which are the subject of investigation by Western philosophy, are concentrated or made literal for being *enforceable*.[76]

Reopening the thumbprint

What we see in the thumbprint signature, then, is the same movement of the removal of voice in favour of a signature capable of signifying. Derrida analysed the performative act of signature as having some structural characteristic of an act of pure will, which changes it from a non-significatory mark (a simple act of volition which we might equate with Agamben's 'voice') into an act we *recognize or semantically define* as being a singular act of intention but which in fact is in its condition of being *not at all singular* – a form conforming in its structure to the repeatable or iterable sign of discourse – in other words, in a form which we recognize as the signature-form (or a performative form) more generally. Although the signature is probably already the best example of this phenomenon, Timothy Clark gives the date as an alternative example: 'in idea, [the date is] unique and idiomatic. Yet to be readable at all, a date must, so to speak, have effaced its putative singularity in its repeatability within the calendar.'[77] According to Clark, a date 'necessarily emerges as the very negation of that which it names in its singularity'.[78] Were a performative

[76] That is to say, brought (famously) into an intimate relationship with violence, as Walter Benjamin, Jacques Derrida, Giorgio Agamben and others have made clear.

[77] Timothy Clark, *Derrida, Heidegger, Blanchot: Sources of Derrida's Notion and Practice of Literature* (Cambridge, 1992), p. 168.

[78] *Ibid.*

mark to be totally singular, it would be unreadable, and as Derrida puts it, non-iterable.

So iterability is the same as the removal of the voice, and the taking-on of the terms of Voice; that is, the condition of becoming structurally ready to signify and participate in the conditions of discourse. In fact, something about the thumbprint alerts us to its readiness for legal discourse. In no sense can we say that a thumbprint is akin to the animal voice in Agamben's writing, nor the voice in Derrida's writing as close to the *unum* of transcendental, natural writing. This is so since knowledge about its uniqueness (and therefore its potential to function as signature) necessarily involves ontic knowledge of the technologies of human biology or the state of uniqueness or singularity with respect to the body and population. If fingerprints are close to the 'self' it is only a concept of 'self' which is already located with respect to the population at large and as administered by some form of equipped authority. A fingerprint may very well be a physical index of the 'animal' producing it, but its epistemological history is one which is tied up in techniques of what Foucault called governmentality; of management of a population – political life, or *bios*. The fingerprint as a species of legal mark, in the words of Steve Connor, marks an 'absolute coincidence of law and the body' and also 'an absolute break between an epoch of law and an epoch of wanton decoration',[79] in which an Aboriginal thumbprint might have some other 'voice'; a circulation in another system of meaning. In making this point I am saying only that it is already a sovereign discursive technique to apply the thumbprint as a signification of *will*. And this should be unsurprising, since Goodrich makes clear that the vernacular is inadmissible in legal fora, so it is precisely an 'erasure of voice' which is routinely undergone in order to participate in the 'benefits' of the community of legal language.[80]

How Topsy Kundrilba's will is constructed by the presence of the thumbprint as always already consenting

And, in fact, this is an example of the metonymic distribution of the sovereign discourse. The 'silent' pronominal form-as-Voice which is

[79] Steve Connor, 'The Law of Marks' (2001), http://www.bbk.ac.uk/english/skc/marks/ (accessed 1 November 2005).

[80] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London, 1990), p. 185. Goodrich points out that the presence of a vernacular might locate the language of the law as just 'one more dialect' which could then be 'weighed in the scales of legitimacy'.

the possibility of sovereign discourse has metaphysical priorities which O'Loughlin J privileges in interpreting the form. But in the thumbprint we also see these same conditions of discourse *producing* the object (a subject) for analysis. The dispersed operation of power, no longer necessarily constrained in the figure of the sovereign state, is here re-imagined (according to Butler) as a sort of marker of the historical loss of the Leviathan. The fantasy of its return takes place in language, she argues, in the figure of the performative.[81] The performative in language credits to the subject of its emanation an assumed power to act in force of its words, in a 'phantasmatic production of the . . . subject' designed to replay the subject as the only possible agent of power.[82] As John Frow has argued, 'the Western juridical subject is defined as the one who has (always already) the right to sign their name . . . the subject is at the same time constituted in the act of signature, the writing of the proper name'.[83] This creates a metaleptic circuit (in which causes are posited as effects and vice versa), established by the ever-ready *maintenance* of the signature.[84] Topsy appears as a fully volitional subject whose documented will cannot (and will not) be supplanted. If as Butler said, 'consent always and only constitutes the subject',[85] Topsy is constructed by her signature as already self-aware, knowledgeable and *possessing intention*, in the sense of being *self-possessed*.[86]

[81] Butler, *Excitable Speech*, p. 78. [82] *Ibid.*, p. 80.

[83] John Frow, 'The Signature: Three Arguments about the Commodity Form' in Helen Grace (ed.), *Aesthesia and the Economy of the Senses* (Nepean, NSW, 1996), pp. 151–200 at p. 177.

[84] On this metaleptic operation, see Friedrich Nietzsche, 'On the Genealogy of Morals' in Walter Kaufmann (ed. and trans.), *Basic Writings of Nietzsche* (New York, 1968) and Judith Butler's discussion thereof in Butler, *Excitable Speech*, pp. 45–6.

[85] Butler, *Excitable Speech*, p. 85.

[86] This attribution of self-possession and contractual awareness is particularly poignant. In a thoughtful handling of Margaret Radin's work, John Frow sets out how both buying and selling property enhance the individual's self-conception of 'freedom', and he also establishes, through Radin, that this is underpinned by a negative conception of liberty (one is free to act unless another is harmed), pointing out that the idea of 'inalienable possession' is marginalized: Frow, 'The Signature', pp. 172–7. As a result, continues Frow, John Stuart Mill had difficulty in arguing against the freedom to sell oneself into slavery because of the absence of a secure locus in the self for a fundamental inalienability. Frow presents Radin's argument as asserting a 'personal' property which attaches to an inalienable core of personhood, which is then asserted against liberalism. But he goes on, at pp. 176–7:

> The major weakness of Radin's argument, however, is that in asserting the category of personhood against liberalism she is insufficiently attentive to the central role that personhood already plays there as a category of property. 'The person' is neither a real core of selfhood nor a transcendental principle that inherently resists being

Frow was mainly concerned with the 'signature' as evidence of artistic authenticity – this embodying something exemplary about the nature of the individual. But in his conclusion that 'the form of the person is the juridical basis of all property rights in information, including aesthetic information',[87] there is the principle that it is the self-possession of the will to create, or to understand oneself, that must exist in order to have something to create or to commit to paper. This rational individuality, which is also the subject of rights, has been lamented directly and indirectly by indigenous scholars. Irene Watson quotes Haunani-Kay Trask who resists the definition of indigenous Hawaiian identities and practices as the holders and contents of 'rights':

> [I]ndigenous, Native practices are not 'rights' which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel . . . When Hawaiians begin to think otherwise, that is, to think in terms of 'rights,' the identification as 'Americans' is not far off.[88]

Watson elaborates Trask's sentiment in pointing out that this universalizing attribution of subjectivity on the Western liberal model leads to the position where the relationship between an indigenous person or group and property is conceptualized as the same as that subsisting in Anglo-Australian law – ultimately enabling the treatment of indigenous property as alienable.

> Trask's ideas, translated to native title rights, illustrate how the Aboriginal relationship to land and law can be reduced to a commodity or an economic unit and finally extinguishment. Our connections to land are about law and families. It is a spiritual relationship, which speaks of ancient traditional ways of life, ideas, which are in conflict with the state.[89]

But if a well-documented danger exists at large for indigenous people who wish to retain an ancestral relationship to property and the self, and if this danger is clearly present in the assumption that they who 'sign' do so as an already-constituted Western individual, O'Loughlin J seems

> alienated in the market, because it is always the product of the social relations formed by the distinction between alienable and inalienable possessions. Nor is it simply the on the side of the latter: what Strathern calls 'Western proprietism' is based on self-possession, a primordial property right in the self which then grounds all other property rights. 'The person' is at once the opposite of the commodity form and its condition of existence.

[87] Frow, 'The Signature', p. 177.
[88] As cited in Watson, 'No Possibility of Rights without Law', p. 5.
[89] Watson, 'No Possibility of Rights without Law', p. 5.

to be blissfully unaware of it. O'Loughlin J appeals instead to our sense of Western liberal equality, supplying Topsy with a 'natural', standard-issue Western sovereign juridical subjectivity. In a remarkable assumption about the nature of the individual and their state of knowledge, he asserts that even though she did not speak English and *we will never know what was actually explained to her*, 'that was no reason for assuming that because Topsy was a tribal Aboriginal, she did not understand what was happening'.[90] The signature, then, retrospectively constructs a 'decision' to sign.

Prior to, and after, signature

Prior to the advent of the signature, the language of the form is performatively dormant. Although it certainly had a place in the social and linguistic context of its creation, and as such had a certain force (a *relation*; a vestige of sovereignty's jurisdiction), and although its words and phrases of course engaged the regular unstable structure of signification (they meant something), it is obvious that it had no particular performativity for Topsy Kundrilba until it was activated by the touching of the form by the thumb. But, at that point, the signature appears not as an appended afterthought to the form,[91] but as the very embodiment of Topsy's will. It will be Topsy's 'will' which is the *only signification* made by the form. It is crucial to recall here that, as the 'I' of the form has been supplied particularity by a name, so the form is enlivened. But, in a reciprocal movement, the missing referent of the performative act of signature (which we said earlier provokes a Husserlian crisis of meaning) is supplied by the language of the form. In another substitution of cause for effect, the signifying potential of the form is reversed and declared to be the product of the signature. In a sense, the production of the sovereign subject (who is also the subject of sovereignty) hermeneutically seals off the question of the thumbprint's origin from consideration as a 'past' problem due to the signifying force of its presence. But how does O'Loughlin J determine the content, the *significance* of this will? Always and only through the form, of course. On Hannah Robert's analysis, O'Loughlin J sidesteps 'any issues of compulsion, duress or undue influence' raised by the oral and other evidence concerning Mr Gunner's removal – which, recall, was evidence that Topsy

[90] *Cubillo*, 103 FCR 1 at 245; 174 ALR 97 at 344.

[91] Derrida, *Margins*, p. 328. Derrida refers to the signature as being 'appended', quoting Austin (it is unclear whether with approval or not). The thumbprint on Topsy Kundrilba's form certainly appears contrary and heterogenous to the order of the text it marks.

Kundrilba had previously hidden her son when officials arrived – and that 'the community at Utopia was generally fearful that their children would be taken away'.[92]

So the form validates itself as a 'request', supplying itself as the very plenum of the will of the signatory and obligingly assisting the carriage of that will – attributing its new mystical origin to the identity it constructs as always already signifying the desire borne out in the form's wording. Thus, through a borrowing of the intentional identity which has been constructed for her (particularly, her *proper name*, or her *name plus signature*), the form attains a perfect unity of saying and meaning. Even as it borrows from the signature to activate its force and significance, the form's words return to fill the signature with meaning. The two (which are after signature inseparable, self-evident) are mutually reinforcing, each giving the other its content.

On the form as the plenitude of meaning, a natural writing

The ideality of the signed form as both an embodiment of a sovereign individual's will and as a giant or supreme 'shifter' providing the ground for the taking place of sovereign language is alluded to by Yablon in his elegant and sparing remark that, when the legal form (he was considering a form of summons) makes a statement, then '[t]his statement is true. It cannot be false.'[93] The legal form secures its own interpretation by unifying the conditions of interpretation with the conditions of production, enabling it to become the very ideality of its message, such that its significance becomes its meaning; a natural consequence of its existence.

The form of consent seems to issue naturally and spontaneously as an administrative gesture; there to facilitate the meaning which, after its fact, seems to be self-evident. After its signature, the form means itself – as if there was any other way, as if, once introduced into the trial as evidence, it could ever have been left unsigned. Such moments are foreclosed. The form's communion with a sense of 'natural writing', worked through by Derrida in *Of Grammatology*, lends the form a sense of having been produced with an 'element of ideality or universality'.[94] The naturalness

[92] Robert, 'Unwanted Advances', p. 9, referring to the evidence of Mrs Pula (*Cubillo*, 103 FCR 1 at 260–1; 174 ALR 97 at 360), and the general reports of people fleeing when white patrol officers arrived (103 FCR 1 at 240–1; 174 ALR 97 at 340–1).

[93] Yablon, 'Forms', p. 259.

[94] Jacques Derrida, *Of Grammatology* (trans. Gayatri Chakravorty Spivak, Baltimore, 1997), p. 20.

and uncontestability of this production is experienced, Derrida tells us, as the experience of '"being".[95] As is well known, this is only a starting point for Derrida's working through of metaphysics as grammatology, in fact of logocentrism, which we can now begin to see in the context of the *Cubillo* decision (that is, in relation to the hierarchies of presence that it engenders) in its status as an 'original and powerful ethnocentrism'.[96]

The relation between word and being is, in this natural language, unsullied by the arbitrary signifier. And Derrida establishes this kind of writing's opposite: not a natural, divine, full and perfect meaning, but a fallen, human, technological, finite, exteriorized writing. In similar terms, Benjamin wrote of a fall from pure meaning, as the 'uncreated imitation of the creative word', in which the *human* word by its structure, duplicates but fails of course to achieve, the *absolute* relation of name to knowledge. In attempting to *communicate something other than itself*, human language, says Benjamin, is not the creative word but rather, name as reflection of the Word.[97] But, according to Benjamin, there is one point of communion with the naming power of God:

> The deepest images of this divine word and the point where human language participates most intimately in the divine infinity of the pure word . . . are the human name. The theory of proper names is the theory of the frontier between finite and infinite language. Of all beings man is the only one who himself names his own kind, as he is the only one whom God did not name.[98]

This is crucial in understanding how the form of consent in *Cubillo* was able to garner Charles Yablon's sense that its language 'is true', 'cannot be false' – that it communicates nothing other than itself. In order to apprehend this sense, a brief summary is required. First, the missing referent (signified) of the performative act of thumbprinting has by now been found – it is the content of the form. But it is the content of the form which has been cycled back through the metaleptically-created pure will of the signature, borrowing from the sense of the willing self. The 'void' pronoun of the 'I' in the form is not only enlivened by the application of the pure will and the pure name *which mean themselves*, but the entire signification of the form through the signature becomes the illusory product

[95] *Ibid.* [96] *Ibid.*, p. 3.

[97] Walter Benjamin, 'On Language as Such and On the Language of Man' in *Reflections: Essays, Aphorisms, Autobiographical Writings* (ed. Peter Demetz, trans. Edmund Jephcott, New York, 1978), pp. 314–32 at p. 327.

[98] *Ibid.*, pp. 323–4.

of the will, or rather, the illusory product of the illusory will (remembering that the subjectivity of the will is inaugurated with the act of signature). Thus, the relation which enables the taking place of language (the Voice, or structural readiness to signify) is the will of sovereign Being, a supplied Being that decodes itself perfectly. As such, it achieves a unity of saying and meaning. This is the very sense and meaning of the whole pronominal relation of the form; the nature of the sovereign jurisdictional pronoun 'You' which is silent and unspoken and yet assumed in the very fact of the form.

The effect of these illusions of a presence is to create an *uncontestable* writing which is the paragon of Western metaphysical relation. The proper name plus the (partly pronominal) substance of the form read together as inseparable and as activating each other results in a kind of perfect representation whose interpretation is always in maintenance of the same order of priorities. As Hannah Robert has said, discussing O'Loughlin J's handling of the form, 'just as a marriage certificate once made women "unrapable" by their husbands, the "form of consent" made "half caste" children "unstealable"'.[99]

The abandonment of Topsy Kundrilba

These fairly complicated descriptions have addressed the foundational possibility of the signifying and/or performative functions of the form and the thumbprint. What is adumbrated by all of these textual operations is Topsy Kundrilba's *relation* to the sovereign. It has become impossible, using the metaphysics of presence, to explain O'Loughlin J's approach, to speak of Topsy Kundrilba as a *self*, to speak of her *herself*, in her participation in these processes of signification (the supplied meanings of her subjectivity and its message in the *unum/plenum* of the signed form). Butler describes the idealization of performative speech acts, such as Topsy Kundrilba's signature, as an imagination of the 'forceful voice' of sovereign power.[100] On Butler's account, and in the manner I have described here, the state sovereign re-emerges as the paragon of the kind of power of which the sovereign speech act has become emblematic. On the other hand, Kundrilba's identity, described through these definite and particular Western metaphysical rules of being, has at once been included as an identity made ready to signify and participate in the systems of Voice of sovereignty, and also therefore (because of these qualifications) *excluded*.

[99] Robert, 'Unwanted Advances', p. 13. [100] Butler, *Excitable Speech*, p. 82.

The complicated system above, of construction and supply of meaning, signification and making ready to signify, means that the signed form is *in force* but *without significance*, experienced as a pure force of supplementary meanings. Agamben's now-notorious formulation in *Homo Sacer* of the sovereign relation as that of the 'ban' found a convenient expression thus:

> Being in force without significance . . . nothing describes better the ban that our age cannot master than Scholem's formula for the status of law in Kafka's novel [*The Trial*]. What, after all, is the structure of the sovereign ban if not that of a law that *is in force* but *does not signify*? Everywhere on earth men live today in the ban of a law and a tradition that are maintained solely as the 'zero point' of their own content, and that include men within them in the form of a pure relation of abandonment . . .
>
> In Kant the pure form of law as 'being in force without significance' appears for the first time in modernity. What Kant calls the 'simple form of the law' . . . in the *Critique of Practical Reason* is in fact a law reduced to the zero point of its significance, which is, nevertheless, in force as such . . . 'Now if we abstract every content, that is, every object of the will (as determining motive) from a law', he writes, 'there is nothing left but the simple form of a universal legislation' . . .[101]

This 'abstraction' of 'every determining motive' from a law traces the truth-effect of Topsy's will which is a product of the metaphysics of presence, as set out above. As the sovereignty attributed to her signature replays a model of communication which the sovereign state would like for its own, Topsy thus forms the ground for a taking place of law. So the form of consent in *Cubillo* offers an exemplary instance of the manner in which the logics of sovereignty exert such a being as a being in force. Topsy Kundrilba's position also demonstrates the relationship between being in force without significance, and the ban. As Düttmann writes, being in force without significance 'is a *pure* relation which includes that to which it relates by way of abandoning and excluding it'.[102] Catherine Mills elaborates the idea of the ban, drawing on Nancy through Agamben: 'to be abandoned means to be subjected to the unremitting force of the law while the law simultaneously withdraws from its subject'.[103] She

[101] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998), pp. 51–2 (emphasis in original).

[102] Alexander García Düttmann, 'Never Before, Always Already: Notes on Agamben and the Category of Relation' (2001) 6(3) *Angelaki* 3, 4 (emphasis in original).

[103] Catherine Mills, 'Life beyond Law: Abandonment and Hope in Agamben and Coetzee' (2004, unpublished article, on file with author), p. 4.

continues that the 'status of the subject before the law of abandonment is one of absolute exposure, in which the subject of the ban is turned over to the law and simultaneously left bereft by it'.[104] This is an abandonment of Topsy Kundrilba, having 'signed' the form of consent, or having been-found-having-signed the form of consent.

Postscript

The effect of O'Loughlin J finding credible the oral evidence around the existence of the thumbprinted form, at the expense of the form, would not only be the undoing of a sequence of enmeshed priorities of the Western metaphysics of presence, it would also be a failure of the sovereign relation in the present. And this supplies what is missing from my analysis. I have not explained how, if the form is Voice, is sovereign relation and is summed up in the pronoun 'You', it is 'demonstrated' in the sense required by Agamben's account of the Aristotelian determination of the *prote ousia*. Some demonstration, some taking hold of (or gesture towards) the non-linguistic would be required in order for the form-as-shifter to refer to sovereign discourse taking place. This demonstration is also called performance, and in law it is a display of 'capturing anomie',[105] or walking and transgressing a boundary between inside and outside the sovereign order. The application of these orders of priority to Topsy Kundrilba in her relation of abandonment and as a 'tribal Aborigine' is, then, a performance of the Anglo-Australian sovereignty.

[104] *Ibid.*, p. 5.
[105] Giorgio Agamben, *State of Exception* (trans. Kevin Attell, Chicago, 2005), p. 60.

PART II

Human rights and other values

6

Reassessing international humanitarianism: the dark sides

DAVID KENNEDY*

In the American foreign affairs tradition, the word 'humanitarian' signals at least five important commitments. First, a commitment to engagement with the world, engagement by our government and, perhaps more important, engagement by our citizenry. Secondly, a commitment to multilateralism and intergovernmental institutions. Thirdly, a renunciation of power politics, militarism and the aspiration to empire. Fourthly, a commitment to moral idealism and projects of ethical, spiritual and political betterment for other nations and the world – projects of moral uplift, religious conversion, economic development and democracy. Finally, a commitment to cosmopolitanism – attitudes of tolerance, moderation of patriotism and respect for other cultures and nations – an aspiration that we might rise above whatever cultural differences divide our common humanity.

At this quite general level, these are commitments shared by our allies in European international law, in the world of international human rights, and in the broad United Nations system. These are noble ideas. Yet the history of their transformation into international legal regimes is complex, and made more so by the tensions *among* these commitments, tensions that leave those who espouse them uneasy about the exercise of power and leadership in the world.

My intention here is to explore some of the difficulties that arise when humanitarian sentiments like these are transformed into legal and institutional projects in human rights, efforts to humanize global trade, and a century of humanitarian efforts to limit the violence and frequency of warfare. My basic argument is this: humanitarians are conflicted – seeking

* This chapter introduces themes developed in David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

to engage the world, but renouncing the tools of power politics and embracing a cosmopolitan tolerance of foreign cultures and political systems. These conflicts have been built into the tools – the UN, the human rights movement, the law of force – that humanitarians have devised for influencing foreign affairs.

As a result, we humanitarians have a hard time acknowledging our own participation in rulership, preferring to think of ourselves off to one side speaking truth to power, or hidden in the policy apparatus advising other people, the princes, to humanize their means and ends. We commonly chalk any doubts up to the weaknesses of the humanitarian tradition – a meek David facing the Goliath of foreign policy establishments in a harsh world of power politics. But humanitarians increasingly provide the terms in which global power is exercised. We speak the same language as those who plan and fight wars, the language of humanitarian objectives and proportional, even humane means. Our legal and professional terminology has seeped into popular parlance – collateral damage, rules of engagement, humanitarian intervention, self-defence, collective security – and has become the vocabulary of governance. Human rights has elbowed economics aside in our development agencies, which now spend billions once allocated to dams and roadways on court reform, judicial training and 'rule of law' injection. The UN High Commissioner for Refugees designs and manages asylum and immigration policies with governments around the world.

Humanitarians need to face the dark sides of our humanitarian tradition by acknowledging costs that can sometimes swamp our activism and policy-making efforts. But our hesitation to see ourselves as powerful, as rulers, makes it difficult to look honestly at the consequences of our work and to take responsibility for the damage we sometimes do. In a word, to be responsible partners in governance, humanitarians should become more *pragmatic*, should do more to acknowledge and take responsibility for the costs as well as the benefits of their work.

But pragmatism also has its own limits. After sketching the sorts of costs and background considerations I propose humanitarians bring to the surface, I turn to the law of force to explore the limits of humanitarian pragmatism.

Before turning to war, I would like to look briefly at two quite familiar global humanitarian projects: the human rights movement, and efforts to soften the impact of global trade through the adoption of global labour and other social standards.

International human rights

Let me start by stressing that the human rights movement has unquestionably done a great deal of good, freeing individuals from great harm and raising the standards by which governments are judged. The human rights tradition makes a series of promises: to engage individuals directly, as activists and as victims, giving a global voice to individual pleas for justice; to give the non-governmental institutions of civil society a voice on the global stage, establishing, if you will, a humanitarian profession; and, most importantly, to establish a universal vocabulary for ethics – a value orientation for international law and foreign affairs.

These are enormously appealing ideas, but, when translated into governance, they also create costs. Human rights professionals I have known rarely place these costs centre stage, where they can be assessed and either refuted or taken into account. We discuss the dark sides only privately, often cynically, rarely strategically. Let me offer a brief list of the sorts of costs I have in mind.

I worry that the international human rights movement can occupy the field, crowding out other ways of pursuing social justice and other emancipatory vocabularies that may sometimes be more effective, such as religious vocabularies, local traditions, and tools focused more directly on economic justice or social solidarity. There are lots of ways to pursue social justice. Human rights is but one, and not always the most appropriate. I worry, moreover, that human rights, given its origins, its spokesmen, its preoccupations, has often been a vocabulary of the centre against the periphery, a vehicle for empire rather than an antidote to empire.

It is nothing new to point out how narrowly the human rights tradition views human emancipation by focusing on what governments do to individuals, on participatory rather than economic or distributive issues, and on legal rather than social, religious or other remedies. Problems that are hard to formulate as rights claims for individuals – collective problems, economic problems, problems of poverty or health – are easy to overlook. Emancipating people as rights holders, moreover, stresses their individual claims, their personal relationship with the state. This can encourage a politics of queue-jumping among the disadvantaged, propagating attitudes of victimization and entitlement while making cross-alliances and solutions that involve compromise and sharing more difficult.

I am concerned that human rights often excuses government behaviour by setting standards below which mischief seems legitimate. It can be easy

to sign a treaty and then do what you want. But even compliance may do more harm than good: a well-implemented ban on the death penalty, for example, can easily leave the general conditions of incarceration unremarked.

There is often a 'tips of the iceberg' problem – focus on the real problems of refugees can make it more difficult to contest the closure of borders to economic migration. Indeed, the legal definition of refugee has done as much to exclude people in grave need from protection as it has to legitimate UN engagement. Even Abu Ghraib – sexually humiliating, even torturing and killing prisoners – is not the worst or most shocking thing the coalition has done in Iraq. Our horror at the recent photos may also be a way of not thinking about other injuries, deaths and mutilations our government has wrought.

Human rights criticism can get us into things that we are not able to follow through on, such as by triggering interventions in Kosovo, Afghanistan and even Iraq with humanitarian promises that it cannot deliver. The universal vocabulary of human rights can seem to promise the existence of an 'international community' that is simply not available.

By defining justice as a relationship to the state rather than simply a condition in society, human rights can distract our attention from background norms and economic conditions that often do far more damage. Perhaps most disturbing, the international human rights movement often acts as if it knows what justice means, always and for everyone; all you need to do is adopt, implement and interpret these rights. But justice is not like that. People must build it anew each time, struggle for it, imagine it in new ways.

Of course, human rights professionals worry about these things, but they are terribly difficult to take into account, to weigh and balance against the real upsides of human rights work. It can be all too easy to say 'let us at least begin'. Normally, of course, such an attitude in government would be completely irresponsible. Imagine a proposed road. It will contribute to national welfare by creating jobs, improving traffic flow and stimulating economic growth. But, before the government builds the first mile, we expect it also to look into the costs of the endeavour, such as lost homes, neighbourhoods, increasing sprawl and environmental damage. Only when officials have done so, when the choices have been squarely faced and democratically made, do we expect the project to proceed.

The attitude 'let us at least begin' is possible only if we blind ourselves to the exercise of power, the governing, that the human rights activist or the policy-maker does, and if we deny that we have any responsibility

to take costs into account. Yet, when human rights initiatives succeed, when the movement gains power in the world, when our advocacy has an effect, we invariably create winners and losers. And human rights can be intoxicating precisely because it often works. Human rights has succeeded in becoming a vocabulary of power, a tool not only for a global village of NGOs, but also for George W. Bush, the World Trade Organization and Texaco.

It is common to attribute the costs of human rights advocacy to a misuse of the vocabulary. When President Bush drops bombs for human rights, we accuse him of misusing the concept. But we have worked hard to make human rights as user-friendly as possible. Where nails are bent, we may be right to look first to the carpenter, but sometimes the hammer is also off balance. We should be suspicious if custodians of the tools blame every downside on the carpenter, just as we would be suspicious were he to blame only his tools.

The most significant challenges for the human rights movement in the years ahead will not only be to address problems difficult to formulate as rights claims – collective problems, economic problems – but to understand what it means to be a participant in governance and not just a critic of it. If we are to be a responsible participant in power and to remain attentive to the downsides of promoting human rights, we must also focus on the quotidian routines of humanitarian work more than on the sporadic and symbolic. The prisoner of conscience released is an easily visible success of which human rights advocates should be proud. Incarceration legitimated is less visible, an ongoing and routine effect that is far more difficult to pinpoint and assess.

The significance of attention to background in assessing humanitarian initiatives is perhaps best illustrated by efforts to humanize trade flows through global labour and other social standards.

Humanitarianism and trade

In the field of trade, humanitarian voices have led us seriously astray. By and large, humanitarians have responded to the expansion of global commerce by seeking to preserve the potential for top-down public regulation. Where national regulatory capacity seems threatened by the opening of markets to foreign products, services, capital or labour, humanitarians have sought either to restrain these global flows or to develop international regulatory replacements for national social welfare arrangements. In doing so, humanitarians focus on *public* ordering, on the

visible machinery of national sovereignty and international institutional standard-setting. Virtually ignored is the world of background norms, such as private law, corporate standards, transnational administrative arrangements, and rules of corporate governance and liability.

Take the WTO. We have long known that in some sense, as the saying goes, 'fair trade is free trade's destiny'.[1] As tariffs came down, industrial nations began to challenge elements of one another's regulatory environment as 'non-tariff barriers to trade'. There seemed no natural limit to this practice, as the EU's legal order has amply demonstrated. It is an old legal realist insight, after all, that the reciprocal nature of a comparison between two legal rules or legal regimes makes it impossible to say which causes the harm, or which is 'discriminatory'. Is it the railroad's right of way that damages the farmer's wheat, or the farmer's property right that imposes cost on rail transport?

In the trade context, we might ask whether Mexico's low minimum wage (or failure to implement its own minimum wage scheme) is an unfair 'subsidy'; or whether Chinese manufacturers who benefit from non-enforcement of local law are 'dumping' when they export to American markets. But we might equally well ask whether it constitutes a 'non-tariff barrier', an unfair or unreasonable extraterritorial reach of US law, for the US to demand higher labour standards for production of goods to be imported to its market.

To decide, conventional legal analysis relies on an assumption about which legal scheme is 'normal' and which not. If farmers normally grow wheat, a new railroad may appear to impose the cost. If the difference between American and Mexican wages is 'normal', American efforts to raise Mexican standards will seem an abnormal non-tariff barrier. Deciding what is 'normal' and what is not is rulership – an unavoidable political decision about the allocation of costs.

The WTO provides a mechanism for settling disputes between nations when each asserts that its background rule is normal and that the trading partner is imposing unfair costs or offering unfair advantages. In processing routine trade disputes, the WTO system generates a string of decisions about globally tolerated levels of differentiation among labour and other regulatory standards. Meanwhile, however, humanitarians are struggling, largely in vain, for adoption of a 'social charter' within the

[1] Brian Alexander Langille, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)' in Jagdish Bhagwati and Robert E. Hudec (eds.), *Fair Trade and Harmonization* (2 vols., Cambridge, MA, 1996), vol. II, pp. 231–66 at p. 236.

WTO, for new international 'soft law' social norms, for implementation of international economic and social rights. If only the international legal order were powerful enough, we moan, to take on the question of labour rights. But the international legal order is doing that every day as it provides an interface between national regulatory schemes. The difficulty is in finding opportunities for politically contesting the results it generates.

The Right has had no trouble focusing on the world of background norms by developing a complex network of financial and payment systems to facilitate the free movement of capital, extraterritorial uses of national regulation to combat terrorism or money-laundering, and more. Unfortunately, the humanitarian vocabulary has impeded similar work on the Left by focusing our attention on the foreground of public regulation.

Humanitarian efforts to restrain war

In thinking about human rights and trade, I have stressed the need for humanitarians to grasp the nettle of rulership and to be realistic about costs and benefits. The good at heart and the gentle in spirit should relate to power pragmatically, consequentially, functionally – in a word, *realistically*.

In many ways, the modern law of force represents a triumph of just this sort of pragmatism. Humanitarians have been 'realistic' and have successfully infiltrated the decision-making of those they would bend to humanitarian ends, yet something is still amiss. It turns out that the complex partnership – dance, even – between idealism and realism that has been the hallmark of twentieth-century international legal humanitarianism can be part of the problem as much as the solution.

Modern international law has offered two large visions for restraining warfare: 'law in war', the tradition of 'humanitarian law' itself, or jus in bello, limiting the use of force in war by outlawing weapons and providing standards for conduct on the battlefield and for the just treatment of casualties, prisoners and civilians; and 'law of war', rooted in 'just war' ideas, limiting the situations in which states can legitimately resort to force, a tradition that finds its best modern expression in the multilateral commitments and institutional framework of the Charter of the United Nations.[2]

[2] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67 ('UN Charter').

Humanitarian law: the law in war

The 'law in war' tradition, associated most prominently with the International Committee of the Red Cross, has always prided itself on its pragmatic relationship with military professionals. The most significant codifications have been negotiated among diplomatic and military authorities and codified as expressions of sovereign will. Of course, reliance on military acquiescence limits what can be achieved: military leaders outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defence would be too expensive or difficult. Narrowly drawn rules permit a great deal, and they legitimate what is permitted.

Recognition of these costs is one reason pragmatism in international law has meant more than positivism, more than deference to sovereign consent, more than legal clarity and more than old-fashioned realism about the power of nation-states. Pragmatism has also meant *antiformalism*. Since at least 1945, a parallel vocabulary of principles has grown up alongside tough-minded military bargains over weaponry. The detailed rules of The Hague or Geneva have morphed into simple standards that can be printed on a wallet-sized card and taught to soldiers in the field. The means of war are not unlimited, and each use of force must be necessary and proportional – these have become the ethical baselines for a universal modern civilization. The move to principles has allowed the law in war to infiltrate the vocabulary of military professionals while blending smoothly with the new ethical vocabularies of human rights.

The vocabulary of standards accompanied the rise of courts and the inauguration of judicial review of battlefield behaviour. The laws of war are increasingly expressed in the language of criminal justice: war crimes, war criminals. This is also language that has merged with human rights. If states agree to treat prisoners of war humanely, should we not say that each prisoner of war has a *right* to humane treatment? For that right to have remedy and to be enforced, we will need courts. In the 1990s, ad hoc criminal tribunals were established in loose imitation of Nuremberg, and, in 1999, international humanitarians successfully promoted the establishment of a permanent International Criminal Court.

Today, we see this merger from the other side: terrorism migrating from the world of criminal law to that of war. The pragmatism of this new regime – as opposed to its idealism or its wishful thinking – lies in the transformation of the law in war from a system of restraint into a vocabulary for judgment, or, more accurately, for debates about judgment.

Rare is the commander who orders 'unnecessary', 'wanton' or 'disproportional' violence, if for no other reason than that doing so might waste ammunition. We do not need international law for what the military itself seeks. The real work begins where militaries disagree. Typically, it is the tactics of other forces that seem excessive. Wherever tactics seem extreme – carpet bombing, siege, nuclear first use, suicide bombing, terrorizing the civilian population – the condemnation and the defence seem to converge on the vocabulary of necessity, proportionality and so forth. Think of Hiroshima.

As a vocabulary for debate and judgment, the law in war offers the possibility of embracing the unavoidability of making trade-offs, balancing harms, accepting costs to achieve benefit – a calculus common to both military strategists and humanitarians. Just as military planners rarely order wanton violence, professional humanitarians no longer categorically preclude the use of force for humanitarian objectives. The point is to weigh and balance.

Take civilian casualties. Of course, civilians will be killed in war. Civilians are also part of the war machinery – they man factories, repair communications infrastructure and provide political and economic support for the regime. During the NATO bombardment of Belgrade, justified by the international community's humanitarian objectives in Kosovo, strategists discussed the targeting of those civilian élites most strongly supporting the Milosevic regime. If bombing the bourgeoisie would have been more effective than a long march inland towards the capital, would it have been proportional, necessary – humanitarian – to place the war's burden on young draftees in the field rather than on the civilian population whose actions caused them to be sent there? Some argued that targeting civilians supporting an outlaw (if democratic) regime would also extend the Nuremberg principle of individual responsibility. Others disagreed. But they were disagreeing in a common vocabulary.

Limiting civilian deaths has become a pragmatic commitment – *no unnecessary damage, not one more civilian than necessary*. All we need to do is figure out just what is necessary. This is the spirit in which every target in the Iraq conflict was pored over by lawyers. Or in which American Major General James Mattis, poised to invade Falluja, concluded his demand that the insurgents stand down with these words: 'We will always be humanitarian in our efforts. We will fight the enemy on our terms. May God help them when we're done with them'.[3]

[3] As quoted in Thom Shanker, 'US Prepares a Prolonged Drive to Suppress the Uprisings in Iraq', *New York Times*, 11 April 2004, p. 13.

But it is troubling that this so often has been a vocabulary for judgment of the centre against the periphery. When the Iraqi insurgent quoted on the same page of the *New York Times* as Major General Mattis threatened to decapitate civilian hostages if the coalition forces did not withdraw,[4] he was also threatening innocent civilian death – less of it actually – but without the humanitarian promise. When the poor deviate from the best military practices of the rich, we face a hard choice. Either their struggle is illegitimate, or their deviance is excused because we see them as 'backward', not yet up to the demands of humanitarian civilization.

In 1996, I travelled to Senegal as a civilian instructor with the US Naval Justice School to train members of the Senegalese military in the laws of war and human rights. At the time, the training programme was operating in fifty-three countries, from Albania to Zimbabwe. The training message was clear: humanitarian law is not a way of being nice. By internalizing human rights and humanitarian law, you will make your force interoperable with international coalitions, suitable for international peacekeeping missions. To use the sophisticated weapons we sell, we explained, your military culture must have parallel rules of operation and engagement to our own. Most importantly, we insisted, humanitarian law will make your military more effective – will make your use of force something you can sustain and proudly stand behind.

When we broke into small groups for simulated exercises, a regional commander from a border area plagued by guerrilla raids repeatedly asked the hard questions – when you capture some guerrillas and need to interrogate someone in a hurry, isn't it better to place a guy's head on a stake for deterrence? Well, no, our officers would patiently explain – this will strengthen the hostility of villagers to your troops – and imagine what would happen if CNN were nearby. They would laugh – of course, we must be sure the press stays away.

Ah, but this is no longer possible – if you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or, better, just over your shoulder. Not because force must be limited and not because CNN might show up – but because only force which can imagine itself to be seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, more *legitimate*. This was a lesson apparently lost on those who considered the interrogation of 'high value targets' in our own war on terror. Nevertheless, the Senegalese had learned – as

[4] Christine Hauser, 'Iraqi Claims US and Falluja Foes Agree to a Deal', *New York Times*, 11 April 2004, pp. 1, 13.

Secretary of Defense Donald Rumsfeld now seems to be learning – what was required for a culture of violence to be something one could proudly stand behind. What was required, in a word, for warfare to be civilized.

But there is a further problem. The promise of weighing and balancing is rarely met. If you ask a military strategist, 'Precisely how many civilians *can* you kill to offset how much risk to one of your own men?' you will not receive a straight answer. He or she will say, 'It's a judgment call'. Indeed, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians.

In the early days of the Iraq war in 2003, coalition forces were frustrated by Iraqi soldiers who advanced in the company of civilians. Corporal Mikael McIntosh reported that he and a colleague had declined several times to shoot soldiers for fear of harming civilians. 'It's a judgment call', he said. 'If the risks outweigh the losses, then you don't take the shot.' He offered an example: 'There was one Iraqi soldier, and 25 women and children, I didn't take the shot.'[5] His colleague Sergeant Eric Schrumpf jumped in to describe facing one soldier among two or three civilians, opening fire and killing civilians: 'We dropped a few civilians, but what do you do? . . . I'm sorry, but the chick was in the way.'[6]

There is no avoiding decisions of this type in warfare. The difficulty arises when humanitarian law *transforms decisions about whom to kill into judgments.*

When military planners say that every target was carefully evaluated for necessity and proportionality, the word 'evaluate' could cover a multiplicity of inquiries not undertaken. They did not, in fact, have a metric in mind for comparing enemy civilian lives with those of coalition pilots, or for factoring in future deaths from disease or anything else.

But neither did the humanitarians. If you ask leading humanitarian law experts how many civilians you can kill for this or that, you also will not get an answer. Rather than 'It's a judgment call', however, they are likely to say something like, 'You just can't target civilians' – thereby refusing to engage in the pragmatic assessments necessary to make that rule applicable in combat.

In psychological terms, it is hard to avoid interpreting this pragmatism-promised-but-not-delivered as a form of denial: a denial of participation

[5] Quoted in Dexter Filkins, 'Either Take a Shot or Take a Chance', *New York Times*, 29 March 2003, pp. A1, B4 (emphasis added).

[6] *Ibid.*

in the war machine. Schrumpf 'dropped a few civilians' as an exercise of '*judgment*'. Humanitarians are free to be horrified – civilians are inviolable. But saying so denies the partnership with military and political authority they have carefully built for more than a century. Effects *are* hard to calculate, but they are not hard to imagine. Is it responsible not to take them into account? To turn from judgment precisely when the principle begins to bite?

The military's *own* culture of discipline can be difficult for civilians to grasp. It is part bureaucratic necessity, part instrumentalism, central to the effectiveness of the mission and to the safety of colleagues. All this is wrapped in honour, integrity, in a culture set off from civilian life, a higher calling.

Although military discipline is a social production, it is also, and perhaps more importantly, a work on the self. The US Army runs a recruitment commercial which implores 'become an army of one'.[7] The promise is power, to be sure. But also discipline – self-discipline. If you join, you will be transformed inside – *you* will become an army, coordinated, disciplined, your own commanding officer, your own platoon, embodying within yourself the force of hundreds because of the work you will do, and we will do, on you.

Of course, there is opportunity for individual judgment, error. Soldiers who run amok. We remember the pilots who flew beneath the Italian ski-lift, slicing the cables. Or the precision guided missile fired in Kosovo with the tail fins put on backwards – spinning ever further from its programmed target until it exploded in a crowded civilian marketplace. The American pilots who bombed their Canadian allies. Or, for that matter, My Lai, the abuse of prisoners in Baghdad, and all the other tales of atrocity in war.

But it is not clear that humanitarianism offers any more workable limits than military discipline – indeed, it may be the opposite. Take the Abu Ghraib photos. The humanitarian tradition offers us two quite different vocabularies for reacting to the photographs, neither satisfactory.

First, instrumentalism. 'The idiots! This will undermine the whole project.' And so it has. But the military knows this – they don't need international law for that. International law may well help drive such photographs underground.

Or, secondly, moral outrage. We have repeatedly heard it said that the administration was shocked by the photos. Perhaps, but, again, this is not the most shocking thing to have occurred. And, were they really shocked?

[7] US Army, 'How to Join', http://www.goarmy.com/contact/how_to_join.jsp (accessed 1 November 2005).

If Rumsfeld was indeed shocked, might he not be just a bit too naïve to be entrusted with taking the country to war? He was shocked as we all were, in part because the violence was gratuitous, unnecessary . . . And, of course, because it was photographed. But was it really not necessary? How effective *is* humiliation as an interrogation technique? How does it compare to sleep deprivation – which is more humane?

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians – and being counselled by their officers, their chaplains, their mental health professionals, who explained that what they had done was necessary, proportional, and therefore just.[8]

When soldiers are tried for breach of military discipline, their defence is often *stronger* under the vague standards of international humanitarian law than under national criminal or military law. We should remember that the now infamous Justice Department memo was not only a brief against application of international law to the American executive – it was also an interpretation of what international law permits and can legitimate.[9] Indeed, the standards of self-defence, proportionality and necessity are so broad that they are routinely invoked to refer to the zone of *discretion* rather than limitation. I have spoken to numerous Navy pilots who describe briefings filled with technical rules of engagement and military law. After the lawyer leaves, the commanding officer summarizes in the empowering language of international law – 'just don't do anything you don't feel is necessary, and defend yourself – don't get killed out there'.

After the Gulf War, it was widely acknowledged that the decision to take down the electrical grid by striking the generators had left power out for far longer than necessary, contributing to unsanitary water supply and the unnecessary death of many tens of thousands from water-borne diseases such as cholera and typhoid.[10] Military planners now readily admit this was a mistake – and they have revised their procedures accordingly. In

[8] For an account of this kind of counselling, see for example John Brinsfield, 'A War without End', *New York Times*, 26 May 2003, p. A15.

[9] Office of Legal Counsel, Department of Justice, 'Memorandum for Alberto R. Gonzales Counsel to the President: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A' (1 August 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 172–217 at pp. 184–91.

[10] See World Health Organization, 'Potential Impact of Conflict on Health in Iraq' (March 2003), discussing the impact of the Gulf War on water supply and health; Harvard Study Team, 'Special Report: The Effect of the Gulf Crisis on the Children of Iraq' (1991) 325 *New England Journal of Medicine* 977 at 978–9; Alberto Aschiero *et al.*, 'Effect of the Gulf War on Infant and Child Mortality in Iraq' (1992) 327 *New England Journal of Medicine* 931 at 934–5.

Kosovo, and now Iraq, such a devastating blow to the electrical grid was not struck. But they will *not* say that the Gulf War strike lacked proportionality or necessity, or that it was excessive given what they knew then and what they were trying to achieve. These legal standards remain the solid ground on which their acts, and the deaths of many thousands, can remain legitimated.

The law of war

From at least the mid-seventeenth century, 'just war' doctrines have addressed the causes as well as the conduct of war. It is not clear, of course, that the 'unjust' war idea ever really limited the use of military force. We can easily imagine just war doctrine having done less to restrain than to encourage war by de-legitimating the enemy and justifying the cause. In any event, in the nineteenth century world of increasingly autonomous national states, the distinction between just and unjust war faded, a casualty of a loss of faith among policy élites in the plausibility of natural law limits on statecraft. International law had very little to say about the decision to go to war, a silence rooted in the assumption that war was an unrestrained prerogative of sovereign power. The modern law of war is a century-long reaction against this nineteenth-century legal silence, rooted in jurisprudential frustration with conceptualism and formalism, and promoted by successive generations as a turn to realism, to pragmatism, and to engagement with the world of politics.

After the First World War, international law took a historic turn – a move, we might say, from doctrine to institutions. Through the League of Nations, the global community could sanction and deter aggression and provide a framework for the peaceful settlement of 'disputes'. After the Second World War, again in the name of pragmatism, this scheme matured into a comprehensive constitutional system. The UN Charter aimed to establish an international monopoly of force and placed responsibility for maintaining the peace with the Security Council. War was prohibited, except as authorized by the UN Charter. Not as authorized *by the UN*, but as authorized by the *Charter*.

The Charter, like a constitution, is drafted in broad strokes. Force is permitted in 'self-defence'.[11] Or when authorized by the Security Council.[12] Or when the use of force does not threaten the territorial integrity of a state,[13] thus exempting civil war and internal strife from international

[11] UN Charter, Art. 51. [12] See *ibid.*, Art. 42. [13] See *ibid.*, Art. 2(4).

scrutiny. Or when compatible with the 'purposes of the United Nations',[14] thus opening the door for humanitarian intervention, anti-colonial wars of liberation, and intervention for democracy.

Like any complex constitutional order, this scheme would need to be interpreted and kept up to date in a changing political world. And it was repeatedly reinterpreted. Other than the first Gulf War, no military conflict since 1945 has gone off precisely as envisioned in San Francisco. We might blame the Cold War for 'departures' from the original Charter – but the result has also been a remarkable achievement of legal imagination. Increasingly permissive interpretations of the Charter have been developed and defended in functional, pragmatic and realist styles of analysis familiar from American postwar constitutional law. What began as an institutional effort to monopolize force became a constitutional regime to legitimate justifications for warfare.

This modern vocabulary of force has a jurisprudence, an attitude about the relationship between law and power. Oscar Schachter gave perhaps the best description in his eulogy for Dag Hammarskjold, who epitomized the new jurisprudential spirit. It is worth quoting at length:

> Hammarskjold made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and directions of collective action . . . It is also of significance in evaluating Hammarskjold's flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem . . . He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.[15]

[14] See *ibid.*

[15] Oscar Schachter, 'Dag Hammarskjold and the Relation of Law to Politics' (1962) 56 *American Journal of International Law* 1 at 2–5, 7.

Following Hammarskjold we increasingly understand international affairs as a conversation among players – national states, private actors, intergovernmental organizations, courts, legislatures, military figures – about the legitimacy of state behaviour. Conversing before the court of world public opinion, statesmen not only assert their prerogatives, they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy, just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, states must defend their prerogatives to keep them. They must back up their assertions with action to maintain credibility. A great many military campaigns have been undertaken for just this kind of credibility: missiles become missives.

In a conversation about legitimacy, everything depends on audience reaction. How, for example, should one weigh civilian casualties? From the military point of view, they should be taken as heavily as they would de-legitimate the campaign. We can imagine calculating a 'CNN effect', in which the additional opprobrium resulting from civilian deaths, discounted by the probability of their becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity.

The 'international community' of professional humanitarians becomes a stand-in for the views of this broader public, a proxy for the CNN effect. In this, of course, the humanitarian participates in deciding how many civilians to kill. But there is more. To function as a proxy, humanitarian judgment must in fact match that of the broader public. The hope is that promoting humanitarianism will alter future CNN reactions. As a result, it makes sense to *enchant humanitarian tools*. For example, the existence of an international criminal court can seem more significant than whether using it after any particular massacre promotes or retards humanitarian objectives on the ground. Indeed, it is important not to find out how the costs would net out. Finding out could undermine the vocabulary of humanitarianism itself.

Looked at this way, the strategic choices are strikingly similar to those faced by military planners. We must weigh current deaths against future humanitarian gains, or future humanitarian losses against civilians saved today. Before interpreting humanitarian obligations more strictly than the military does, we might calculate a *reverse CNN effect*: the additional opprobrium resulting from our seeming unrealistic, discounted by the probability of its becoming known to relevant audiences,

multiplied by the ability of those audiences to deny support to our ongoing institutional efforts to promote humanitarianism. This must be weighed against the upside of our ability to de-legitimate this particular military action.

Like the military planner, we must decide when to draw down and when to pay into our legitimacy stockpile – and therefore when to accept civilian casualties as necessary for longer-term objectives. In such a calculation, it can easily seem more important to promote the humanitarian vocabulary than to use it, particularly if using it might entangle it in the pros and cons of a contentious military campaign.

Although humanitarians talk about the long-run benefits of building up the UN system or promoting the law of force, they do not make these kinds of calculations. Belief in the humanitarian project seems enough. Current costs are discounted, future benefits promised. It is as if there were nothing to weigh against expansion of humanitarian institutions and ideas, no civilians who needed to be allowed to die for the legitimacy of the UN. In this, we depart from pragmatic calculation altogether and enter the domain of *absolute virtue.*

Yet there is no doubt that this system has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that could not be legitimated in these terms. It is a rare statesman who launches a war simply to be aggressive. There is almost always something else said – the province is actually ours, our rights have been violated, our enemy is not in fact a state, we were invited to help, they were about to attack us, we are promoting the purposes and principles of the UN.

And there is the problem of institutional fetishism. For a time in 2003, the question of whether war would be humanitarian seemed less significant than that the dispute over its legitimacy be held in the UN. But would the situation really have been all right had France gone along? France had done so in the first Gulf War, and the 'coalition of the willing' continues to rely on this acquiescence to legitimate invasion in the second. And the war would not have made any more sense had it been approved by the UN apparatus.

The Charter scheme also has the unfortunate effect of changing the subject by making it more difficult to address the motives for a war and to devise alternatives. Let us take Deputy Secretary of Defense Paul Wolfowitz at his word. Let us say that after 9/11 we needed a completely new political and military strategy for dealing with the Middle East, for maintaining security at home, and for protecting oil supplies. And it is, of course, completely legitimate for Western political leaders to worry about a stable

oil supply; they would be abdicating their responsibility were they not to do so. Let us say, moreover, that these ends could no longer be ensured in a region of unstable though friendly dictatorships. Let us say it was necessary to 'change regimes' from eastern Turkey to western Pakistan. Indeed, let us go further and say that only by changing regimes throughout the region could a stable and just peace be achieved for Israel and Palestine. This set of ideas has true humanitarian appeal: democracy and middle class stability for millions.

Notice, however, how difficult it is to discuss these ideas. Ideas about sovereignty and the limits of the Charter, alongside core humanitarian commitments to the renunciation of empire and the vocabulary of power politics, all render the desire to change regimes undiscussable.

If we go back six or eight months before the Iraq war, the Bush team did defend their proposed Iraq policy in these terms: we must change their regimes and bring them to market, to democracy, and, of course, to heel. Then they tried to enlist the UN, where no project defended in such terms could get a hearing. So they focused instead on Saddam Hussein – his threat to his neighbours, his violations of international law, his weapons of mass destruction and his defiance of the UN inspection teams.

We might see this as a great triumph for international law in establishing a new basis for the coalition's work and a new standard for measuring the success of the venture. But it was also a way of changing the subject. It focused attention on weapons – which, when not forthcoming, delegitimated the entire enterprise. It focused attention on Saddam Hussein, whose capture made the occupation seem ready to be wrapped up. It reinforced the idea that Iraqi sovereignty was a significant and fixed star.

This frame makes it difficult to talk about the ongoing and legitimate ways in which supposedly sovereign regimes are already entangled with one another. The Charter vocabulary makes it difficult to acknowledge that we – our economy, our government, our international financial institutions, our media, our humanitarian agencies – influence regimes across the globe every day. We make their governments accept structural adjustment policies, open their markets, exploit their resources and change their cultures. Wilful blindness to this ongoing entanglement makes it difficult to see how long, how intense and how expensive our intervention would need to be to accomplish anything like Wolfowitz's objectives. It makes it all too easy to think that our intervention in Iraqi affairs began with the invasion and will end with the handover of 'sovereignty'. It has prevented the emergence of a nuanced vocabulary for thinking about the

economic side of the story. What development policy for Iraq will come with the invasion? Humanitarians have been too busy debating last year's intelligence reports about weapons of mass destruction to notice.

In short, our humanitarian vocabulary gave progressives and Europeans an easy and irresponsible way out. We never needed to ask, *how should* the regimes in the Middle East – our regimes – be changed? What is the humanitarian way to proceed? Is Iraq the place to start? Is military intervention the way to do it? Can it be done?

And what would it mean for Europe to take the global challenges of terrorism and Middle Eastern instability as seriously as they did the collapse of the Soviet world? Might they draw on Europe's own experiences with 'regime change' along its borders – in Spain, Portugal and Greece in the 1980s, the old East Germany in the 1990s, and now the ten new European Union member states in Central and Eastern Europe?

The World Bank reports that the promise of membership in the EU, along with the plodding process of accession negotiations, has a better track record for transforming governance in transitional and less developed countries than anything tried elsewhere. The prospect of assimilation into EU legal and political structures can concentrate the mind. No factor has been more significant than the allure of Europe in breaking the Cyprus deadlock and easing relations between Turkey and Greece.

Imagine the Europeans extending that promise to countries of the Middle East, beginning with accession negotiations for Turkey, followed by an offer to put Morocco, Jordan and Tunisia on the road to membership. There is no reason to think Israel and Palestine and even Iraq and Syria might not eventually respond to the allied promises of belonging, respect and market access. We would never have predicted Muammar Gaddafi meeting with EU President Romano Prodi in Brussels either.

Membership does not happen all at once. It is preceded by years of preparatory negotiations and reforms, and followed by transition periods that can last for decades. The EU, moreover, is a collage of varied legal arrangements. Workers from the new members will not enjoy free movement for years, and their farmers may never enjoy the rich flow of subsidies that have supported agriculture in the West.

Extending the European deal of peaceful coexistence and reform through legal and economic integration would be expensive, but not by comparison to the Iraq war or the efforts Europe has already taken along its borders. The expansion of NATO and the expansion of the EU each cost Europeans more than Americans have spent on war and occupation in Iraq, already topping US$200 billion.

But Europe would also need to think in global rather than regional terms. Until now, European governments have only been willing to spend such sums close to home, integrating the former East Germany, ensuring the cohesion of poorer regions, supporting European farmers as markets opened, and preparing the European East for membership.

Unfortunately, Europe thinks about Europe and about the broader world in different terms. The vocabulary of legal, economic and political community gives way on the global stage to the old language of multilateralism and international law. Europe urges us to respect Iraqi sovereignty, making it all too easy to think our intervention in Iraqi affairs began with the invasion and will end with the handover of 'sovereignty'. Europe encourages us to use the UN and to think of global policy as a combination of short multilateral police actions and humanitarian assistance.

These, however, are not the tools they use in Europe. There they focus on economic prosperity, legal security, democratic governance and cultural integration with the West. Indeed, the middle powers persist in thinking their internal affairs follow a different logic from the international world. Their pragmatism is a tale of two architectures, European and global.

But the UN world of independent sovereigns is an increasingly dangerous fantasy. The West – our economies, our governments, our international financial institutions, our media, our humanitarian agencies – is deeply entangled with regimes across the globe.

It now seems clear that Iraq was not the right place to begin and war was not the right instrument. But it was surely right that we could no longer afford to rely on the stability of shaky dictatorships across the Arab and Islamic worlds that cannot provide for the basic welfare of their citizens. Europe understands this for Europe, and Europe could help us on the global stage by applying the lessons of its own recent history. Regime change through law rather than force, and through European law rather than UN law. And economic development through phased accession to the complex internal regime of the most advanced economies rather than military intervention, humanitarian assistance and market shock.

It has become routine to say that international law had little effect on the Iraq war – arguments by a few international lawyers that the war was illegal failed to stop the Bush Administration and its allies, who were determined to go ahead regardless, and who had, after all, their own international lawyers. But this lets international law off the hook too easily. The laws of force are not the only rules that affect the legitimacy, violence and incidence of war. The military conducts its campaigns in

the shadow of endless background rules and institutions of public and private law, national and international. If we expand the aperture from the decision to invade, then war looks ever more to be a product of law: the laws in war that legitimated targeting, the laws of war that provided the vocabulary for assessing its legitimacy, the laws of sovereignty that defined and limited Saddam's prerogatives and have structured the occupation, not to mention commercial rules, financial rules and private law regimes through which Iraq gamed the sanctions system and through which the coalition built its response. The UN law of force makes these background rules seem matters of fact rather than points of choice.

We act as if we lived in a roiling world of power, which we struggle vainly to cover in a veil of legal rules. But the situation is more the reverse – a global thicket of legal rules and institutions with only the slightest opportunities for political engagement or contestation. An effective humanitarianism will need to find space in that world for political struggle if we are to become responsible protagonists over the terms and future of global justice.

Conclusion

Where does this leave the humanitarian objective to beat swords into ploughshares? About where Clausewitz left it when he wrote: 'Is not War merely another kind of writing and language for political thoughts? It has certainly a grammar of its own, but its logic is not peculiar to itself.'[16]

Humanitarians and military officers now speak the same pragmatic language of legitimate objectives and proportional means. We have met the empire, and it is us. After more than a century of insistent demands that humanitarians face the need to weigh and balance, and that the military become a civilized profession of discipline and instrumental calculation, it is hard to think how else we would want them to speak about the use of force.

Humanitarians have come into rulership. They have become, in a word, political. Yet modern humanitarianism remains a Gordian knot of participation and denial, wilful blindness posing as strategic insight. Just when we have gotten in the door and found them speaking *our language*, we turn back. Drop this bomb, here? Kill those people, there? No, we prefer to think of ourselves as outside power, judging the powerful, opposing government, speaking to it with the truth of law or ethics. Despite a century's

[16] Carl von Clausewitz, *On War* (trans. J. J. Graham, 3 vols., London, 1908), vol. III, p. 122.

work of pragmatic renewal, humanitarianism still wants to be outside of power, even if the price is ineffectiveness. Or better, it wants to seem pragmatic and effective while continuing to be experienced as outside power – effectiveness without responsibility.

The Democratic Party in the US excoriates the Bush Administration's foreign policy – its militarism, its lack of attention to human issues of poverty and health, its disengagement from multilateral institutions, its unwillingness to renounce the language of and aspiration to empire. But, if the Democrats had been elected, what exactly would be different? What do they now propose to do about the humanitarian, political and economic disaster that is the contemporary Middle East? Nothing expensive. Nothing that disturbs their ambivalence about exercising global power. Nothing that would change any regimes.

The problem on the Left is not an unwillingness to be tough or macho – humanitarians have advocated all manner of forceful action in the name of humanitarian pragmatism. The problem is an unwillingness to do so *responsibly*, facing squarely the dark sides, risks and costs of what we propose. Humanitarians have become partners in governance but have not been able to accept politics as our vocation.

I would like to end with a list of suggestions – or maxims or heuristics – to help international humanitarians who wish to develop such a posture.

1. International humanitarianism is powerful

Every international humanitarian practice I know presents itself as weak, needing fealty, barely able to hold its own against the world of power. We think of ourselves in terms of identifying with the dispossessed and marginal. We fall easily for the idea that we must refrain from deconstructing what has hardly been built. Instead, I propose that we foster our will to power and embrace the full range of our effects on the world.

2. Indeed, international humanitarianism rules

There is scarcely a humanitarian practice that does not act as if governance were elsewhere – in government, statecraft, the member states, the states parties, the Security Council, the field, the headquarters, the empire. And yet we *do* rule. We exercise power and affect distributions among people. Let us no longer avert our eyes from humanitarian rulership.

3. The background is the foreground

International humanitarians think we know where politics happens: in the public institutions that host an explicit clash of ideological positions and social interests. Yet decisions taken by experts managing norms and institutions in the background of this public spectacle are usually more significant. To hear the workings of these gears, we must mute the clamour calling us to identify power with the sites of conventional politics. Public ceremonies, theatrical commitments and magic incantations, even of human rights, do not bring justice. Justice must be made by people in their background vocabularies, each time for the first time.

4. Weigh outcomes, not structures

We have focused on structures – institutions, constitutions – rather than outcomes. We have preferred procedures to substance. We have substituted the forms of political organization for the experience of political life. Let us rather heat up our politics and acknowledge our conflicts about consequences, our uncertainty about what to do, and our realization of the necessity for responsible decision.

5. It's not about 'intervening'

Imagine an international humanitarianism that took a break from preoccupation with the justifications for 'intervention', no longer imagined the world from high above as the 'international community', and instead saw itself in a location as one interest, one culture, among many. Such a humanitarianism might avoid fantasies of a costless, neutral engagement in faraway places. It might more easily acknowledge its part in the quotidian and its ongoing responsibility.

6. Ask not for whom the humanitarian toils

Humanitarians think we speak truth to power as representatives of someone else – the under-represented, the powerless, the victimized, the voiceless. But we have enchanted the unrepresented, have acted as if speaking for them absolved us of responsibility. Let us speak in our own name, remembering that we, like they, are uncertain where virtue lies. Doing so might centre us in governance as people with projects, with our feet to the fire of participation in power.

7. Tools are tools

We have treated our norms as true rather than as reminders of what might be made true. We have substituted multilateral decisions for humanitarian decisions, and the work of the UN for humanitarian work. We have mistaken a pragmatic vocabulary of instrumental reason for responsibility. The idolatry of tools disguises itself as the wisdom of the long run. But let us assess those long-term promises with cold and disenchanted eyes.

8. Progress is not programme

Every humanitarian discipline I have encountered has a shared sense of its own progressive history. International law is 'primitive' and must be allowed to mature before it can bear the scrutiny of criticism. Progress narratives give direction to our work, but they also still our hand with the easy promise that humanitarianism will be achieved in the final days. Only by forgoing dreams of progress can we live again in history, as responsible for what we do next as for what they did before.

9. Humanitarianism as critique

We have used criticism but we have not been critical. We have treated criticism as an instrument to return us to our ideals or to perfect our assessment of consequences. Imagine a humanitarianism whose knowledge was critique, human rights not as a codification of what we know justice to be but as a lexicon for criticizing the pretences of justice as it is. Imagine human rights training in critical reasoning, with treaty instruments reminding us to ask again what justice requires. Imagine a humanitarianism that invigorated our political life for heterodoxy.

10. Decision, at once responsible and uncertain

As international humanitarians, we have sought power but have not accepted responsibility. We have claimed to know when we were unsure. We have advocated and denounced while remaining content that others should govern. We have made policy while turning our eyes from consequences.

The most difficult heuristic is this: to take responsibility for more than we can see. Imagine a humanitarianism that embraced the act of

decision – allocating stakes, distributing resources, making politics, governing, ruling – with all the ambivalence and ignorance and uncertainty we know as humans. A humanitarianism that no longer spoke as if we knew but did not act, and instead acted as if we governed and were not sure.

There is freedom here – the freedom of discretion, of deciding in the exception, a human freedom of the will. It is at once pleasurable and terrifying. It entails responsibility to decide for others, causing consequences that elude our knowledge but not our power. I imagine this humanitarianism in the language of spirit and grace, at once uncomfortable and full of human promise.

7

Trade, human rights and the economy of sacrifice

ANNE ORFORD*

> *Desiring* to further the use of harmonized sanitary and phytosanitary measures between Members . . .[1]
>
> This need to enter into a relation with someone, in spite of or over and above the peace and harmony derived from the successful creation of beauty is what we call the necessity of critique.[2]

There is a great deal of institutional energy in the field of international law currently channelled into a debate about the relationship between trade and human rights. Much of this literature focuses on the human rights effects of the World Trade Organization and the trade agreements negotiated and implemented under its auspices. Texts dealing with this question can be found in activist essays, scholarly literature and the reports of international institutions. Most such texts engage with the substantive content of trade or human rights law. The end of such scholarship is to produce an account of the best way to achieve a particular normative commitment, such as justice, efficiency, economic integration, human dignity or the rule of law. This chapter pauses to reflect upon a prior question: what are the *forms* of law which transmit, frame or accompany these substantive obligations and normative commitments? Focusing on this question of the forms of law embodied in the two fields of trade

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[1] Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 3 ('Marrakesh Agreement'), Annex 1A (Agreement on the Application of Sanitary and Phytosanitary Measures), 1867 UNTS 493, preamble.

[2] Emmanuel Levinas, 'The Transcendence of Words' in Seán Hand (ed.), *The Levinas Reader* (Oxford, 1989), pp. 144–9 at p. 147.

and human rights is helpful, perhaps even necessary, in developing an understanding of the relationship of liberal democratic politics to global capitalist economics. By referring to 'form', I mean the pattern of relations and subject positions to which these laws attempt to give shape. Trade and human rights law are expressions of the desire to create the proper order of things, the proper arrangements between subjects often imagined and constituted as parts of a greater whole (the state, the international community, the global economy). The subjects and relations given form by these areas of international law are as integral to its political effects as are the substantive obligations (dealing with, say, health and safety regulation, or electoral law, or services provision) to which international agreements in these fields give rise.[3] In other words, the forms of law are not apolitical or neutral.[4] While this argument is relevant to the relationship of trade and human rights more generally, my particular focus here will be trade agreements that pursue the goal of regulatory harmonization as a means of achieving greater market access and economic integration. My aim is thus to explore the relationship between the form of law mandated by such harmonization agreements, and the form of law envisaged by those critics who argue that trade agreements are a threat to democracy and political participation.

Criticisms of the potential human rights impact of the agenda for trade, financial and investment liberalization pursued by the WTO began to surface in the aftermath of the Uruguay Round of trade negotiations. With the creation of the WTO at the completion of the Uruguay Round in 1995, the political nature of free trade decision-making became increasingly visible. The Uruguay Round outcomes significantly expanded the range of activities brought within the scope of the multilateral trade regime, and greatly increased the enforcement powers of the regime through the establishment of a sophisticated dispute settlement process.[5] In addition, once a rule is agreed to as part of a trade negotiation, it is very difficult to alter it, while the importance of the WTO for all its Members means that the costs of withdrawal are enormous. The resulting 'irreversibility' of rules agreed to at the WTO means that proposed agreements are increasingly subject to intense scrutiny by 'outsiders' to the regime, including human rights

[3] For a related argument about the politics of legal form, see Pierre Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction' (1989–90) 11 *Cardozo Law Review* 1631.

[4] *Ibid.*, p. 1633.

[5] Marrakesh Agreement, Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), 1869 UNTS 401.

experts and NGOs.[6] Such critics have argued that WTO agreements pose an illegitimate constraint on the political choices open to peoples and governments. Those trade lawyers who have engaged with this critique argue that economic freedom is the precursor to, or at least the partner of, political freedom. In the words of former WTO Director-General Mike Moore, economic globalization when combined with democratic internationalism will lead to 'longer and more sustained peace, longer and more sustained economic growth, and a fairer and better society'.[7] There is no outside to this harmonious whole, no need or desire that can or should disrupt the workings of the WTO as a 'linkage machine'.[8] Human rights can be conceived as just one more link in a chain made larger to accommodate this set of interests. This debate often seems to lead to a dead end. The sense of being unable to move forward persists despite, or perhaps because of, the tendency of both trade lawyers and human rights lawyers to couch their arguments in terms of what must be done to prepare for the future, for that which is to come. The texts of both trade law and human rights law call for the redesign of existing societies and assume the fallibility of their present inhabitants.[9] This chapter will explore the relationship between the form of law which trade agreements seek to introduce (the form of sacrifice) and the form of law envisaged in an appeal to liberal democratic participation (the form of abandonment).

The second part of the chapter begins this exploration through an analysis of the form of law mandated by one WTO agreement – the Agreement on Sanitary and Phytosanitary Measures ('SPS Agreement').[10] This is one of a series of agreements aiming at 'harmonization' of existing laws in Member States. Those who support these agreements argue that they enshrine rationality, science, objectivity and transparency as the norms

[6] Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94 at 107; J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats' (2001) 35 *Journal of World Trade* 191.

[7] Mike Moore, *A World without Walls: Freedom, Development, Free Trade and Global Governance* (Cambridge, 2003), pp. 249–50.

[8] The view of the WTO as 'a linkage machine' is developed in José E. Alvarez, 'The WTO as Linkage Machine' (2002) 96 *American Journal of International Law* 146 at 146.

[9] For a discussion of messianism as the central spirit guiding cosmopolitan international lawyers of the twentieth century who assumed 'the fallibility of present society . . . the fallibility of the human beings that inhabit that society and the law that they create out of their narrow vision', see Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 *New York University Journal of International Law and Politics* 471 at 486.

[10] See above n. 1.

governing such decision-making. The agreements, it is argued, oblige Member States to exclude passion, secrecy and singularity (or deference to special interests) from the domestic legislative process. However, I will suggest that these agreements, and the SPS Agreement in particular, can better be understood as requiring national decision-makers to respond to the demands of the market, and thus as incorporating passion, secrecy and singularity at the heart of responsible decision-making. This relationship founds an economy of sacrifice, accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.[11] WTO agreements ask of many Member States that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers.

The third part of the chapter asks whether an appeal to human rights or democratic participation can offer a means of countering the demands of the market. The human rights tradition, at least as translated into the declarations and covenants of modern law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. Indeed, in the *Refah Partisi* case, the European Court of Human Rights held that a party proposing to organize a state and society according to religious or divine rules poses a threat to liberal democracy.[12] Yet the liberal democratic demand for a public realm of empty universalism must be understood in relation to the sacrificial logic of the market. Sacrifice comes before the law.

The chapter concludes by returning to the question of that which escapes sacrificial substitution. It asks how a critical international legal practice might engage with the place of sacrificial responsibility in international law and governance.

Debating trade and human rights

My starting point for this chapter is an uneasiness with the literature on the 'linkage' of trade and human rights. For critics of the WTO and of economic globalization more broadly, WTO membership poses a source

[11] On the reward of the righteous, see Matthew 10:34–40 (unless otherwise indicated, biblical citations are to the Revised Standard Version).

[12] *Refah Partisi (The Welfare Party) and Others* v. *Turkey*, 2003-II ECtHR (Ser. A) 267.

of constraint on the democratic choices open to peoples and governments. For example, a number of contributors to the Amnesty International Lectures on *Globalizing Rights* argue passionately that economic liberalization threatens the future of human rights. For Susan George, if neo-liberal globalization continues, 'politics will concern primarily the deadly serious issue of survival'.[13] The 'bottom-line issue of human rights' will become 'who has a right to live and who does not?'[14] At stake is the price paid by 'loser nations' and 'losers at the individual level', who suffer as a result of homelessness, unemployment, lack of access to health care, starvation and suicide.[15] George argues that human beings can and must challenge this neo-liberal model, and asks 'what obligations, if any, have the fast castes to the slow ones, the best to the rest?'[16] Human rights promise inclusion and participation, offering 'standards for a rights-based society which consciously chooses to respect the dignity of every human being so that no one is left out'.[17] A rights-based system is the opposite of an 'unregulated market free-for-all', and involves the acceptance by business that 'it has responsibilities not just to shareholders but to employees, suppliers, and the communities and nations where it is located'.[18] The challenge is to 'seek to restore power to communities and states while working to institute democratic rules and fair distribution at the international level'.[19]

This argument about the threat posed to democracy by the WTO is well developed in much activist literature, including the influential book by Lori Wallach and Michelle Sforza, entitled *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*.[20] The book was published by the NGO Public Citizen, just before the ill-fated Seattle Ministerial Meeting of the WTO in 1999. In the preface, Ralph Nader argues that we now face 'a race against time: How will citizens reverse the expanding globalization agenda while democratic instincts and institutions remain, albeit under attack?'[21] Wallach and Sforza develop this theme further, arguing that the creation of the WTO represents 'an insidi-

[13] Susan George, 'Globalizing Rights?' in Matthew J. Gibney (ed.), *Globalizing Rights: The Oxford Amnesty Lectures 1999* (New York, 2003), pp. 15–33 at p. 23.
[14] *Ibid.* [15] *Ibid.*, pp. 21–3. [16] *Ibid.*, p. 24. [17] *Ibid.*, p. 17.
[18] *Ibid.*, pp. 28, 32. [19] *Ibid.*, p. 32.
[20] Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (Washington DC, 1999).
[21] Ralph Nader, 'Preface' in *ibid.*, p. xii. See also Ralph Nader and Lori Wallach, 'GATT, NAFTA, and the Subversion of the Democratic Process' in Jerry Mander and Edward Goldsmith (eds.), *The Case against the Global Economy and for a Turn Toward the Local* (San Francisco, 1996), pp. 92–107.

ous shift in decision-making away from democratic, accountable forums – where citizens have a chance to fight for the public interest – to distant, secretive and unaccountable international bodies, whose rules and operations are dominated by corporate interests'.[22] The WTO's undemocratic processes make it a forum for avoiding responsibility and accountability,[23] while the agreements negotiated under its auspices constrain democratic politics.[24] The WTO thus 'serves as the engine for a comprehensive redesign of international, national and local law, politics, cultures and values'.[25]

The difference in style and tone between this literature and that written by trade lawyers is quite striking. For the 'enthusiasts of globalization through law' seeking 'legally rigorous economic integration',[26] such critiques and the growing phenomenon of anti-globalization protests are best met with bigger doses of liberal rationality and better design proposals. This literature worries about how best to 'micromanage divergent public orders'[27] or manage 'the interface' between 'trade liberalization and the regulatory state',[28] understands the WTO as a 'linkage machine',[29] and engages in endless attempts to allocate tasks to different global actors according to a functional logic – 'what institutions, if any, with the authority to manage linkage – that is, to enable states effectively to negotiate and agree on linkage – will best allow us to achieve our goals'.[30] Unlike earlier economic theorists, those writing about economic globalization tend not to make explicit the cultural forms or political order that underpin their sense of the ideal destination of economic globalization. Yet we do catch glimpses of this destination through their discussions of what international economic law is *for*: 'an engine for prosperity', the achievement of harmony through regulation, economic integration defeating

[22] Wallach and Sforza, *Whose Trade Organization*, p. 2.
[23] *Ibid.*, p. 215. [24] *Ibid.*, p. 222. [25] *Ibid.*
[26] See Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J. H. H. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford, 2001), pp. 35–70 at p. 37.
[27] Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, 'It's a Question of Market Access' (2002) 96 *American Journal of International Law* 56 at 75.
[28] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed., London, 1999), p. 500.
[29] Alvarez, 'The WTO as Linkage Machine'.
[30] Joel P. Trachtman, 'Institutional Linkage: Transcending "Trade and . . ."' (2002) 96 *American Journal of International Law* 77 at 77.

the dark forces of national protectionism.[31] This political vision of economic globalization appears most clearly in the work of its self-identified '"liberal" friends',[32] who suggest that there is nothing to be afraid of in the institutional linking of trade and human rights. For example, Ernst-Ulrich Petersmann sees human rights and markets as having a common telos – as 'organized dialogues about values' they both 'promote peaceful coexistence, tolerance and scientific progress'.[33] Human rights serve 'instrumental functions' – they 'make human beings not only better democratic citizens but also "better economic actors"'.[34] The goal of international economic organizations should be to transform '"market freedoms" into "fundamental rights" which – if directly enforceable by producers, investors, workers, traders and consumers through courts . . . can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health)'.[35] Trade-related rights to property or due process could be enhanced through WTO decision-making, thus achieving both 'economic efficiency' and 'democratic legitimacy'.[36] Robert Howse also suggests that democracy-based critiques can usefully be accommodated – 'the law of international economic integration, having survived and/or been reshaped by such critique and contestation, will possess all the more social legitimacy'.[37] And, for those who are supporters of the American vision of a new world order, 'WTO admission and participation would set up a kind of tutorial in rule-of-law values' and might provide the means to push a human rights violating state 'not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on'.[38] In these quite different ways, human rights or democratic challenges are absorbed into the vision of the future that informs the work of proponents of economic globalization.

[31] Remarks by Frederick M. Abbott, 'Human Rights, Terrorism, and Trade' (2002) 96 *American Society of International Law Proceedings* 121 at 126.

[32] Howse, 'Adjudicative Legitimacy', p. 69.

[33] Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621 at 627.

[34] *Ibid.*, p. 626, citing UNDP, *Human Development Report 2000: Human Rights and Human Development* (2000), p. iii.

[35] *Ibid.*, p. 629.

[36] *Ibid.*, p. 624.

[37] Howse, 'Adjudicative Legitimacy', p. 69.

[38] Remarks of Lori Fisler Damrosch, 'Human Rights, Terrorism and Trade' (2002) 96 *American Society of International Law Proceedings* 128 at 130.

For some commentators, this assimilation of human rights within the free trade agenda is a source of frustration. Philip Alston, for example, has been highly critical of attempts by scholars to appropriate human rights to legitimize the free trade regime. Alston argues that there is a marked difference between the rights promoted by the WTO and those promoted by international human rights law.

> [A]ny such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights.[39]

For Alston, the suggestion of an existing link between WTO law and human rights law involves 'a form of epistemological misappropriation'.[40] The debate over the proper relationship between trade and human rights must take a new direction,[41] involving a recognition that trade law and human rights law have 'a fundamentally different ideological underpinning'.[42] While I share the sense that a new direction for this debate is needed, I am not so sure that the trade law literature avoids confronting the challenge that human rights pose to the global trade regime. The latter sections of the chapter explore the possibility that human rights law in its current engagement with international economic institutions may in fact *not* pose a challenge to trade law, and that in order to understand why this is so, it is useful to explore the intimate relationship between the forms of law embodied in the two international regimes.

My uneasy response to the existing conversation about trade and human rights is also produced by the effect of my attempts to speak and write about this conversation. The moment in which my disenchantment with the genre of writing about this topic became impossible to ignore came in the middle of teaching a subject called 'Trade, Human Rights and Development'.[43] The subject involves a close analysis of texts

[39] Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815 at 826.
[40] *Ibid.*, p. 842. [41] *Ibid.*, p. 844. [42] *Ibid.*, p. 842.
[43] I am responding here to the argument by Gayatri Chakravorty Spivak that 'the real political model' that underlies any piece of academic writing is 'the educational institution'.

in which capitalism and human rights are linked. The discussions in the early part of the subject, which involved readings of classic economic and human rights texts with texts by critical and feminist scholars, was productive, thoughtful and responsive. The students generated insightful analyses of value, waste, democracy, nature, participation, nationality, exchange, gifts, charity and property as these terms functioned in legal and economic narratives.

Later in the subject, we moved to look closely at the work of international economic institutions and trade agreements, using human rights texts and norms to critique the forms of law that trade agreements require states to enact. In particular, we talked about whether these trade agreements constrained democratic participation and those civil and political rights designed to enable that participation. At this point, the mood shifted quite dramatically. The critique became sharper, yet a sense of hopelessness also began to grow. As one student said dully: 'But there is no other way, there is no alternative.' I felt that the discussion was deadened the more I talked about the nature of the legal forms mandated by the various agreements and their relation to human rights norms. Instead of engagement and of opening texts out to alternative readings, this discussion seemed to produce an exhausted acceptance of the inevitability or necessity of sacrifice and punishment in order to reach the goals of development or economic integration. Why did the appeal to democracy and human rights when read with capitalism produce this sense of closure? We all know (don't we?) that we don't have to organize ourselves according to this economic vision, that there are all sorts of other worlds out there that look nothing like this fantasy of perfect control and endless profit, docile bodies and redeemed souls. So what was my role in (re)producing this fantasy in my classroom? How might I approach this differently?

In the final session of the subject, I felt I needed to communicate my sense that there is an outside to these economic narratives, that other ways of being are possible. In doing so, I drew on two texts about writing, economics and value. The first was a piece by J. K. Gibson-Graham, in which she writes:

See Gayatri Chakravorty Spivak, 'Schmitt and Poststructuralism: A Response' (2000) 21 *Cardozo Law Review* 1723 at 1729. For her reading of the politics that secures the opening of texts when you talk about them to 'clusters of alterity – groups of others' (classes, public audiences), see Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (London, 1993), p. 142.

> [W]hat we have blithely called a capitalist economy in the United States is certainly not wholly or even predominantly a market economy . . . The market, which has existed throughout time and over vast geographies, can hardly be invoked in any but the most general economic characterization. If we pull back this blanket term, it would not be surprising to see a variety of things wriggling beneath it. The question then becomes not whether 'the market' obscures differences but how we might want to characterize the differences under the blanket.[44]

Gibson-Graham uses the household as one of the examples of this claim that we do not inhabit purely market economies. It may be that our relations with the people we live with are not capitalist.[45] They might be feudal (involving 'the appropriation of surplus labour in use value form and relations of fealty and mutual obligation');[46] they might be fascist (governed by the fantasy that all are working in an idealized unity towards a common end)[47] or socialist; we might even give and receive gifts from the people with whom we live. So we discussed this location as one site that might suggest the inadequacy of the capitalist account of the possibilities of social life.

The second set of relations I invoked were those with friends and students in and around the academy. These involve teaching, learning, listening, speaking, reading and writing – scenes I inhabited with these students. Of course, the university is in (increasingly large) part governed by capitalist market relations – these relations produce the student body, my students and I are invited to see each other in market terms (me as service provider, they as consumers). My judgments of their work, their judgments of my teaching, are used in our various workplaces as one amongst many markers of value. But also, much of the time for me, and I hope often for my students, there is something that goes on in the space of the classroom or the university office which is not explicable in terms of capitalist exchange relations. I do not experience our creativity and

[44] J. K. Gibson-Graham, *The End of Capitalism (As We Knew It)* (Cambridge, MA, 1996), p. 261.

[45] But for a reading that suggests a close relationship between capitalist exchange relations and the modern 'long-term public couple arrangement based on the assumption of sexual fidelity' as an 'economy of intimacy', see Laura Kipnis, 'Adultery' (1998) 24 *Critical Inquiry* 289 at 290–1.

[46] Gibson-Graham, *End of Capitalism*, p. 212.

[47] See the discussion of the economic grounds of fascism in Juliet Flower MacCannell, *The Hysteric's Guide to the Future Female Subject* (Minneapolis, 2000), p. 133.

thought as being purely in the service of corporate profit or governed by its forms.[48]

So this chapter is also a more sustained attempt to make sense of that moment in my teaching where I became aware of a problematic relationship in my linking of trade and human rights discourse, and also of the gesture I felt was required of me to address that moment – the recollection of an outside to this liberal economic account of the world. I want to think about whether economic law and human rights law somehow are complicit in creating a sense of despair, a sense that there are no political alternatives available, that we really have in some meaningful way reached that much-vaunted end of history. In trying to see whether there is some deep complicity between the two forms of law, I want also to try to hold onto the idea that there is nonetheless something that escapes those forms.

Sacrifice and the secrets of international trade law

Rationality and mystery

Many of the trade agreements implemented under the auspices of the WTO are concerned with the harmonization of domestic regulatory standards. They achieve this end by mandating or prohibiting particular ways of writing law or particular forms of law. In order to begin this reading of the forms of law embodied in WTO agreements, it is useful to compare the WTO with earlier free trade regimes, such as those embodied in the original General Agreement on Tariffs and Trade 1947 (GATT).[49] The GATT was essentially an agreement about trading in goods or commodities, and took as its foundational premise the norm of non-discrimination. The barriers to moving goods to market were material (such as quarantine stations where goods were kept for spurious reasons, or customs inspectors who seized goods that were in excess of a designated import quota), or monetary (classically the imposition of tariffs to imported goods that might threaten the market in goods produced domestically). Under GATT, parties agreed to convert quantitative barriers to trade into tariff barriers, to lower tariff barriers over time, and not to discriminate between different trading partners or in favour of domestic over foreign producers of goods.

[48] Eve Kosofsky Sedgwick, *Tendencies* (London, 1994), p. 19.
[49] Geneva, 30 October 1947, in force 1 January 1948, 55 UNTS 187.

The GATT also addressed some barriers to trade that were invisible and interior, such as charges imposed internally, and regulations that functioned as disguised barriers to trade, such as taxes that were imposed in a discriminatory fashion internally and effectively functioned as tariffs. However, this move away from a focus on 'border' measures into the interior of the state, and the attempt through trade agreements to control 'domestic regulations', became uncoupled from the non-discrimination norm during the Uruguay Round. This was the trade round that resulted in the creation of the WTO, and the new harmonization agreements implemented under its auspices aim at the removal of regulatory barriers that might limit the movement of goods, services and capital. The aim is to harmonize divergent regulatory environments that threaten to constrain commercial activity, whether or not the domestic regulations discriminate between foreign and domestic producers, or between different foreign producers. Such agreements aspire to 'an economic life without friction'.[50] They are unusual in international law terms, in that they are ambitiously prescriptive in terms of legal systems, judicial processes, legislative processes and substance of laws that states must have in place. Underpinning this constraint of legislative activity and this commitment to regulatory standardization, is the end of 'harmonization'.[51] Harmonization moves beyond a concern with discrimination, to draw legal regimes into one integrated system. Difference is conceptualized as discord. The musical metaphor of harmony exerts its pull – nations and their laws become 'closed wholes whose elements call for one another like the syllables of a verse'.[52] That which prevents the achievement of the harmonious whole (unreason, passion, special interests, culture) must be outlawed.

Let me describe the operation of the SPS Agreement to give a sense of this. The Agreement sets out obligations and procedures relating to the use of sanitary and phytosanitary measures, including measures relating to human or animal health and safety, and applies to all sanitary and phytosanitary measures which may directly or indirectly affect international trade.[53] Members of the WTO are obliged to ensure that any such

[50] David Kennedy, 'Laws and Developments' in John Hatchard and Amanda Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21st Century* (London, 2003), pp. 17–26 at p. 24.

[51] SPS Agreement, preamble ('*Desiring* to further the use of harmonized sanitary and phytosanitary measure between Members . . .') and Art. 3.

[52] Emmanuel Levinas, 'Reality and its Shadow' in Seán Hand (ed.), *The Levinas Reader* (Oxford, 1989), pp. 129–43 at p. 132.

[53] Key terms including 'sanitary or phytosanitary measure' are defined in Annex A.

measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without scientific evidence.[54] In addition, measures must be based on an assessment of the risks to human, animal or plant life or health, conducted 'taking into account risk assessment techniques developed by the relevant international organizations'.[55] Under the Agreement, Members also agree to base their measures on international standards, guidelines or recommendations where they exist.[56] Members may introduce or maintain standards which result in a higher level of protection than would be achieved by measures based on such international standards, if there is a scientific justification for such increased protection or where the Member has engaged in a process of risk assessment as laid down in Article 5.[57]

The SPS Agreement thus mandates a particular approach to decision-making about issues that include food security, consumer safety, regulation of genetically modified food, sustainable farming practices, animal welfare or the effects of agribusiness on small farmers. This approach has two key features. First, the Agreement obliges Members to 'ensure that their sanitary and phytosanitary measures are based on an assessment . . . of risks to human, animal or plant life or health'.[58] Decision-makers must therefore engage in 'risk assessment' and 'risk management' processes. Risk assessment requires

> the evaluation of the *likelihood* of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[59]

A failure to evaluate or calculate risk breaches obligations under the SPS Agreement, so that a Member may not decide to introduce an SPS measure as a means of dealing with an absence of scientific certainty about the risks posed by a novel technology. '[T]he risk evaluated in a risk assessment

[54] SPS Agreement, Art. 2. The only exception to the obligation to base such measures upon scientific evidence occurs where relevant scientific evidence is insufficient. In that situation, Members can provisionally adopt measures on the basis of pertinent information, but must seek to obtain additional information necessary for a more objective assessment of risk within a reasonable period of time: Art. 5(7).

[55] *Ibid.*, Art. 5(1). [56] *Ibid.*, Art. 3(1). [57] *Ibid.*, Art. 3(3). [58] *Ibid.*, Art. 5(1).

[59] *Ibid.*, Annex A (emphasis added).

must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed".'[60]

The second key feature of the approach to regulation mandated by the SPS Agreement is that this assessment and evaluation of risk must be premised on 'science'. 'Science' has been defined by the Appellate Body of the WTO in terms of a method or technique for understanding the relationship of a subject to knowledge. In its 1998 decision in the *EC – Measures concerning Meat and Meat Products* ('*EC – Hormones*') dispute, the Appellate Body sought to articulate the factors to be considered in carrying out a risk assessment in order to legitimately ground a national health policy.[61] It noted that the list of factors to be taken into account in the assessment of risks as set out in Article 5.2 begins with 'available scientific evidence'.[62] The decision refers to a US statement of administrative action as to the meaning of scientific:

> The ordinary meaning of 'scientific', as provided by dictionary definitions, includes 'of, relating to, or used in science', broadly, 'having or appearing to have an exact, objective, factual, systematic or methodological basis', 'of, relating to, or exhibiting the methods or principles of science' and 'of, pertaining to, using, or based on the methodology of science'.

Science provides a method for evaluating 'risk', 'not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die'.[63] Thus the absence of certain (extremely expensive) forms of scientific evidence and the failure to conduct risk assessments invalidates laws or regulations that directly or indirectly affect international trade. The process of regulating is presented as mechanical – regulations must be justified according to risk assessment procedures and risk management strategies based on detailed scientific data, and such risk assessment must reasonably support or warrant the regulatory measure adopted in response.[64]

[60] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, adopted 6 November 1998, WT/DS18/AB/R, para. 125 ('*Australia – Salmon*').

[61] Report of the Appellate Body, *EC – Measures concerning Meat and Meat Products (Hormones)*, adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.

[62] *Ibid.*, para. 187. [63] *Ibid.*

[64] Even if a challenged measure is based on such a risk assessment, it may be found to be in breach of the SPS Agreement if *all* comparable products are not subject to similar regulatory measures based on equally detailed scientifically based risk assessments: *Australia – Salmon.*

If there is no scientific evidence supporting a particular SPS measure, that measure cannot be adopted without breaching the obligations under the SPS Agreement. The much discussed *EC – Hormones* decision provides an example of this. The measures in dispute were a series of EC directives which operated to ban the importation or sale within the EC of meat from animals treated with any of six specified growth hormones. The Appellate Body of the WTO found that, while the measures in dispute did not result in discrimination between domestic and foreign producers or in a disguised restriction on international trade, the ban on importation of meat treated with hormones was nevertheless in breach of the SPS Agreement. It held that the EC was not entitled to regulate the use of growth hormones as its decision to do so was not based on sufficient scientific evidence. There must be a risk assessment based on detailed scientific data in order for such measures to be in compliance with SPS obligations, even where there is no clear scientific opinion regarding the risks posed by a product. In its argument to the WTO Appellate Body, the EC relied upon scientific opinion that ingestion of the hormones in dispute was potentially carcinogenic. The Appellate Body held that the scientists upon whose opinion the EC was relying had not evaluated the carcinogenic potential of the hormones when used *specifically* as growth promoters.[65] In a footnote, the Appellate Body held that, even if the scientific evidence concerning the risk to women was correct, only 371 of the women currently living in the Member States of the European Union would die from breast cancer as a result of trade in hormone-related beef, while the total population of the Member States of the European Union in 1995 was 371 million.[66] By implication, the deaths of this number of women would not justify enacting measures that could constrain the operation of the market or inhibit progress towards economic integration.

In the *Japan – Measures Affecting the Importation of Apples* decision, the Appellate Body again stressed the centrality of science, objectivity and rationality as the grounds for legitimate decision-making under the SPS Agreement.[67] Japan had in place a phytosanitary measure designed to prevent the spread of the disease fire blight through apples imported from the US.[68] These measures included inspection, spraying and chlorine treatment of packaging and containers. The Appellate Body confirmed that a measure is maintained 'without sufficient scientific evidence' in breach of

[65] *EC – Hormones*, paras. 199–200.
[66] *Ibid.*, footnote 182.
[67] Report of the Appellate Body, *Japan – Measures Affecting the Importation of Apples*, adopted 10 December 2003, WT/DS245/AB/R.
[68] *Ibid.*, para. 14.

Article 2.2 'if there is no "rational or objective relationship" between the measure and the relevant scientific evidence'.[69] This includes situations where the measure is considered to be 'clearly disproportionate' to the risk of infection. The Appellate Body rejected Japan's argument that national authorities be given a 'certain degree of discretion' in their approach to the evaluation of the risks established by scientific evidence. Japan argued that it sought to take a prudent and precautionary approach to evaluating the risks posed by importation of even 'mature, symptomless apples', given the fact of 'trans-oceanic expansion of the bacteria', the growth in international trade and 'the fact that the pathways . . . of transmission of the bacteria are still unknown'.[70] However, for the Appellate Body, 'total deference to the findings of the national authorities would not ensure an objective assessment',[71] and thus it was not appropriate to defer to 'Japan's approach to scientific evidence and risk'.[72]

'*[Y]our Father who sees in secret will reward you*'[73]

Much initial concern with agreements such as the SPS Agreement has been framed around the criticism that, in the pursuit of harmonization, such agreements provided no place for uncertainty, caution or even politics in their approach to the writing of laws and regulations. The agreements seemed to adopt a programmatic, and thus deeply irresponsible, approach to knowledge. Responsibility understood in this way involves 'the experience of absolute decisions made outside of knowledge or given norms, made therefore through the very ordeal of the undecidable'.[74] This involves a relationship to the other to whom we respond, to whom we are responsible. This 'form of involvement with the other . . . is a venture into absolute risk, beyond knowledge and certainty'.[75] At first glance, this linking of responsibility with 'the ordeal of the undecidable' seems far from the approach to knowledge set up by the SPS and related agreements. These trade agreements appear to be quite the opposite of this – instead of involving a 'venture into absolute risk' or the realm of the undecidable, the agreements require that political decisions that affect market integration must be based on scientific method, assessment and management. All the

[69] *Ibid.*, para. 147. [70] *Ibid.*, para. 150. [71] *Ibid.*, para. 165.
[72] *Ibid.*, para. 167. [73] Matthew 6:1–4.
[74] Jacques Derrida, *The Gift of Death* (trans. David Wills, Chicago, 1995), pp. 5–6. Derrida here develops this relationship of responsibility to risk and uncertainty in his reading of the meaning of the Christian legacy for European politics.
[75] *Ibid.*, p. 5.

language of the agreements is about privileging rationality. Indeed, for those supporting the form of these agreements, it is the focus on reason and science that is the contribution of these agreements to democratic politics. As Robert Howse argues, the provisions of the SPS Agreement:

> can be, and should be, understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control. There is more to democracy than visceral response to popular prejudice and alarm; democracy's promise is more likely to be fulfilled when citizens, or at least their representatives and agents, have comprehensive and accurate information about risks, and about the costs and benefits associated with alternative strategies for their control.[76]

Yet a closer analysis of the structure of the SPS Agreement makes clear that it is only the claim to know better than the market that has to be proved according to these scientific methods. The logic of the Agreement is that a Member State may not regulate in the name of constraining the activities of the market unless those measures can be justified according to scientific evidence and risk assessment. In other words, the SPS Agreement *mandates* 'a venture into absolute risk'. For example, if a decision to manage or regulate risk cannot be justified according to risk assessment methods based on scientific evidence, this does *not* mean that the risk goes away, or that no decision is made. A decision *is* made – the decision to allow citizens of the state to be made subject to risk in the name of removing barriers to the market and allowing economic integration. There is no requirement that the rationality of this decision *not* to regulate be established, or that the reasoning involved in reaching this decision be made public, supported by adequate documentation, or based on scientific principles. Instead, the SPS Agreement obliges the decision-maker to approach this decision as a venture into absolute risk – to imagine that at the moment of decision he or she is responsible to the market, rather than accountable to members of a shared national community. This is a form of a law that publicly champions rationality, while instituting a secret relationship to mystery or the unknown. The language of the trade agreements appears to exclude mystery or secrecy from politics, with the commitment to the meticulous standards of scientific evidence and risk assessment as the basis of public decision-making. In this vision,

[76] Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization' (2000) 98 *Michigan Law Review* 2329 at 2330.

'responsibility is tied to the public and to the nonsecret, to the possibility and even the necessity of accounting for one's words and actions in front of others, of justifying and owning up to them'.[77] Yet these trade agreements incorporate at their heart that mystery which they claimed to exclude.

This form of law, with its secret relationship to mystery, can be understood through the Christian doctrine of sacrifice. Of particular relevance to the theological form of trade agreements is the need to hold universal principles, but also to betray those principles as part of the response to the sacrificial demand of the absolute other. Sacrificial responsibility involves a singular relationship with an unknown other. In the Christian tradition, this other is named God, but in the tradition of economic law we might name this other 'the Market'. This responsibility can be acted upon only in silence, in solitude and in the absence of knowledge. Responsibility in this tradition describes the split relationship of an individual to the public world of universal principles, and to the unknown other to whose demands the individual must respond in secret.

The mapping of this sacrificial tradition of thinking about responsibility has been traced by Jacques Derrida in a reading of the story of Abraham, of whom God demands 'that most cruel, impossible, and untenable gesture: to offer his son Isaac as a sacrifice'.[78] God tells Abraham: 'Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering.'[79] In this demand by God, Abraham is confronted by this experience of God as absent and mysterious:

> God doesn't give his reasons, he acts as he intends, he doesn't have to give his reasons or share anything with us: neither his motivations, if he has any, nor his deliberations, nor his decisions. Otherwise he wouldn't be God, we wouldn't be dealing with the Other as God or with God as *wholly other* [*tout autre*].[80]

Christians encounter this demand from a God who does not explain his reasons, and to whom they must respond in his absence, in solitude. This experience of God as the wholly other is rendered more profound in the call to sacrifice, and particularly to sacrifice a beloved

[77] Derrida, *Gift of Death*, p. 60.

[78] *Ibid.*, p. 58. While a version of this story appears in the religions of Judaism, Islam and Christianity, I am interested, with Derrida, in tracing the Christian form of the story, with its strongly economic logic.

[79] Genesis 22:2. [80] Derrida, *Gift of Death*, p. 57.

son. This 'supposes the putting to death of the unique in terms of its being unique, irreplaceable, and most precious'.[81] It is this sacrifice of 'what is one's own or proper, of the private, of the love and affection of one's kin' that, for Derrida, gives meaning to sacrifice as the gift of death.[82] The moment when Abraham obeys God and puts the knife to his son's throat 'is the moment when Abraham gives the sign of absolute sacrifice, namely, by putting to death or giving death to his own, putting to death his absolute love for what is dearest, the only son'.[83]

Abraham does not speak of what he has been called to do. He thus betrays his public commitment to Isaac's mother, Sarah – his decision to sacrifice Isaac is 'a sort of rupture of marriage, an infidelity to Sarah, to whom Abraham says not a word at the moment of taking the life of his son, their son'.[84] Nor does Abraham speak of his decision to Isaac himself. Indeed, when Isaac asks his father where the sacrificial lamb is to be found, Abraham replies that God will provide the lamb for the burnt offering.[85] This is the meaning of responsibility – it 'consists in always being alone, entrenched in one's own singularity at the moment of decision'.[86] To the extent that I am responsible, this 'responsibility remains mine, singularly so, something no one else can perform in my place'.[87] This responsibility that consists in 'being alone . . . at the moment of decision' is taught to us by the silence of Abraham. Abraham must act not only in secret, but also in the absence of knowledge:

> The knight of faith must not hesitate. He accepts his responsibility by heading off towards the absolute request of the other, beyond knowledge. He decides, but his absolute decision is neither guided nor controlled by knowledge.[88]

Abraham's hand is stayed, at the moment when he takes the knife to his son's throat. The angel of God calls to Abraham from heaven: 'Lay not thine hand upon the lad, neither do thou anything unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son, from me.'[89] 'I see that you have understood what absolute duty means, namely, how to respond to the absolute other, to his call, request,

[81] *Ibid.*, p. 58. [82] *Ibid.*, p. 95. [83] *Ibid.*
[84] Jacques Derrida, '"Le Parjure," *Perhaps*: Storytelling and Lying' in Carol Jacobs and Henry Sussman (eds.), *Acts of Narrative* (Stanford, 2003), pp. 195–234 at p. 233.
[85] Genesis 22:8. [86] Derrida, *Gift of Death*, p. 60. [87] *Ibid.*, p. 60.
[88] *Ibid.*, p. 77.
[89] Genesis 22:12 (King James Version).

or command.'[90] The moral of this story concerns the tragic nature of responsibility in the face of the call to sacrifice.

> Absolute duty means that one behave in an irresponsible manner (by means of treachery and betrayal), while still recognizing, confirming, and reaffirming the very thing one sacrifices, namely, the order of human ethics and responsibility.[91]

The trade agreements I have described affirm in this way principles of transparency, rationality and universality of application without discrimination.[92] Yet they also require that the subjects of these agreements sacrifice such public virtues in the political realm to meet the demands of responsibility. Like Abraham, the responsible subjects of these agreements must wait, 'sad and dangerous',[93] ready to respond in secret to the call of the unknown other. These agreements ask of many Member States that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers. This double sense of responsibility – involving at once a public espousal of obligations to one's family or community (one's own), and a secret relationship to a singular other which betrays those obligations – underpins the economic agreements I am exploring here.

Of particular relevance to this reading is the economic nature of Christian sacrifice. Sacrifice initially appears in Genesis in the form of a gift. Abraham gave his gift of that which is priceless 'outside of any economy . . . without any hope of exchange, reward, circulation, or communication'.[94] Yet God gave back the life of Abraham's beloved son once he was assured that there was this absolute gift.[95] So 'because he renounced calculation', God gave back to Abraham the very thing he had decided to sacrifice.[96] Yet the Christian doctrine established upon this act of sacrifice

[90] Derrida, *Gift of Death*, p. 72. The experience of a relationship with God as distant, unknowable, other and mysterious is at the heart of the experience of sacrifice for Derrida. He explores it further through the relationship to a mysterious God that is invoked in St Paul's letter to the Philippians: 'Wherefore my beloved, as ye have always obeyed, not as in my presence only, but now much more in my absence, work out your own salvation with fear and trembling': at p. 56, citing Philippians 2:12 (King James Version).

[91] Derrida, *Gift of Death*, p. 67.

[92] See for example the obligations set out in the SPS Agreement, Art. 2(3) (non-discrimination), Art. 7 (transparency).

[93] Martti Koskenniemi, 'The Silence of Law/The Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge, 1999), pp. 488–510 at p. 510.

[94] Derrida, *Gift of Death*, p. 96. [95] *Ibid.* [96] *Ibid.*, p. 97.

inaugurates an *economy*. Sacrifice becomes part of a relationship of exchange or substitution, although the Christian cannot know or calculate what will be received as a reward for this sacrifice. Christians are called upon to sacrifice, to love God more than a father, mother, son or daughter, in return for the promise of the 'reward of the righteous'.[97] Christian justice requires giving without knowing what the reward will be – there is a paying back, but it is 'one that creatures cannot calculate and must leave to the appreciation of *the father who sees in secret*'.[98] Through this promise of a reward in the future, 'God the Father re-establishes an economy that was interrupted by the dividing of earth and heaven'.[99] This economy of sacrifice is thus founded on the circulation of risk and reward between fathers (God, Abraham) and sons (Abraham, Isaac). Translated into the language of international economic law, the harmonization agreements require decision-makers to understand themselves as bound to respond to the demands of the market, to sacrifice their own (their citizens, their public obligations) in the expectation of the reward of the righteous in the future by the Father (God/Market) who sees in secret.

Yet something escapes the closed circle of this sacrificial economy. What comes before this moment of decision? What gifts are the condition of this economy; what sacrifices are made but not rewarded in order to inaugurate this story of fathers and sons? To translate this back into the language of international economic law, let me return to the women whose sacrifice was nonchalantly noted in footnote 182 to the *EC – Hormones* decision. The Appellate Body was there providing instruction to Member States in how to decide in a way that is responsible to the market in accordance with the dictates of their obligations under WTO agreements. Members of the WTO must sacrifice their own, their citizens, in order to meet this responsibility and receive the reward of the righteous. The responsibility of the decision-maker is not owed to these women of footnote 182, or the

[97] Matthew 10:34–40:

> *The reward of the righteous.* Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's foes will be those of his own household. He who loves father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me; and he who does not take his cross and follow me is not worthy of me. He who finds his life will lose it, and he who loses his life for my sake will find it.

[98] Derrida, *Gift of Death*, p. 107. [99] *Ibid.*, p. 99.

others who 'live and work and die' within the jurisdiction or the territory of WTO Members. Rather, the WTO agreements structure that responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers. It is the market to whom the decision-maker must be responsible in order to receive the reward of the righteous. Yet it is the women whose sacrifice is recalled in the footnote to the *EC – Hormones* decision, where the Appellate Body inscribes an account of the sacrificial logic underpinning the SPS Agreement, who suggest an outside to this economy of sacrifice. It is to these unrewarded sacrifices that I want now to turn to explore the possibilities they suggest for developing a critique of the global economy that might take us beyond the dead end of my classroom discussion.

The suspended question of woman's sacrifice

> Would the logic of sacrificial responsibility within the implacable universality of the law, of its law, be altered, inflected, attenuated, or displaced, if a woman were to intervene in some consequential manner? Does the system of this sacrificial responsibility and of the double 'gift of death' imply at its very basis an exclusion or sacrifice of woman? A woman's sacrifice or a sacrifice of woman, according to one sense of the genitive or the other? Let us leave the question in suspense.[100]

This suspended question of the feminine haunts the institutions founded on an economy of sacrifice. The drama of the story of Abraham and Isaac turns on the singular and loving relationship between a father and his only son – as Derrida reminds us, it is not a sacrifice to put to death what one hates.[101] So the object of sacrifice must be the object of one's love, that which one knows intimately, perhaps even one's property – 'those I love in private, my own, my family, my sons'.[102] 'Take your son, your only son', God tells Abraham the father. How then to understand the meaning of paternal ownership as it relates to this founding story of sacrificial responsibility?

Before this sacrificial economy is inaugurated, there exists a set of relations that suggest another beginning. If we start with a different genesis, we might find that the biblical texts open out in ways that disturb the place of paternity and property in the stories of sacrifice. So let me return to Genesis, and to an event that occurs between the birth of Isaac and the

[100] *Ibid.*, p. 76. [101] *Ibid.*, p. 64. [102] *Ibid.*, p. 69.

testing of Abraham. For Isaac is in fact not self-evidently the 'only son' of Abraham. Indeed, Sarai (later renamed Sarah by God) did not bear children to Abram (later renamed Abraham) for many years. Sarai told Abram that, as 'the Lord has prevented me from bearing children', Abram should take her Egyptian maid Hagar as his wife.[103] Hagar bore Abram a son, whom Abram named Ishmael. Then God came to Abram and told him that he would make a covenant with Abram, that he would 'be the father of a multitude of nations' and that his name would be Abraham.[104] God then tells Abraham that his wife shall be named Sarah, and that she will be blessed by God who will give Abraham a son by her. 'I will bless her, and she shall be a mother of nations; kings of peoples shall come from her.'[105] In this story of sons and of naming, we see beginning an account of the economy of words and of rewards circulating between God and Abraham.

God visits Sarah and she conceives and bears Abraham a son – 'Abraham called the name of his son, who was born to him, whom Sarah bore him, Isaac.'[106] Here begin two parallel stories of sons and of the relationship to mother, father and God. In the story that comes first in time, Sarah sees Ishmael and Isaac playing together. She says to Abraham, 'Cast out this slave woman with her son; for the son of this slave woman shall not be heir with my son Isaac.'[107] This is displeasing to Abraham 'on account of his son',[108] whom we understand to be his son Ishmael. God then speaks to Abraham:

> 'Be not displeased because of the lad and because of your slave woman; whatever Sarah says to you, do as she tells you, for through Isaac shall your descendants be named. And I will make a nation of the son of the slave woman also, because he is your offspring.' So Abraham rose early in the morning, and took bread and a skin of water, and gave it to Hagar, putting it on her shoulder, along with the child, and sent her away. And she departed, and wandered in the wilderness of Beersheba.[109]

Thus Abraham is promised that his descendants shall be named through Isaac – authentic filiation is established through this promise. Yet the story does not end here. In contrast to the more familiar account of the call to sacrifice Isaac, a drama that is played out between God, Abraham and his son, this story does not end with the action of the father. Instead, we

[103] Genesis 16:1–3. [104] Genesis 17:4. [105] Genesis 17:15–16.
[106] Genesis 21:1–3. [107] Genesis 21:10. [108] Genesis 21:11.
[109] Genesis 21:12–14.

follow Hagar and Ishmael into the wilderness. When their water is gone, Hagar casts Ishmael under a bush.

> Then she went, and sat down over against him a good way off, about the distance of a bowshot; for she said, 'Let me not look upon the death of the child'. And as she sat over against him, the child lifted up his voice and wept. And God heard the voice of the lad; and the angel of God called to Hagar from heaven, and said to her, 'What troubles you, Hagar? Fear not; for God has heard the voice of the lad where he is. Arise, lift up the lad, and hold him fast with your hand; for I will make him a great nation.' Then God opened her eyes, and she saw a well of water; and she went, and filled the skin with water, and gave the lad a drink.[110]

The relation of these two stories is essential to making sense of God's command to Abraham that he sacrifice his 'only son'. Isaac's designation as the 'only son' is true in a complicated way. Ishmael is conceived through insemination by Abraham, Isaac is conceived by the Lord doing to Sarah 'as he had promised'.[111] Abraham is the father of Isaac through the promise of God, while Abraham is the father of Ishmael through his sexual encounter with Hagar. In order to experience the morality of this story about the sacrifice of a proper and only son, we must believe in the promise of the Lord as 'the instrument of generation'.[112] Christianity accepts Abraham's understanding of authentic filiation. The story of Ishmael and Abraham, although involving the separation of father and son and the sparing of the son's death by God, is not recounted as a founding fable of Christian doctrine. The differences between the two stories are telling. In the story of Ishmael, the son who is exiled but not sacrificed, the action is not immediately economic. In a much stronger sense than that involved in the story of Isaac, this is a narrative of dissemination or 'that which doesn't come back to the father'. Abraham and the reader expect 'neither response nor reward' from this decision to exile a son and a lover.[113] The mother, Hagar, remains a central player in the story. She intervenes 'in some consequential manner', and as a result 'the implacable universality' of the law of sacrificial responsibility is subtly altered. We feel the distance between Hagar and the son whose coming death she dreads – we hear the cries of the child as he mourns his separation from his mother. The angel of the Lord speaks directly to the mother, and relieves her

[110] Genesis 21:15–19. [111] Genesis 21:1.

[112] Judith Grbich, 'The Problem of the Fetish in Law, History and Postcolonial Theory' (2003) 7 *Law Text Culture* 43 at 61.

[113] For the description of the story of Isaac in these terms, see Derrida, *Gift of Death*, p. 96.

suffering. We do not forget the memory of the flesh, the intimate relation between mother and child. Nor do we forget the brothers playing together, or the fraught relationship between their mothers. These other relations, gifts and sacrifices fade away once we focus our attention on the drama of responsibility and rewards at stake in the economy circulating between father and son, the drama of Abraham and Isaac alone with God.

Given that this form of sacrifice is now institutionalized as the foundation of a global economy, it matters that responsibility is limited. It matters what questions are asked of us, how we are rewarded for sacrificing others, and in whose name we sacrifice. If we return to the story of Abraham and Isaac, we can see that, in making the decision, in answering the call of the other, we can only ever be responsible to the one who makes the demand. It is always possible that this singular other might be our child, our lover, our brother or sister, that unique, irreplaceable other represented in ethics or aesthetics.[114] However, international economic agreements mandate that the other around whom this understanding of responsibility is organized is the market. Without focusing on the form of law that governs this moment of decision, we cannot address the conditions that lead to this moment of decision-making (such as the constitution of some subjects as the property of others, or the unrewarded sacrifices made by many in order to make it possible for the decision-maker to make the responsible decisions for which he will be rewarded). The question remains – how can decision-makers be responsible (rather than simply 'accountable') to those they sacrifice in such an economy? How might we think about the responsibility of Abraham to his wife, to his slave-woman, to his sons? Is it possible ever to be responsible to all the (other) others who are excluded from the relationship between decision-maker and the one to whom the decision-maker is responsible, those whom we sacrifice when we decide to respond to the demands of the Father who sees in secret? Does human rights law offer any means of intervening in this economy, or of remembering these other gifts of life and death?

[114] The realm of art or representation has been privileged in some strands of European philosophy as one in which difference or otherness might be experienced. Yet, in the second half of the twentieth century, this idealized sense of aesthetics began to face an ethical challenge by those arguing that the other is only ever represented by accommodating or assimilating it to existing economies, languages or practices. For a useful overview of this debate, see the essays collected in Dorota Glowacka and Stephen Boos (eds.), *Between Ethics and Aesthetics* (Albany, NY, 2002).

The place of sacrifice in the democratic polity

Sacrifice before the law

I have so far suggested that trade agreements are structured by a Christian doctrine of sacrifice. Human rights and democracy are regularly invoked as a response to economic and religious excesses. The democratic rights-bearer of liberal legalism would seem to be the counter to any theological fundamentalism, whether economic or otherwise. Human rights are understood as being granted to all human beings 'on the basis of the inherent human dignity of all persons'.[115] Where economics treats individuals as 'objects rather than as holders of rights', able to be sacrificed to achieve some larger purpose, human rights treats individuals 'as political actors in the full sense'.[116] Thus the human rights tradition, at least as translated into the declarations and covenants of modern law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. The European Court of Human Rights has reaffirmed this sense of the opposition between liberal democracy and theocracy in the *Refah Partisi* case, where it held that a political party proposing to organize a state and society according to religious or divine rules poses a threat to liberal democracy.[117] The Court interpreted statements by the leaders of Refah Partisi referring to 'religious or divine rules as the basis for the political regime which the speakers want to bring into being' as presenting 'a clear picture of a model conceived and proposed by the party of a State and society organized according to religious rules'. The Court supported the banning of this party on the basis that 'Refah's policy of establishing sharia was incompatible with democracy' and expressed support for Turkey's 'form of secularism which confined Islam and other religions to the sphere of private religious practice'.[118]

This decision provides a point at which to begin to think about the limits of this liberal promise, and thus of the capacity of human rights to offer a secular response to the demands of the market. While Alston suggests that human rights are 'recognized for all on the basis of the inherent human dignity of all persons', the decision of the Court is that

[115] Alston, 'Resisting the Merger and Acquisition', p. 826. [116] *Ibid.*
[117] *Refah Partisi (The Welfare Party) and Others* v. *Turkey*, 2003-II ECtHR (Ser. A) 267.
[118] *Ibid.*, pp. 311–12.

the rights to participation enshrined in the European Convention on Human Rights (ECHR) are not owed to all persons merely by virtue of being human, without further preconditions.[119] Instead, in order to exercise these rights to participation, individuals must first demonstrate the appropriate demeanour or correct posture towards the state – they must present themselves in the public sphere divested of those attachments or practices (here the enjoyment of religion) that they may perform in private. It is this demand that the individual enter into an empty relation with the state that is relevant to the question of whether human rights works to limit or reinforce the sacrificial logic of the market.

This Kantian relationship of the democratic citizen to a law evacuated of moral content founds the democratic, human rights state. The citizen must obey a law 'reduced to the zero point of its significance, which is nevertheless in force as such'.[120]

> Now if we abstract every content, that is, every object of the will (as determining motive) from a law . . . there is nothing left but the simple form of a universal legislation.[121]

To stand before the open door of the law, a law that 'demands nothing of him', a law now abstracted from content, is the condition for the citizen in modernity. This law which is in force without signifying thus excludes any intimate relation between the sovereign and the citizen. The Italian philosopher Giorgio Agamben illustrates this vision of the citizen standing before the law, transfixed by its brilliance and wasting away, by reference to Franz Kafka's short parable 'Before the Law'.[122] This is the story of the man from the country, who journeys to the door of the law and finds it open. The open door is guarded by a gatekeeper, who refuses to let the man enter but stands aside to let the man see through the door. The man from the country wastes away as he waits before the open door of the law, asking regularly whether he might yet be permitted to enter, and even trying to bribe the gatekeeper to allow him through the gate. When, towards the end, he asks why no one else has come to the door, the gatekeeper

[119] For a critical analysis of the inability of positivism to affirm universality, see Gregor Noll, 'The Exclusionary Construction of Human Rights in International Law and Political Theory', Institute for International Integration Studies Discussion Paper No. 10, November 2003, pp. 7–9.

[120] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998), p. 51.

[121] *Ibid.*, citing Immanuel Kant, *Kritik der praktischen Vernunft* (1913), p. 27.

[122] Franz Kafka, 'Before the Law' in *Metamorphosis and Other Stories* (trans. Malcolm Pasley, London, 1992), pp. 165–6.

tells him it was there only for him, and that now he is going to close it. The citizen-subject thus is doomed to stand, dazzled, before the law, awaiting the decision of the gatekeeper to allow him to enter the kingdom of the law-maker/father. He 'is delivered over to the potentiality of law because law demands nothing of him and commands nothing other than its own openness'.[123] The price of obedience is inscribed on his wasted body. There is no economy of desire and reward circulating here between Father and son, sovereign and citizen. Instead, the law holds the man from the country in its ban – 'it includes him in excluding him'.[124] In this way, Agamben argues that the regime of power operating in liberal states does not take the form of a sacrificial law. Instead, the law that governs the relationship of the liberal state to its citizens appears to take the form of 'abandonment'.[125]

Yet, as Kafka's story illustrates, the sovereignty of the nation-state is at the same time grounded on the inclusion of the bodies of its subjects through the management and transformation of human life.[126] The transformation of human life into a task or project for governance marks 'the biopolitical turn of modernity'.[127] It is through assuming life 'as a task' that this life becomes 'explicitly and immediately political'.[128] The kinds

[123] Agamben, *Homo Sacer*, p. 50. [124] *Ibid.*

[125] For Agamben's argument that we must not interpret the treatment of those destroyed or abandoned by the modern nation-state within a biblical doctrine of sacrifice, or grant this destruction 'the prestige of the mystical', see Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive* (trans. Daniel Heller-Roazen, New York, 1999), pp. 26–33. For a critical response to Agamben's ethical project of rewriting 'the sacred nature of destruction', see David Fraser, 'Dead Man Walking: Law and Ethics after Giorgio Agamben's Auschwitz' (2000) 12 *International Journal for the Semiotics of Law* 397.

[126] Agamben, *Homo Sacer*, pp. 126–43. Agamben here is following Michel Foucault's argument that power operates in liberal states in ways that differ from the juridical or sovereign model. For Foucault, this model has been largely replaced by 'disciplinary' or 'bio-power', a new mechanism that emerged in the seventeenth and eighteenth centuries in Europe. Bio-power designates:

> what brought life and its mechanisms into the realm of explicit calculations and made knowledge – power an agent of transformation of human life. It is not that life has been totally integrated into techniques that govern and administer it; it constantly escapes them . . . But what might be called a society's 'threshold of modernity' has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.

Michel Foucault, *The History of Sexuality* (3 vols., trans. Robert Hurley, London, 1980), vol. I, p. 143.

[127] Agamben, *Homo Sacer*, p. 153. [128] *Ibid.*

of calculations that we see required of decision-makers by the SPS Agreement might thus be understood as symptoms of this grasping of human life as a management task for the state. It is the relation of sacrifice to this regime of biopolitics that returns us to the realm of theology. The place of sacrifice is in effect pre-democratic – it grounds the relation premised on the sovereign/citizen waiting before the door of the law for the word of the Father. Citizens may only participate in political life once they have sacrificed that which is cherished to the realm of civil society or the market. This sacrifice constitutes the liberal, democratic state, and shapes its form.

The religious, and indeed Christian, nature of the relationship that exists between these economic and political forms of law has perhaps best been explored by Karl Marx in his essay 'On the Jewish Question'.[129] For Marx, the political community of the liberal democratic state is famously 'a mere means for the preservation of these so-called rights of man', the rights to liberty, private property, equality (in the sense that 'each man shall without discrimination be treated as a self-sufficient monad') and security ('the concept of the police').[130] The democratic state emancipates itself from state religion and from private property, so that neither religious belief nor the ownership of private property are qualifications for participation in elections or for holding private office. Yet the state still allows religion and private property to exist.[131] Indeed, the state 'only feels itself to be a political state and asserts its universality by opposition to these elements'.[132] As a consequence, the subject in such a state is split, becomes both a citizen in the political community or the subject of human rights law, and an individual in what Marx calls civil society, or, as we might think of here, the subject of trade law. This leads to a kind of metamorphosis or, as Marx argues, a 'decomposition' of the subject of capitalist democracy: 'The difference between the religious man and the citizen is the difference between the trader and the citizen, between the labourer and the citizen, between the property owner and the citizen, between the living individual and the citizen.'[133] This, then, is already a Christian logic and form of the state. The state is Christian because of this founding dualism between individual life and communal or species-life. While the 'perfect Christian state is the one that recognizes itself as a state and abstracts [itself] from the religion of its members', the state

[129] Karl Marx, 'On the Jewish Question' in Jeremy Waldron (ed.), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987), pp. 137–50 at p. 137.
[130] *Ibid.*, pp. 146–7. [131] *Ibid.*, pp. 139–40. [132] *Ibid.*, p. 140. [133] *Ibid.*, p. 141.

nonetheless remains recognizably Christian precisely through these acts of recognition and abstraction.[134] It is 'the human foundation of Christianity' rather than Christianity itself that founds this state.[135] It is worth setting out in detail Marx's conclusion on this point:

> Religion is here the spirit of civil society, the expression of separation and distance of man from man . . . The fantasy, dream, and postulate of Christianity, the sovereignty of man, but of man as an alien being separate from actual man, is present in democracy as a tangible reality and is its secular motto.[136]

In such a state of 'complete democracy', religious consciousness has particular force because its history is forgotten – the force of religion derives from its lack of 'political significance and earthly aims'.[137] It is within such a vision of the relation between politics, economics, religion and the state that Marx's famous dismissal of human rights can then be understood. Responding to the claim by his colleague Bruno Bauer that 'man must sacrifice the "privilege of belief" in order to be able to receive general human rights', Marx argued that this was true only in the sphere of public or communal life – in the economic sphere of civil society man can continue to hold on to his privileges free of interference from his fellow men or the community.[138] With this double movement, the sacrifice of belief becomes the necessary condition for the receipt of human rights communally, while the maintenance of that belief remains as the foundation of the economy. In the words of Marx, while '[r]eligion is no longer the spirit of the state . . . religion has become the spirit of civil society'.[139]

International economic law mandates that the relationship between the market/Father and economic man/son be one of sacrificial responsibility. The subject of international human rights law, the rights-bearing citizen, is produced out of this sacrifice to the God of the market. The split subject shaped by the intimate relation between the two forms of law sees freedom and liberation as its telos, and yet is forever caught within a sacrificial economy. In order to think through the political effects of appealing to democratic participation as a counter to the excesses of economic globalization, it is necessary to analyse these two forms of law together – the form of abandonment and the form of sacrifice. I want now to sketch the political stakes of this insistence on an attention to form.

[134] *Ibid.*, p. 144. [135] *Ibid.*, p. 143. [136] *Ibid.*
[137] *Ibid.* [138] *Ibid.*, p. 144. [139] *Ibid.*, p. 142.

Human rights as participation

Many commentators appeal to human rights or democratic participation as a counter to the excesses of economic globalization. For some, a commitment to democratic principles provides a means of increasing the accountability of those exercising power through the new forms of governance made possible by such trade agreements. As Susan Marks argues, '[i]f a bias in favour of inclusory politics were woven into international law, this might help to signal the urgent need for those new structures of power to be linked to new approaches to participation and new forms of accountability'.[140] For Marks, 'democratic principles are a crucial corrective to technocratic forms of decision-making'. These principles provide a basis 'for challenging elites and enhancing the opportunities for participation by those affected'.[141] Economic globalization leads to technocratic decision-making and the marginalization of some members of the community – this is answered by the turn to democracy, participation and accountability. For Susan George, it is this promise of inclusion and participation which makes of human rights a challenge to neo-liberal globalization.[142] And, according to the Office of the UN High Commissioner for Human Rights, '[h]uman rights is neutral with regard to trade liberalization or trade protectionism'.[143] A human rights approach instead focuses on participation: '[A]dopting a human rights approach to trade brings individuals and communities squarely into the processes of negotiating and implementing trade law.'[144] Human rights in this vision is about the creation of a public realm directed to formal equality, one that protects the values of transparency, universality, openness, accountability and participation. Thus the High Commissioner's report advocates that, in promoting free trade, states respect the principle of non-discrimination, promote popular participation in the development of trade rules, promote accountability in the processes of trade liberalization, ensure the promotion of corporate social responsibility and encourage international assistance to poorer countries.[145]

[140] Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford, 2000), p. 117.

[141] Susan Marks, 'Democracy and International Governance' in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), pp. 47–68 at p. 66.

[142] George, 'Globalizing Rights'.

[143] Office of the High Commissioner for Human Rights, 5th WTO Ministerial Conference, Cancún, Mexico, 10–14 September 2003, *Human Rights and Trade*, p. 4.

[144] *Ibid.* [145] *Ibid.*, pp. 4–5.

These appeals to opportunities for equal participation (of states or individuals) would seem to offer to the international economic integration project that which public international law represents on its best days – a culture of political equality between sovereign entities that 'represents the possibility of the universal . . . by remaining "empty"'.[146] At the international level, this culture translates into a vision of international organizations as a 'useful abstraction in which political debate can take place beyond national boundaries'.[147] Robert Howse, for example, has suggested that using public international law as a guide in WTO dispute settlement proceedings will increase the social legitimacy of economic governance, precisely because of this normatively empty quality of international law. WTO interpretation which reflects or refers to other areas of public international law opens the field of trade to 'rules that may reflect or prioritize other values and interests than those of trade liberalization', and also to a culture which is capable of responding to conflicts of values and which is developing in light of an equity-oriented agenda.[148] Here international law is introduced as representing the promise of an empty universalism, one that does not articulate its normative commitments in terms of 'substantive values, interests, or objectives'.[149] The lack of content is a condition of the legitimacy and effectiveness of the role of the international organization in such a vision. As Jan Klabbers explains this, international organizations are ideally 'political arenas where politics can be conducted unimpeded, unconcerned with the bare necessities of survival while being devoted to the modalities of living together'.[150]

Yet, while international law promises to maintain 'the possibility of an open area of politics', this cannot provide a counter to the constitution of an economy of sacrifice through WTO agreements. The appeal to notions of equality, inclusion and participation must be understood within the vision of the relationship between liberal democratic politics and the capitalist economy developed above. The culture of international law,

[146] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001), p. 504.

[147] Jan Klabbers, 'The Changing Image of International Organizations' in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), pp. 221–55 at p. 244.

[148] Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), pp. 355–407 at p. 387.

[149] Martti Koskenniemi, 'What Is International Law For?' in Malcolm D. Evans (ed.), *International Law* (Oxford, 2003), pp. 89–114 at p. 111.

[150] Klabbers, 'Changing Image of International Organizations', p. 245.

introduced or imagined as an empty universalism, and as a commitment to openness and accountability, is conditioned upon a secret relationship to the market. As was the case with Kafka's man from the country, or with the ruling in the *Refah Partisi* case, it is the sacrifices made before the law that limit the possibilities for democratic relations between legal subjects. States become Members of the WTO, and thus equal participants in a formally democratic polity, only *after* they have responded to the demands of the market. For 'developed' country Members, these sacrifices take place when the Member State ensures that its internal measures conform with its obligations under WTO agreements. For 'developing' and 'least-developed' country Members, these demands to sacrifice are much greater – these states in general have already responded to detailed prescriptions requiring an openness to global economic integration and removal of barriers to market access. These demands are imposed as part of conditions for use of funds disbursed by international financial institutions or in order to be entitled to 'preferential' treatment from developed countries as permitted under the GATT.[151] It is in those areas of law that are 'supplementary' to the mainstream or conventional understandings of the field of public international law – and particularly the areas of international economic law and international human rights law – that the promise of openness is broken, the emptiness of formalism filled.[152] Indeed, attention to the history of European international law would suggest that this has always been so – participation in the culture of formalism has long been conditioned upon being produced as a civilized subject of that culture elsewhere.[153] In order to be recognized as a subject entitled to participate in the making of law, difference must present itself in the terms of the language at play in the institutional space. In other words, where once the *conditions* of possibility of the empty universalism of international law were the colonial doctrines governing sovereignty and later the mandate and trusteeship systems, today these conditions include the creation of liberal democratic capitalist states through the strictures

[151] For a discussion of the circumstances in which the practice of attaching conditions to the granting of preferences to developing countries by developed countries is GATT-consistent, see Report of the Appellate Body, *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, adopted 20 April 2004, WT/DS246/AB/R.

[152] On the conventional treatment of war, human rights and international organization as outside the mainstream of public international law, see Martti Koskenniemi, *From Apology to Utopia* (Helsinki, 1989), p. xxv.

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

of international economic law.[154] Those who are not formed in this image risk remaining outside the coming 'community between different-thinking particularities',[155] subject to invasion or regime change (or perhaps just the reception of a 'poverty reduction strategy paper' by the World Bank).

Contesting the effects of economic globalization by calling for increased democratic participation at the domestic level of the nation-state, or by calling for an increased accountability to citizens on the part of individual decision-makers, also involves working within the logic I have described above. We can get a sense of the limited effect of the turn to participation in the liberal democratic realm alone by looking briefly at the vision of the state and the law which is proposed by development institutions, and the ways in which a call for greater participation reinforces their project of global economic integration. In World Bank documents about participation and governance, the rule of law is envisaged in terms of a law in force without signifying. Thus, in a key 1992 World Bank document on the introduction of the rule of law, the Bank defines the rule of law as involving 'the processes of formulating and applying rules'.[156] 'It is not enough for a law to be on the books: it has to applied, it has to be in force in reality.'[157] For the Bank, the basis of 'a good order' is 'a system in place, based on abstract *rules* which are actually applied and . . . functioning *institutions* which ensure the proper application of such rules'.[158] This creates the necessary relation between state and citizen: 'the elements of the rule of law discussed above are an important element of the procedural framework and institutional system which – if adhered to by the governments concerned – encourages stability and predictability . . . and elicits compliance with the rules'.[159] And this political realm of compliance is intimately linked to the realm of economics:

> elements of the rule of law are needed to create a sufficient stable setting for economic actors – entrepreneurs, farmers, and workers – to assess economic opportunities and risks, to make investments of capital and labor, to transact business with each [other], and to have reasonable assurance or recourse against arbitrary interference or expropriation.[160]

Thus calling for increased transparency and openness in democratic governance, without challenging the form of law mandated by international

[154] *Ibid.*
[155] Koskenniemi, *Gentle Civilizer of Nations*, p. 504.
[156] World Bank, *Governance and Development* (Washington DC, 1992), p. 30.
[157] *Ibid.*, p. 32. [158] *Ibid.*, p. 38. [159] *Ibid.*, p. 39. [160] *Ibid.*, p. 28.

economic agreements, takes us only as far as footnote 182. There, the Appellate Body performs the role of the model, responsible decision-maker: it brings 'life . . . into the realm of explicit calculations',[161] decides that the lives of 371 women can be sacrificed to respond to the demands of market integration, and then declares openly and transparently the nature of this calculation and decision. This is the limit of what can be achieved by calling for participation without challenging the sacrificial economy established by these trade agreements – the decision to sacrifice might be made in public, rather than in secrecy. It is the conditions which make possible the moment of decision (such as the prior constitution of subjects and of relations between them) that the law has to remember if it has any chance of doing justice to those whose sacrifices go unrewarded.

Human rights and the responsible subject

This introduction of the rule of law as an empty universalism depends in turn upon the constitution and disciplining of the proper kinds of subjects capable of participating responsibly in a liberal capitalist polity. So development institutions are also engaged in providing instruction manuals designed to produce the subjects of economic globalization – both as citizens who subject themselves to the disciplines of the market, and as decision-makers willing and able to enter into calculations about risk and reward.[162] The World Bank, for example, has spelt out in detail the ways in which the system of education developed in communist states must be transformed to ensure that students accept capitalist values.[163] Countries in transition from communism must adapt the biopolitically correct 'education package' and reform curricula and modes of teaching. With disarming frankness, the World Bank authors explain: 'Liberal market economies . . . use education to transmit cultural, political, and national values as well as knowledge and skills.'[164] These values include those of personal responsibility, freedom and problem-solving skills. Certain key concepts and words are also necessary in order to be able to participate as subjects of capitalism.

[161] Foucault, *History of Sexuality*, p. 143.

[162] For a discussion of development practices as manifesting the disciplinary force of the Christian rule of law, see Jennifer Beard, 'Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology' (2003) 18 *Australian Feminist Law Journal* 27 at 43–8.

[163] World Bank, *World Development Report 1996: From Plan to Market* (New York, 1996), pp. 123–31.

[164] *Ibid.*, p. 124.

> The gaps in the curriculum have led to missing concepts and hence to missing words. 'Efficiency,' for example, means something very different to a manager seeking only to comply with a central plan than to one seeking to boost profit and market share in a competitive system.[165]

Curricula must also be redesigned to enable the production of good capitalist citizens: in the communist education system 'subjects such as economics, management sciences, law, and psychology – all of which feature prominently in market economies – were deemed irrelevant and ignored or underemphasized'.[166] The existing 'content' in 'such subjects as economics and history' must be reformed, and new textbooks adopted.[167] At its crudest, this is understood as providing the 'human capital' necessary to reproduce markets. So in its *Governance and Development* report, the World Bank authors note:

> Among the underlying causes of poor development management is the level of economic, human, and institutional development. Lack of an educated and trained work force and weak institutions can substantially reduce the capacity of countries to provide sound development management.[168]

Equally, development institutions encourage states to introduce legal property systems and transform existing laws, such as those governing land. According to Hernando de Soto, an enthusiastic advocate of such legal transformation projects, one of the beneficial effects of the introduction of a property system is to make people more accountable.[169] 'By transforming people with property interests into accountable individuals, formal property created individuals from masses.'[170] This property system is recorded in a central registry, and the resulting dispersal of information about individuals in an integrated system means that 'anonymity has practically disappeared in the West, while individual accountability has been reinforced'.[171] The power of legal property 'comes from the accountability it creates, from the constraints it imposes, the rules it spawns, and the sanctions it can apply'.[172] To put this bluntly: 'People with nothing to lose are trapped in the grubby basement of the precapitalist world.'[173]

The World Bank is also intimately involved in reproductive education, developing nutrition and population programmes, providing microfinance programmes to help 'youth development' in Eastern Europe,

[165] *Ibid.* [166] *Ibid.* [167] *Ibid.*, p. 125.
[168] World Bank, *Governance and Development*, p. 10.
[169] Hernando de Soto, *The Mystery of Capital* (New York, 2000).
[170] *Ibid.*, p. 54. [171] *Ibid.*, p. 55. [172] *Ibid.* [173] *Ibid.*, p. 56.

responding to the 'development problem' of HIV/AIDS, and providing statistics and reports on issues such as nutrition, gender, poverty reduction and communicable diseases. Patricia Stamp comments of the local centres of power-knowledge constituted through this development enterprise:

> There is a certain sleazy intimacy to the posters tacked up in countless village community development offices, with their infantilizing charts and graphics showing how to feed a baby, how to wash yourself, how to plant corn and keep your yard tidy. How did it become routine and acceptable that the mundanities of daily hygiene, personal and family maintenance became poster subjects, fit material for didactic instruction by people from other continents? . . . [I]n the Third World states whole populations are policed, the criterion for selection being whether one's community or demographic group has been targeted for an aid project.[174]

The engagement of human rights law with international economic institutions at the level of domestic governance has been largely through this biopolitical ground. So the World Bank sees possibilities for engaging with the human rights community in these areas of health, sanitation, extending safety nets for children and the ageing,[175] while human rights commentators in turn see World Bank programmes on child labour, alcohol and drug issues relating to children, HIV/AIDS prevention, judicial reform and press freedom as some areas of potential engagement with human rights approaches.[176] Yet, if human rights law reinforces this process of producing the responsible subjects of capitalist economics, it cannot challenge the subjection of Third World populations to biopolitical management. Indeed, in a sense it intensifies that subjection. Bodies become the ground of political control, now exercised globally, and calculations of population control, the measurement of human development, public health policy and the production of human capital are all capable of reformulation as human rights problems.

A memory of the flesh

> [T]he most intimate perception of the flesh escapes every sacrificial substitution, every assimilation into discourse, every surrender to the God . . .

[174] Patricia Stamp, 'Foucault and the New Imperial Order' (1994) 3 *Arena Journal* 11 at 17.
[175] World Bank, *Human Rights and Sustainable Development: What Role for the Bank?* (2002), p. 5.
[176] Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, 2003), pp. 156–66.

> this memory of the flesh as the place of approach means ethical fidelity to incarnation. To destroy it is to risk the suppression of alterity, both the God's and the other's.[177]

In concluding, I want to return to the question of that which escapes the economy of sacrificial substitution. Despite the move to grasp life as something to be evaluated and weighed as part of a politics of risk assessment, 'life has [not] been totally integrated into techniques that govern and administer it; it constantly escapes them'.[178] In a short section of his book *Of Grammatology* entitled 'The Exorbitant: Question of Method', Derrida argues for a critical practice that tries to read for the traces of that which escapes the circle of exchange, the economy of substitution or 'the eternal return of the same'.[179] Derrida proposes that 'the task of reading' is and should be ex-orbitant, following that which is unique, singular or excessive.[180] Such readings 'allow texts to remember and speak what they always knew'.[181] Yet each attempt to read, speak or write the law differently, including my attempt here, imposes a new form. In this rewriting, an other disappears.[182] How to attempt to encounter or repay our debts to those figures whose bodies seem to be the necessary ground of these internationalist texts, and whose sacrifices remain outside the economy that these texts establish?

Where the economy of sacrifice I have explored in this chapter involves a circulation of gift and reward between fathers and sons, we might read for those moments when this closed circle is under threat of being breached or at least pulled out of shape by other relations. We can not know in advance where we will experience that excess, or find its possibility. For me, in reading these texts about the constitution of sacrificial economies or body politics involving father and son, that which escapes is always the relation

[177] Luce Irigaray, 'The Fecundity of the Caress: A Reading of Levinas, *Totality and Infinity*, "Phenomenology of Eros"' in *An Ethics of Sexual Difference* (trans. Carolyn Burke and Gillian C. Gill, Ithaca, 1993), pp. 185–217 at p. 217.

[178] Michel Foucault, *History of Sexuality*, p. 143.

[179] John Forrester, *Truth Games: Lies, Money and Psychoanalysis* (Cambridge, MA, 1997), p. 148.

[180] Jacques Derrida, *Of Grammatology* (trans. Gayatri Chakravorty Spivak, Baltimore, 1997), pp. 157–64. See further Jane Gallop, *Anecdotal Theory* (Durham, 2002), pp. 7–8; and for a discussion of a similar use of the figure of the ellipsis in the writing of Sigmund Freud, see Shoshana Felman, *Jacques Lacan and the Adventure of Insight* (Cambridge, MA, 1987), pp. 64–7.

[181] Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Texts in the Texts of Law* (London, 1991), p. 124.

[182] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA,1999), p. 353.

between mother and child. Indeed, when I first tried to finish this chapter, it was this relation to which I turned as offering the exemplary outside to the circle of sacrificial relations.[183] The mother's sacrifice is not rewarded – her gifts remain the necessary but forgotten ground of the economy of risk and reward circulating between father and son. Her encounter with the wholly other is a model of closeness rather than distance, of that 'most intimate perception of the flesh' to which Luce Irigaray refers in the quote which opens this section.[184] If we take as our example that later Christian story of paternal sacrifice of a son, Jesus, by his father, we might think this relation with divinity through the figure of Mary, the mother. Mary is represented in the gospels as 'Mediatrix between Word and flesh . . . the means by which the (male) One passes into the other'.[185] The sacrifice of her sexual and maternal body is echoed in the crucifixion of Christ.[186] The sacrifice of the generativity of Mary takes place in order to represent her as a '[r]eceptacle that, faithfully, welcomes and reproduces only the will of the Father'.[187] As with the stories of fathers and sons I traced in Genesis, this first sacrifice 'is not noticed'.[188] Instead, it is 'forgotten as a condition for the – apparently – singular event of the second'.[189] The passing of Christ through the body of woman and then incarnation is treated as if it were of no matter, as if the flesh were simply to be endured on the journey back to the father. Yet, Irigaray asks, must this narrative 'be univocally understood as a redemptory submission of the flesh to the Word?'[190] What if we turned to Mary as a model for the experience of the divine?

> And what if, for Mary, the divine occurred only near at hand? So near that it thereby becomes unnameable. Which is not to say that it is nothing. But rather the coming of a reality that is alien to any already-existing identity. Relationship within a more mysterical place than any proximity that can be localized. An effusion that goes beyond and stops short of any skin that has been closed back on itself. The deepest depths of the flesh, touched, birthed, and without a wound.[191]

So, for me, this figuring of the mother/child relationship suggests another experience of the divine 'near at hand'. Yet many people who read and

[183] See further Anne Orford, 'Trade, Human Rights and the Economy of Sacrifice', Jean Monnet Working Paper 03/04, http://www.jeanmonnetprogram.org/papers/04/040301.html (accessed 1 November 2005).

[184] Irigaray, 'Fecundity of the Caress'.

[185] Luce Irigaray, 'The Crucified One: Epistle to the Last Christians' in *Marine Lover of Friedrich Nietzsche* (trans. Gillian C. Gill, New York, 1991), pp. 164–90 at p. 166.

[186] *Ibid.* [187] *Ibid.* [188] *Ibid.*, p. 167. [189] *Ibid.* [190] *Ibid.*, p. 169.

[191] *Ibid.*, p. 171.

listened to that version of the chapter did not identify with the position of mother in the way that I did. For them, my writing from that position inscribed or imposed another model.[192] For one friend and student, Juliet Rogers, the moment of excess is figured by the 'trembling' of the one asked to sacrifice that which he loves – the moment at which the body interrupts the certainty of this transaction. Or perhaps we might find it in the possibility that, after all, the demand to sacrifice cannot be met – we may find that we cannot bring ourselves to exchange that which we love, and thus do not in fact possess it.[193] Each time we are asked to make a gift of death, to exchange that which is to us the most singular or unique, there is the danger that, at that moment, we might make a different decision.

International economic law is in part a call to calculate, to evaluate risk and to measure suffering. We might try to respond to this by entering more fully as critics into the world of 'impossible calculations', of 'secret debts', of 'the charges on the suffering of others'.[194] Yet all this calculation involves language, despite the attempt to imagine that models and mathematics and quantitative measurements take us outside the world of politics and value judgments, truth and lies, and into a far more rational world. When a text of law or economics calls for us to engage in calculation, a critical reading might ask where we find in the text that which exceeds this call. The decisions and scholarly articles and books and treaty provisions expressing their faith in arithmetic and risk assessment and the possibility of evaluating and exchanging things that are substitutable one

[192] 'Still it is necessary that women arrive at the same so that consideration be made, be imposed of the differences that they would elicit there', Luce Irigaray writes in *Speculum of the Other Woman*, and I am still considering the differences elicited in my experiment with writing an economy organized around my experience of the mother's body, negotiating with the place of the mother as passive gift-giver already inscribed in the texts of modern economic law. Yet my discussions with friends suggested that to try to posit the experience of Mary as *the* experience of divinity, as the model, is to replace the word of the Father with the flesh of the mother. So as Jane Gallop writes in answer to Irigaray: 'Woman must demand "the same," "the homo," and then not settle for it, not fall into the trap of thinking a female "homo" is necessarily any closer to a representation of otherness, an opening for the other': Jane Gallop, 'The Father's Seduction' in Lynda E. Boose and Betty S. Flowers (eds.), *Daughters and Fathers* (Baltimore, 1989), pp. 97–110 at p. 105.

[193] Gallop, 'The Father's Seduction', p. 107. Gallop argues that this is the threat that the 'desire for the feminine' poses to the father in the sacrificial economy: 'If the father were to desire his daughter, he could no longer exchange her, no longer possess her in the economy by which true, masterful possession is the right to exchange. If you cannot give something up for something of like value, if you consider it nonsubstitutable, then you do not possess it any more than it possesses you.'

[194] Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (trans. Alan Bass, Chicago, 1987), p. 56.

for the other are communicated through language. Language exceeds calculation, and reaches out to that which is singular and unique even in the call for more measurement. As Derrida writes, all our analysis of costs and benefits, our secret calculations and evaluations 'would have been ignoble, the opposite of love and the gift, if they had not been made in order to give us again the time to touch each other with words'.[195] The being we become when we take up the place of the calculating decision-maker, the analyst of costs and benefits, is still one whose calculations and exchanges involve this touching, this desire to encounter the other. And so counting and writing are not opposites or alternatives between which we can choose. 'What counts then is that it is still up to us to exhaust language.'[196]

[195] *Ibid.* [196] *Ibid.*

8

Secrets of the fetish in international law's messianism

JUDITH GRBICH*

> The 'imploring eyes' of the Rwandan child, whose photograph is shown to obtain money but who 'is now becoming more and more difficult to find alive,' may well be the most telling contemporary cipher of the bare life that humanitarian organizations, in perfect symmetry with state power, need.[1]

Is it possible to write within the European international law tradition and not foreclose dialogue on peace and humanity with other peoples who do not share these cultural and theological conventions? International law scholarship would seem to have turned to its historical and cultural beginnings as a way of rethinking its position in a world politics in which the international lawyer is, impossibly, called upon to legitimate excess of power, and to serve as the guarantor of excess's legitimacy. The theme of international law as having a messianic logic seems to have been a way of rethinking the present, and preserving some hope for a future. Whether this hope is for a more ethically positioned profession for the lawyer, for a discipline less trammelled by the excess of Western power and self-aggrandizement, or for the coming of a safer political order, has not been clear.

How does one retrieve the cultural origins and meanings of messianism in European culture and politics without, once again, privileging a European or Western order in which the figure of Christ as saviour has already been deployed endlessly over the past two millennia to shore up the West against other peoples? If there is a messianic logic or structure to the deployment of Western power, is there any use in returning to this

* Thanks to Anne Orford, Jennifer Beard and Ian Duncanson for comments on my draft paper, and to Anne Orford for her support and encouragement for this project.

[1] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen, Stanford, 1998), pp. 133–4.

logic if international law already remains mired with the returns of these gifts of faith, hope and love?

Agamben's linking of the image of the imploring eyes of the starving, terrorized Rwandan child with humanitarian fund-raising and state power sets the limits of my enquiry. In what sense can one speak of this image of a suffering child as a 'cipher' of bare life? A cipher is both a person or thing of no importance, and also a form of secret writing. What historical uses of images are embedded in these contradictory meanings, of an image of suffering which is of no importance and also a secret writing? What is secretly written in our repetition of these images of suffering which the West often uses to raise funds, and not simply for charitable or humanitarian purposes?[2]

The hope of this paper is to retrieve some sense of that suffering in Western culture which has not been tied to the calculation of nation and value, that paradigm within which the sight of other peoples' sufferings seems to confirm a modern logic of the Western self as 'entitlement'. This is a search in Nancy's sense for 'what might lead us, without either rejecting Christianity or returning to it, toward a point – toward a resource – buried beneath Christianity, beneath monotheism and beneath the West'.[3] In one sense, Schmitt's 'nomos of the earth'[4] is acknowledged as a modern logic of tying the symbolics of economic calculation to land and capacities for its use and fruition, and as a resource within Christianity. But this paradigm of nation and value which uses images of suffering is not only replicated as an inter-national norm, it also mirrors itself in the ways currencies and their constituent beings of monied things are enlivened in the narratives of heroes to whom feudal allegiances of labour and life are due; and to whom in return these white knights of nations entreat their earthly beings to labour to the ends of life and tether. Do the monied things of international finance law 'take life' only *because* they take life?

International law has begun to draw upon critical theorists of politics and internationalism as a way of engaging with these themes of bare life, responsibility, sovereignty and the possibilities of a future in which justice does not simply mimic the utopian form of a limitless wealth. Derrida,

[2] Anne Orford has raised some of these same questions in Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, 2003), especially chapter 6, 'Dreams of Human Rights'.

[3] Jean-Luc Nancy, 'Deconstruction of Monotheism' (trans. Amanda MacDonald) (2003) 6 *Postcolonial Studies* 37 at 40.

[4] Carl Schmitt, *Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (trans. Gary Ulmen, New York, 2003); Carl Schmitt, 'The Land Appropriation of a New World' (trans. Gary Ulmen and Kizer Walker) (1996) 109 *Telos* 29.

Agamben, Nancy and Taubes have each framed these questions by the inclusion of messianism within the study of international law's potential to become more than a European or North American strategy for further appropriation of souls and bodies from new members of the international law community. In different ways this body of theory on politics, law and messianism points towards the theme of abandonment.

Nancy has approached these questions of global politics and 'theologico-economico-political domination and exploitation'[5] by theorizing a politics of abandonment, and using a concept of the ancient German 'ban' to interrogate the form of sovereignty which inheres in the exception.[6] The monotheistic resource into which Nancy is tapping has been mined before. Sovereignty as a practice of ban and exception seems similar to the 'Frankish' designation of the jurisdiction of the lord or noble as a matter of both a landholder's allegiance to his lord and the lord's authority to allocate land to a tribal member; or at least similar to nineteenth-century accounts by British philologists of the nature of English sovereignty, a form which was thought to be reassuring to Queen Victoria during the European troubles of 1848.[7] In this 'history' of the 'English Commonwealth' before the 'Norman conquest', the question of 'rank' or juridical authority is circular and operative in relation to those over whom it applies, but only where some have been 'banned' or not included within the fact of landholder or land user.[8] There must be a category of outsider before authority can appear as present to those subject to both its benefits and its obligations. These are questions of both onto-theology and the historical character of European feudal landholding, and their transformation into the symbolic word pictures of feudal life which remain embedded within English common law poetics of entitlements to monetary and landed things.[9]

Agamben has argued that we might 'give the name bare life or sacred life to the life that constitutes the first content of sovereign power'.[10] He argues that 'what is captured in the sovereign ban is a human victim who

[5] Nancy, 'Deconstruction of Monotheism', p. 44.

[6] Jean-Luc Nancy, *The Birth to Presence* (trans. Brian Holmes *et. al.*, Stanford, 1993), pp. 36–47.

[7] John Mitchell Kemble, *The Saxons in England: A History of the English Commonwealth till the Period of the Norman Conquest* (2 vols., London, 1849), vol. I.

[8] *Ibid.*, pp. 122–36.

[9] Judith Grbich, 'Language as the "Pretty Woman" of Law: Properties of Longing and Desire in Legal Interpretation and Popular Culture' in Margaret Thornton (ed.), *Romancing the Tomes: Feminism, Law and Popular Culture* (London, 2002), pp. 133–48.

[10] Agamben, *Homo Sacer*, p. 83.

may be killed but not sacrificed: *homo sacer*'.[11] It is enough here to link the outsider with Agamben's complex concept of 'bare life'; bare life is abandoned, 'exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable'.[12] In this schema law is understood as having a 'potential' to 'maintain itself in its own privation, to apply in no longer applying. The relation of exception is a relation of ban.'[13]

While acknowledging that Agamben's concept of *homo sacer* is a problematic one,[14] the contemporary qualities of these themes have been pursued by many others, all of whom in different ways recognize an uncanniness to his theorization. This sense of uncanniness or familiarity is most intense around financial practices and their logic of having a life or personhood in law, the realms of the incarnations of fiction. In the common law poetics of Anglo income taxation law interpretation, finance capital can be pictured as a sovereign with authority to hold and measure the imaginary citizens who embody the beings of incorporeal property, what we might usually name as financial entities. The poor souls of the embodied beings of 'bare life' are banned, abandoned from this domain – where 'life' takes its measure and value from poetic forms of birth, life and growth of financial beings, and is standardized or calibrated only by the physical labouring capacities of a human body.[15] The human being's life is outside the authority of the sovereignty of finance capital, abandoned in the sense of having a life exposed and threatened by the non-applicability of the everyday life norms of finance to human life.

As Agamben explains in 'The Logic of Sovereignty', he gives the name of ban to 'a potentiality' of the law to maintain itself in its own privation, to apply in no longer applying.[16] This ban, or threshold which maintains an inside and an outside, is not a set of positive rules of law. It is in the quality of an imaginary structure, a 'feudalscape'[17] in the case of

[11] *Ibid.* [12] *Ibid.*, p. 28 [13] *Ibid.*

[14] Girard has pointed to the different logics of the scapegoat: René Girard, *Things Hidden since the Foundation of the World* (trans. Stephen Bann and Michael Metteer, London, 1987), pp. 130–34.

[15] Judith Grbich, 'The Taxpayer's Body: Genealogies of Exertion' in Pheng Cheah, David Fraser and Judith Grbich (eds.), *Thinking through the Body of the Law* (St Leonards, NSW, 1996), pp. 136–60; Judith Grbich, 'Taxation Narratives of Economic Gain: Reading Bodies Transgressively' (1997) 5 *Feminist Legal Studies* 131.

[16] Agamben, *Homo Sacer*, p. 28; see also Giorgio Agamben, 'The Messiah and the Sovereign: The Problem of Law in Walter Benjamin' in Giorgio Agamben, *Potentialities: Collected Essays in Philosophy* (trans. Daniel Heller-Roazen, Stanford, 1999), pp. 160–74 at p. 162.

[17] Grbich, 'Language as the "Pretty Woman" of Law', pp. 139–43: '"feudalscapes" – imaginary worlds, in which a reader with juridical conventions for picturing the work of making

incorporeal property and its income taxation regimes of measurement. This image or measure of the life of sovereign capital, its sovereignty and its life, measures financial 'life'. It gives a measure of the potential of financial things in their commercial lives.[18] In its *not* applying to human life, by the logical principles of the nature of financial things, human life is threatened in its existence. Human life cannot endlessly feed off the reserves of its body, it cannot issue calls for the contribution of un-paid-up capital during lean times. The fulfilment of its bodily needs is limited to how the monetary measure of its labour is calibrated against the strength of several international currencies. As a currency fails so does human life fail, unless there are somehow no dealings with other currencies. And, unlike financial capital, the quantity of its labour is also limited to how many hours in a day a human being can expend itself until exhaustion.[19]

In this close fit, of the politics of finance capitalism and globalization of currencies and markets with Agamben's theorization of abandonment as the 'nomos of the modern' – a politics of risking human life against the health of financial beings – there is a capture by the modern state of a Christian messianic logic. Hierarchies of both state and finance capital follow the logic of the doomed and glorious heir. Is there a way of differentiating this Christian messianic logic implicated in the linking of human life to the health of financial beings from messianic forms of hope, which do not necessarily feed off images of human suffering?

Messianism and international law scholarship

Koskenniemi has described Franck's account of international law's emerging rights and emerging legal orders as 'a messianic argument and a Christian vision'.[20] The argument is messianic, it seems, because

things with words and writing can recognize privileged forms of being, of citizenship, and of entitlements'.

[18] Nancy captures some sense of this meaning of measure: 'Measure is the name for the propriety [convenance] of one Being to another, or to itself', in Jean-Luc Nancy, *Being Singular Plural* (trans. Robert D. Richardson and Anne E. O'Byrne, Stanford, 2000), p. 177.

[19] To the extent 'intellectual labour' is able to remove itself from these punitive bodily techniques and even become a form of capital, some human beings can negotiate less threatening conditions of existence. In a world population these humans constitute a small élite.

[20] Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 *New York University Journal of International Law and Politics* 471 at 486.

> the future it promises is not fixed in particular institutions or identities; its utopia only shows a horizon that recedes as it is approached . . . We remain, after all, free to act – and only by acting do we realize our freedom. International law is vindicated, not as a ready-made institutional design, but rather as a completely open-ended political project, a professional commitment to imagine different futures and to be ready to criticize whatever present there is, and thus to make room for that which is 'emerging' . . . The fallibility of present society is taken for granted. So is the fallibility of the human beings that inhabit that society and the law they create out of their narrow vision. This is not a recipe for resignation, however, but rather a cause for joy and anticipation: '[A] system's reach should exceed its grasp, or what's a heaven for?'.[21]

Koskenniemi has written in his history of international law of a discipline that 'represents the possibility of the universal . . . but . . . does this by remaining "empty"'.[22] There is thus the 'possibility of an open area of politics [that reaches towards a non-imperialist universality as a] horizon of possibility'.[23] International law has 'a promise of justice',[24] and includes the 'announcement of something that remains eternally postponed'.[25]

These messianic themes seem to focus upon the positioning of the discipline as the Christian messiah, the saviour. But they also seem to act as yet another mask for the civilizing missionary, the son sent to teach of the wisdom of the Father. They seem to pose international law as the saviour of the Third World. Meanwhile, the financial beings of international finance remain enlivened by the bare life of humans who are abandoned and at risk of death by the norms of financial life. International law as salvation is sufficiently imbricated with monetary and proprietory beliefs of Western citizens and Western nations about entitlement that any horizons of possibility which the City of God might have held open for others seems impossibly foreshortened. Any promise of a journey to a 'horizon of possibility' seems limited only to fiscal characters, those figurative captains of industry who still people the imagination of the Western citizen. Present international law

[21] *Ibid.*

[22] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001), p. 504.

[23] *Ibid.*, as extrapolated by Anne Orford, 'Trade, human rights and the economy of sacrifice', in chapter 7 of this book.

[24] Martti Koskenniemi, 'What is International Law For?' in Malcolm D. Evans (ed.), *International Law* (Oxford, 2003), pp. 89–114 at p. 111.

[25] *Ibid.*

scholarship seems to maintain a normativity of human pain and suffering – to the extent monetary or proprietory forms of life remain unscrutinized for how their economies of sacrifice institute and develop raced paths to salvation.

Critical scholarship in international law can be understood as part of Nancy's programme of the 'deconstruction of monotheism', a plan to trace the resources of the three threads of Western monotheism – Judaism, Christianity and Islam. Nancy proposes that how these threads link, break and reassemble will give us the constitutive elements with which we may open out a future for the world.[26] Jennifer Beard has presented a compelling body of research for understanding modern practices of economic development as a First World construction of Third World underdevelopment, and as the symptom of the West's continual effort to maintain an identity of wholeness in the face of its own lack.[27] She argues that First World development has a history in Christian narratives of salvation, narratives which continue to maintain the form of modern desire and contemporary forms of subjectivity. Her research has linked discourses of salvation within international development programmes and their rule of law imperatives to Third World suffering. She has presented a brilliant analysis of early Christian practices of bodily suffering and their theological and redemptive endurance within the modern Western psyche.[28] Anne Orford has argued that both international trade law and human rights discourse involve forms of messianism which repeat a Christian logic of sacrifice and function as doubles, or limits, on thinking outside the sacrifice of others.[29] She has pursued the possibilities of moving beyond the ways the Father–son relationship governs understandings of economics and human rights. In these critical forms of international law scholarship, the monetary and proprietory logics which repeat Christian messianisms are treated as both the theological resources of globalization and a problem of Western domination and appropriation. Derrida's theorization of these practices has provided many a starting point for analysis.

[26] Nancy, 'Deconstruction of Monotheism', pp. 39–40.

[27] Jennifer Beard, *The Political Economy of Desire: Law, Development and the Nation* (London, 2006).

[28] Jennifer Beard, 'Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology' (2003) 18 *Australian Feminist Law Journal* 27.

[29] See chapter 7 of this book.

The fetish at the heart of the Christian messianic

Derrida has given us a detailed study of how we might conceptualize these linkings of international law, financial practices and messianism. Derrida uses the Hebraic story of the sacrifice of Isaac by Abraham to found an analysis of the structure of the laws of the market, and as including those commonplace murders which are 'inscribed in the structure of our existence to the extent of no longer constituting an event'.[30] Derrida refers to the 'mechanics of external debt and other similar inequities' as part of the practice of a Western society of organizing the sacrifice of others in the functioning of its economic, political and legal affairs.

Derrida argues that the secret of the sacrifice of Isaac instantiates an economy tied to the family of words derived from home, the home of the family and hearth.

> It is indeed an economy, literally a matter of the law (nomos) of the home (oikos), of the family and of the hearth [foyer, hearth, focus]; and of the space separating or associating the fire of the family hearth and the fire of the sacrificial holocaust. A double foyer, focus, or hearth, a double fire and double light; two ways of loving, burning, and seeing. To see in secret – what can that mean?[31]

Derrida presents us with an order of what he calls the visible invisible, 'where a surface conceals', and an absolute invisibility of the senses 'outside the register of sight, perhaps as in the case of desire'.[32] Derrida's point is that the Old Testament model of faith in God can be understood as an economy without Abraham's calculation that if he killed his son Isaac as God directed he would receive for himself a recompense. Abraham sacrificed what is 'one's own or proper, of the private, of the love and affection of one's kin'.[33] Abraham 'gives the sign of absolute sacrifice'.[34] By God's returning the son to Abraham and making, as it were, the son as an absolute gift, Derrida argues that the narrative 'reinscribes sacrifice within an economy by means of what thenceforth comes to resemble a reward'.[35]

Derrida pursues the nature of this economy with an enquiry into New Testament gospel narratives of the heart as a place of treasures, and the linking of heavenly rewards for denial of the flesh on earth. Derrida argues

[30] Jacques Derrida, *The Gift of Death* (trans. David Wills, Chicago, 1995), p. 85.
[31] *Ibid.*, p. 88. [32] *Ibid.*, p. 90. [33] *Ibid.*, p. 95. [34] *Ibid.*
[35] *Ibid.*, p. 96. Strangely, this seems a Christian reading of the son, and the sacrifice, and seems to remove the contrast he is seeking between the Old Testament Judaic messianism and the New Testament Christian messianism.

that one can draw from the Gospel of Matthew's story of Jesus and of giving for Christ, giving in the form of earthly denial of oneself, a logic within which

> the real heavenly treasure is constituted, on the basis of the salary or price paid for sacrifice or renunciation on earth, and more precisely on the basis of the price paid to those who have been able to raise themselves above the earthly or literal justice of the Scribes and Pharisees, the men of letters, of the body and of the earth.[36]

Derrida argues this means that 'if your justice does not exceed that of the Scribes and Pharisees or the men of letters, as opposed to those of the spirit, you will not enter the kingdom of heaven'.[37] Once the human heart is inscribed by New Testament teaching as the place of remuneration and the sacrifice of the self, a different economy is instituted than that depicted by Abraham and Isaac. Is it, Derrida asks, a sacrifice of the self that economizes, or an economy that sacrifices? Does the Gospel of Matthew set loose a calculating form of sacrifice of the self within which the purpose is to reap rewards in both a terrestrial and a celestial economy, and could this also be a market economy within which others are sacrificed for the sake of one's own home or national hearth?

Derrida argues that the genius of Christianity to which Nietzsche refers is the overlay of the calculating economy of self-sacrifice with that of a new economy of absolute loss instituted by the New Testament commands of Christ to 'turn the other cheek to he who smites you'. The economy of absolute loss institutes as it were a return to the faith of Abraham in his willingness to give up his son without thought of recompense. Here the infinite gift of the son in return, like the infinite light of God's gaze, replaces the value, so to speak, of the recompense one receives for a denial of the self, of heart's desire. Derrida describes this disymmetrical economy of absolute loss as 'an economy that integrates the renunciation of a calculable remuneration', an 'economy of what is without measure'.[38]

Derrida's linking of the New Testament economies of giving oneself for Christ with the Old Testament economies of the gift of the son, have provided critical scholars with ways of engaging with those resources of the monotheism of Judaism and Christianity which have been most appropriated by Western political theologies and theologico-economies. In the Christian messianic logic, Christ's body links these two economies, and to the extent Christ is the Word made flesh these are in Christian

[36] Derrida, *Gift of Death*, pp. 99–100. [37] *Ibid.*, p. 100. [38] *Ibid.*, p. 107.

consciousness economies of the production and distribution of language, of the name of the Father, and of an 'affect of abjection' which fuels and supports Western rationalism.[39] By focusing upon this link as a fetish, it is possible to engage with how monetary economies and linguistic economies weave their way within each other and through human life and human passion. With the concept of the fetish we can investigate the symbolic structure of this 'economy of what is without measure'. Christ can be conceptualized as that which is without measure, an infinitude substituted for the sin or blood or life of mankind. The New Testament biblical narrative of salvation through faith that Christ's death will save has been endlessly deployed within the practices of Western thought to mean an infinitude can replace the finite life and labour of fallen humanity.

Marx and Freud have used the concept of the fetish with spectacular effects in explaining social processes of affirmation and disavowal – disavowal of the labour of the worker in the case of Marx's commodity fetishism and disavowal of the mother in Freud's theorization of the male child's fetishism. Derrida has pursued some characteristics of the symbolics of the fetish in *Glas*:

> Despite all the variations to which it can be submitted, the concept fetish includes an invariant predicate: it is a substitute – for the thing itself as center and source of being, the origin of presence, the thing itself par excellence, God or the principle, the archon, what occupies the center function in a system, for example the phallus in a certain phantasmatic organization.[40]

There are numerous ways one might use these concepts to pursue further the processes of messianic economies which circulate as globalization and international finance law. In *The Gift of Death*, Derrida ends his analysis of the sacrificial economy within Western practices of national and international law by pointing to the responsibility

> for that which remains more secret than ever, the irreducible experience of belief, between credit and faith, the believing suspended between the credit of the creditor, and the credence of the believer. How can one believe this history of credence or credit?[41]

We have a responsibility to pursue this question of *how* present forms of belief which sustain the sacrificial economy within international law have

[39] See Julia Kristeva, *Powers of Horror: An Essay on Abjection* (trans. Leon Roudiez, New York, 1982).
[40] Jacques Derrida, *Glas* (trans. John P. Leavey, Jr, and Richard Rand, Lincoln, 1990), p. 209.
[41] Derrida, *Gift of Death*, p. 115.

been raised aloft, so as to appear suspended. How can one believe this history of credence or credit? It is well to recognize that Western forms of subjectivity use a sacrifice or denial of the self to plot and plan for personal gain, but where these practices co-opt the denial of life to others in Third World nations both at home and abroad, there is a special responsibility to interrogate the deathly trajectory of the Western soul.

Genealogies of Christian fetishism

By focusing on how Christ's body is figuratively placed within spiritual and monetary narratives of redemption one can gain access to a kind of history of European culture in which some others are always displaced as the saved subject finds his place in heaven. This is a colonialist logic of faith and hope which can be traced at least to Augustine's fifth-century writings on Christ as the Mediator for humanity, between God and Man.[42] But it has also been used to imagine how Christ as Mediator can save in other ways. It is these other ways which form a history of the Western international juridical community, and which provide origins for international law in Christian forms of textual interpretation and aesthetics.

William Pietz's work on historiography of fetish writings of Europeans in the sixteenth, seventeenth and eighteenth centuries[43] has pointed to its so-called African origins in the Portuguese and Spanish encounters with African Guinea Coast peoples, for whom certain objects or *fetissios* were attributed spiritual qualities. Pietz has pointed the way to how these are rather European origins of a religious kind, in which the spiritual practices of the African were, as Freud would put it, recognized or affirmed and disavowed, indeed ridiculed.

In this vein, Bosman's 1702 Dutch travel narrative *Description of the Coast of Guinea*[44] reveals the moral anxieties of a Dutch metropolitan republic about profit-taking using new forms of monetary exchange.[45] Eighteenth-century Dutch society was sufficiently anxious about greed,

[42] St Augustine, *City of God* (London, 1984), p. 359.

[43] William Pietz, 'The Problem of the Fetish, I' (1985) 9 *Res: Anthropology and Aesthetics* 5; 'The Problem of the Fetish, II: The Origin of the Fetish' (1987) 13 *Res: Anthropology and Aesthetics* 23; 'The Problem of the Fetish, IIIa: Bosman's Guinea and the Enlightenment Theory of Fetishism' (1988) 16 *Res: Anthropology and Aesthetics* 105.

[44] William Bosman, *A New and Accurate Description of the Coast of Guinea* (4th ed., London, 1967).

[45] Judith Grbich, 'The Problem of the Fetish in Law, History and Postcolonial Theory' (2003) 7 *Law Text Culture* 43.

avarice and usury within its new-found international economy for the sacrificial logic of its monetary forms to produce a surface tension. Bosman's account of the Guinea Coast 'fetishers' and their cultural practices appears more as a moral fable of the failings of a metropolitan economy to live by Calvinist standards.[46] While moderate usury and profit-taking might flourish with state sanction, there remained theological sanctions against profit-taking from the poor.[47] But the irony of this text is in the Dutch reformation culture in which Christ's death had already been theorized since Luther as the satisfaction or payment for the sins of mankind.[48] Christ's body had already become the sign of the monetary payment in Christ's blood for human sin. Blood and money were substitutes for each other in doctrines of Christ's atonement, God's gift of his son to mankind is a substitute for written or paper money which pays for the new life of man. God's gift of a son returned to mankind repeats Derrida's interpretation of the meaning of the story of Abraham's sacrifice of his son, but it also repeats in the Dutch Calvinist experience, a gift of writing and of credit.

The irony of Bosman's moral fable is the discomfort experienced by knowing paper money practices upon which the Dutch trading system was beginning to flourish already had a founding in a fetish of Christian atonement – the use of Christ's body to picture and mediate what was saved – and it acquired a doubly fetished quality in its demands for Guinea peoples to be thought of as without value. Bosman's metropolitan readers would have been familiar with the numerous editions of Grotius' *Satisfaction of Christ*, in which he pursued how Christ paid the debts of mankind with his own blood.[49]

They would also have been familiar with the equivocations on interest taking of the kind promoted by Grotius in his *On the Law of War and Peace*.[50] For Grotius, 'for us the law given by God to the Jews, which forbids Jews to loan money on interest to Jews, ought to suffice . . . [P]recepts of this kind are binding also upon Christians.'[51] But

[46] See *ibid.* for a discussion of Bosman's travel narrative as a metropolitan moral fable.
[47] J. C. Riemersma, *Religious Factors in Early Dutch Capitalism, 1550–1650* (Mouton, 1967), pp. 75–86.
[48] Martin Luther, *Commentary on the Epistle of St Paul to the Galatians* (Grand Rapid, 1979).
[49] Hugo Grotius, *A Defence of the Catholic Faith concerning the Satisfaction of Christ* (trans. F. H. Foster, Andover, 1889).
[50] Hugo Grotius, *On the Law of War and Peace* (trans. Francis W. Kelsey, New York, 1925), pp. 355–8.
[51] *Ibid.*, p. 356.

> nevertheless the observation should be made that there are certain advantages which approach the character of interest, and commonly seem to be interest, although they are agreements of another kind; such as agreements for making good the loss which one who lends money suffers because he misses the use of the money for a long time.[52]

To pursue a study of how monetary exchanges or financial property can be said to be grounded in theologies of Christ's atonement is part historiography of the weakening of the Catholic Church's prohibitions against usury – where money loaned appears to be secured by a mortgage in land, repeated in various Reformation doctrines and political practices – and part poetics. When a debtor pledged his land to the creditor and seisin or ownership followed the pledge, interest payments could be disguised as usufructory rights of the creditor.[53] The creditor held the land as security and took the profits of the land in repayment of the debt. We can now doubt that this *vif gage* or alive pledge was even sinful, and reserve in hindsight the name of usury for the dead or *mort gage*.[54] In these early modern linguistic and financial practices the poetics of atonement infuses the juridical language of money, precisely for the purpose of conveying the meanings of Christ's body being given by a Godly creditor to save his debtors, and of course portraying the usurious earthly creditor as having some saving graces akin to God's generosity.

A loan secured by land formed the earliest justification acceptable to the Roman Catholic Church, in 1425, for the taking of *interesse*.[55] Despite the biblical prohibition against usury,[56] Luther in 1540 was willing to sanction loans of money which allowed 8 per cent interest, provided the contract was based on redeemable security in land, and of course the fiction that the creditor as landowner was entitled to take the usufructory rights of the land's produce – remarkably, calculated in advance as 8 per cent of the land's value to the creditor, that is the money which he had loaned. In these theological justifications the landowner is imagined as holding the

[52] *Ibid.*, p. 357.

[53] A. W. B. Simpson, *An Introduction to the History of the Land Law* (Oxford, 1961), pp. 132–4.

[54] Simpson argues that the *vif gage* or *vivium vadium* was an honourable transaction: *ibid.*, p. 132.

[55] Benjamin Nelson, *The Idea of Usury: From Tribal Brotherhood to Universal Otherhood* (Princeton, 1949), p. 24.

[56] The words of God to Moses, 'Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury': Deuteronomy 23:19 (biblical citations are to the King James Version).

usufructory rights, the first fruits, and passing these to the new owner as creditor. The first fruits, whether human son or first born as it were, becomes that of the creditor and able to be gifted, and at the end of the life of the money is returned or 'sacrificed' for the sake of the human debtor. The first fruits or produce of the land are held by the creditor and returned or 'sacrificed' by the fact of their cancellation or 'satisfaction' of the sum owed by the debtor.[57] Derrida's economy of the absolute gift of God's return of Isaac to his father Abraham was well repeated in the logic of the usurious loan secured by land. The produce of the land or its first fruits 're-presents' God's son, and God's son was a sign of the monetary amount due to the holder of the land, whether as creditor or debtor.

There are many other Western cultural forms which gave the theological doctrines of Christ's atonement a monetary quality, and infused the experience of the Christian soul with a phenomenonal form of the heart as if it were a treasure house, and the imagination as if it were a device for coining money in the form of words. George Herbert's early seventeenth-century English poem 'Redemption'[58] gives access to a Protestant aesthetics of a suffering Christ imbricated in a theological doctrine of Christ's atonement for the sins of mankind, and a newly emerging practice of picturing entitlements to the use of land as proprietory in its modern sense of alienable, rather than simply feudal. In Herbert's poem, the tenant's payment for the use of the land, and allegorically for the use of his life, has been made by borrowing from Christ. Christ's body, his blood and suffering, paid the tenant's debt to this landlord, God.[59] The European archive of thinking of money payments as sacrifices is so numerous that pointing out its theological source can produce incredulity in one's colleagues. Nevertheless, these language practices give ways of approaching New Testament Christian economies of the giving for Christ or the giving of Christ and their anticipated returns. However, it is Derrida's Old Testament economy of the gift of the son which would seem to offer ways of thinking new directions in international law scholarship.

[57] One difficulty in conveying the sense of these practices is in part due to attempting to describe evolving and changing security practices over some 800 years, during which time the debtor is sometimes the legal owner and possessor of the land, and sometimes is one or neither of these.

[58] George Herbert, 'Redemption' in C. A. Patrides (ed.), *The English Poems of George Herbert* (London, 1974), p. 60.

[59] Grbich, 'The Problem of the Fetish in Law', pp. 44–7.

Abandoned being

In using the theorization of Nancy, Agamben and Taubes, who to different extents explicitly focus on Judaic forms of messianism, it becomes possible to see mimetic patterns which link and infuse the 'theologico-economico-political domination and exploitation'[60] which passes as globalization and international finance law. In Taubes one can follow a Judaic reading of Christ and the apostle Paul, a lesson for me in becoming aware how specific Christian messianism is to Christianity.

In Nancy's themes of 'abandoned being'[61] and the 'secrets of the fetish'[62] are ways of thinking about messianism more generally. Fynsk has argued that Nancy's philosophical work

> follows Heidegger in assuming that any effort to think the present . . . presupposes a lucid understanding of philosophy's closure. Heidegger argued that tracing the limit formed by the end of metaphysics entails *repeating* the movements by which philosophy exhausted its possibilities – this, in order to release what philosophy has closed upon in its effort to secure an ideal order of meaning.[63]

One can argue that Nancy's work on abandonment, on being forsaken, also presupposes a focus upon what juridico-theological writing has closed upon in its effort to secure an ideal order of justicial meaning – an order of rule, punishment, vengeance and mercy. One can understand the form of civil sovereignty, the authority of rule and rule suspension, as a kind of normativity which produces repetitions of this form and its being, of forsaken. In the case of thinking of a financial being as having an authority to rule over financial beings, it is the bare human life which is abandoned to its precarious existence. Civil sovereignty as the authority to 'decide' the exception is but the exhaustion of a form of thinking about civil sovereignty with which the masking of the privileging of the life of financial things is revealed, and the abandoned human presented as an image of life to itself.

[60] Nancy, 'Deconstruction of Monotheism', p. 44.
[61] Nancy, *Birth to Presence*, pp. 36–47.
[62] Jean-Luc Nancy, 'The Two Secrets of the Fetish' (trans. Thomas C. Platt) (2001) 3 *Diacritics* 3.
[63] Christopher Fynsk, 'Foreword: Experiences of Finitude' in Jean-Luc Nancy, *The Inoperative Community* (ed. Peter Connor, trans. Peter Connor, *et al.*, Minneapolis, 2001), p. vii (emphasis in original).

Taubes on the Judaic messianism of Paul

Jacob Taubes' 1987 lectures[64] at the Protestant Institute for Interdisciplinary Research at Heidelberg on Paul's Epistle to the Romans provide analyses of the biblical writings of St Paul which assist in conceptualizing how the form of the sovereign and the suspension or exception is but a repetition of a Judaic messianism, the original so to speak of how an abandoned being might be produced. Taubes had throughout his academic life drawn upon the works of Gershom Scholem,[65] who as a youth shared friendship and scholarly ideas with the young Walter Benjamin. Agamben's study of Benjamin and Scholem begins on similar tracks to those pursued by Taubes, although Agamben later goes in different directions. Agamben says he has pursued Benjamin's

> parallelism between the arrival of the Messiah and the limit concept of state powers. In the days of the Messiah, which are also 'the "state of exception" in which we live', the hidden foundation of the law comes to light, and the law itself enters into a state of perpetual suspension.[66]

Agamben argues that 'the messianic kingdom is not one category among others within religious experience but is, rather, its limit concept. The Messiah is, in other words, the figure through which religion confronts the problem of the Law, decisively reckoning with it.'[67] While Agamben has pursued these themes philosophically, it is Taubes' engagement with the Judaic experience of the messianism of Paul, and with Benjamin's Judaism, which seems to provide that indissoluble mix of political theology which is the Pauline Epistle to the Romans. Where Agamben seems to strive to limit what is the messianic kingdom, to clarify the Law, some experience of the movement of messianic time seems lost. Taubes seems concerned to show *how* the *Geist*, or spirit, or *pneuma* of Judaic messianism produces what he feels to be the politics of Paul and so engages a *lived* messianism.

Taubes' account of the Judaic messianism of Paul is mixed with his need to distinguish it from the Christian narrative of Jesus as the Christ or Messiah. I take heart from Taubes' delight in a picture on a card depicting

[64] Jacob Taubes, *The Political Theology of Paul* (trans. Dana Hollander, Stanford, 2004).

[65] Gershom Scholem, *Major Trends in Jewish Mysticism* (London, 1955); Gershom Scholem, *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York, 1971).

[66] Agamben, 'The Messiah and the Sovereign', p. 162, quoting Walter Benjamin, 'Theses on the Philosophy of History' in *Illuminations: Essays and Reflections* (ed. Hannah Arendt, trans. Harry Zohn, London, 1992), p. 248.

[67] *Ibid.*, p. 163.

some stonework of Moses and Paul in a cathedral in Vezelay. Taubes says this 'picture shows Moses, who pours in grain from above, and the apostle Paul, who collects it below in the sack of the gospel'. Taubes reports that a medieval writer had described the scene of the stone carving as follows:

> By working the mill, thou, Paul takest the flour out of the bran.
> Thou makest known the inmost meaning of the Law of Moses.
> From so many grains is made the true bread without bran,
> Our and the angels' perpetual food.[68]

Taubes tells us that he carries the text and picture with him, 'and if I forget what I think, I look at it, and then I realize again where I stand'. The picture shows Moses pouring the grain of Old Testament words into the grinding mill, and Paul collecting at the base of the mill the purest words with which to make spiritual food. Both are labouring on the interpretation of language. Taubes seems to need this picture to remind him how his own interpretation is to be imagined and how his own thinking might produce what it is he already knows, or had forgotten. The milling of grain for bread has a resonance for Taubes, perhaps it sounds or feels like what he sees before he writes. Taubes describes his picture as 'a Christian image, a medieval allegory, or, more precisely, a Moses–Paul typology as it is felt by Christians'. He says it is 'not *my* Paul', and sees himself as using a Judaic interpretation of Paul. But he likes the picture as it is 'tremendously dense', and he thinks it is 'how an abbot in the eleventh century imagined it. It is the sum total of Christian experience'.[69] But Taubes does not tell us how the picturing of Moses and Paul can be interpreted Judaically if at all, given its Christian form of representation. Nevertheless, his anecdote is heartening as he has to work hard to remember there is a difference, and to think of this difference.

Taubes presents his Jewish reading of Paul as a focus on the necessity to find a way of engaging with *Geist*, Spirit, or *pneuma*.[70] He argues that Hegel was able to do this in his *Phenomenology of Spirit*, and Taubes points to Hegel's Preface where he gives the short explanation of the work: 'In my view, which can be justified only by the exposition of the system itself, everything turns on grasping and expressing the True, not only as

[68] Taubes, *Political Theology*, pp. 39, 148, quoting Abbot Suger, 'Liber de Rebus in Administratione Sua Gestis' in Erwin Panofsky (ed.), *Abbot Suger on the Abbey Church of St-Denis and Its Art Treasures* (2nd ed., Princeton, 1979), pp. 74–5.

[69] Taubes, *Political Theology*, p. 39.

[70] *Ibid.*, p. 41.

Substance, but equally as Subject'.[71] Taubes gives Hegel's linking of the subject, spirit, and the sublime as part of 'the modern age and its religion':

> That the true is actual only as system, in that substance is essentially subject, is expressed in the representation of the Absolute as spirit [now we understand why he emphatically underlines *Geist* here] – the most sublime concept and the one which belongs to the modern age and its religion.[72]

In Taubes' thinking, to understand what was true for Paul one must engage with the Judaic spirit of the early Christian church, before it experienced itself as a new people. Taubes puts Paul within the Judaic traditions of his faith as a Jew, and locates Paul as both a militant whose strategies against the Roman Empire succeed beyond hope, and whose strategies for preservation of the Jewish faith are equally successful.

Taubes' reading of Paul is one of Paul using a 'strategy of outbidding'. He argues that 'all of salvation history is an imitation: Jesus has to flee to Egypt, comes from Egypt, and so on. There the outbidding parallel between Moses and Christ is drawn.' He argues that the 'inner logic of the messianic' in the Judaic faith of Paul is paradoxical: 'Here something is demanded at such a high price to the human soul that all works are nothing by comparison . . . this is the point.'[73] We are to read Paul as 'outbidding' Moses in his willingness to sacrifice what he most treasures – Paul's Judaic faith. Paul, the Pharisee, breaks his Judaic rituals and taboos, and becomes like a Gentile; he offers himself as a sacrifice to save the Jewish people. In this sense Paul repeats the type of the Mosaic messiah. He stages a point of doubt for the reader – is Paul the sign of an offering to God which, like Isaac, is returned to him as a gift? Do we read Paul as the Jew who put Judaism behind him and took up the different doctrines of Christianity in order to save Judaism? Or, similarly, do we read Paul as the Jew who was unfaithful to the laws of the Torah as a strategy to engage God's vengeance and mercy, and his willingness to suspend judgment? Have the 'unfaithful' been abandoned to lives of having to distinguish for themselves the morality of human being?

In the 'Afterword' to Taubes' *Political Theology of Paul*, Hartwich, Assmann and Assmann give an intellectual history of Taubes' academic researches which brings out aspects of his teachings on the Pauline

[71] *Ibid.*, pp. 42, 148, quoting Georg Wilhelm Friedrich Hegel, *Phenomenology of Spirit* (trans. A. V. Miller, Oxford, 1977), pp. 9–10.
[72] Taubes, *Political Theology*, p. 42. [73] *Ibid.*, p. 10.

strategies for Judaism.[74] They argue that at their heart is an antinomistic scheme of interpretation. To understand Taubes and his Judaic framework requires grasping the ways Paul's writings give contradictions between moral principles of Judaism. In Taubes' work Paul is to be understood and interpreted within Judaic antinomial schema. Contradictory principles are pitched against each other. In contrast, Christian typologies seem to focus upon Adam as a type of Jesus, and present Old Testament characters and their plots as signs or prophecies of the New Testament characters and their actions. Prophecies of Jesus as Messiah are always fulfilled.

Taubes interprets the Pauline practices by reference to the 'collective experiences of Jewish history, which are condensed in the ideas of cultic and messianic legitimation'.[75] Paul's text repeats themes and phrases from the Mosaic traditions of Exodus, Leviticus, Numbers and Deuteronomy, which together with Genesis make up the Judaic Torah or Law, the law of the Pentateuch or fivefold book. Taubes is interested in the Moses–Paul typology and as a logic of the Yom Kippur ritual. As explained in the 'Afterword', the 'cultic law' of the temple sacrifice, set out in Leviticus 16, is re-enacted in the readings of the Jewish ceremony of Yom Kippur.

> The ceremony, which consists of a rite of substitution and a rite of elimination, is literally transformed through the reading of Scripture. The sacrificial animal (the rite of substitution), which gives its blood in place of the life of the sinners, repeats the sacrifice of Isaac. To the relinquishing of the scapegoat (rite of elimination), which is enacted as the submersion of evil into water, corresponds the reading from Prophets assigned to that day, from the Book of Jonah. The myths on which both sacrificial scenes are based have opposing structures: Isaac gives himself up as a martyr to the will of God, while Jonah wants to take exile and death upon himself in order to assert his own will against God.[76]

Hartwich, Assmann and Assmann argue that Moses has the problem of a people betraying the covenant with God; the Israelites have turned to idol worship and this has provoked the wrath of God. Moses as the Chosen One is to be preserved while the people are to be destroyed. Moses would rather substitute himself for the sinners and give his own blood as a sacrifice for theirs. But Moses trusts in God's mercy and reminds God of his promise to Abraham that his seed shall inherit the earth. God's anger is diminished by Moses' prayers and the people are pardoned, but

[74] Wolf-Daniel Hartwich, Aleida Assmann and Jan Assmann, 'Afterword' in Taubes, *Political Theology*, pp. 116–42.
[75] *Ibid.*, p. 123. [76] *Ibid.*, p. 126.

justice demands the symbolic penitence of Yom Kippur repeated across the generations. Their atonement is to wander in the desert for forty years. Taubes reads Paul through the story of Moses and his offer of substituting his blood for that of the people, and also through the story of Jonah, the Moses antitype. The Jews of Paul's time have not followed the rituals of their faith. Paul offers himself to God's vengeance and asks that the Law be not applied to the unfaithful Jews. Does Paul sacrifice himself to save the Jews as in the Moses story, or become a scapegoat for the Jews as in the Jonah story? The prophet Jonah is said to be a reverse of the role of Moses. Jonah fears God's mercy towards the repentant Gentiles of Nineveh, the capital of the Assyrian empire. Jonah would rather die than see the Gentiles saved. Hartwich, Assmann and Assmann argue that 'God puts Jonah's right to be angry into question by reminding him of the obligation that the creator has entered into with respect to all living things'.[77]

Taubes has linked the present day rituals of the Day of Atonement performed by practising Jews to the antinomic tradition. As the community annuls all previous vows and reads the messianic themes of the sacrifice, do they engage in a similar performance of the Yom Kippur, the day of atonement? In recognizing and distinguishing the sacrificial one who has given his blood in place of ours do the declarants repeat the Mosaic call for mercy, suspension of the law of vengeance towards the unfaithful and perform an acknowledgment of the Law? Do the proclaimants inherit the benefits of God's promises made to the generations of Abraham? As they announce their willingness to pray with transgressors 'and the stranger that sojourneth among them'[78] do they repeat Paul's strategy of a willingness to give up his faith for the sake of the Jews? As the celebrants speak of their willingness to pray with transgressors, contrary to the Law, do they call to God to remember his promise of the covenant?

Taubes says his readings of Paul are a way of pursuing the *pneuma* or spirit which is the inner logic of Judaic messianism. Hartwich *et al.* argue that Taubes brings out of the Pauline text how the reader of Paul must confront a conflict of guilt. Paul is like Jonah, the antitype of Moses:

[77] *Ibid.*, p. 127.

[78] Numbers 15:26: 'And it shall be forgiven all the congregation of the children of Israel, and the stranger that sojourneth among them: seeing all the people were in ignorance.' See Friedlander for an account of the practices of the Day of Atonement services: M. Friedlander, *The Jewish Religion* (London, 1891), pp. 405–9.

> Paul prophesies to the Gentile metropolis God's anger and the death sentence in the judgment of their sins (*Romans* 1:28, 2:10). But a return and salvation are still possible through faith in the Messiah. However, Paul, who has the vision of a new people of God, continues to belong to the old one. This loyalty gets him into a conflict of guilt. This is why he must justify himself by playing once again the old role of Moses in the drama of Israel's salvation. For the sake of the fallen people of the covenant he is prepared to be once again turned away from messianic salvation and to bear the role of the suffering righteous one, the scapegoat (*anethema*) who neutralizes God's anger.[79]

Does Paul offer himself as a scapegoat for those who have forsaken the law, as a way of enforcing the law, and also perform the offer of himself as a sacrificial messiah as a way of enforcing the law? We are forced to consider, who are the enemies of God? He within the law who would restrict God's mercies to the lawful, or He outwith the law who would extend God's mercies to all those outwith the law? He who provokes God to suspend the law. The Messiah, the pure one who becomes impure and suspends God's judgment.

In Taubes' readings, his eleventh-century Christian abbot had condensed the Pauline interpretation of the Mosaic law to 'love thy neighbour as thyself'. In the Christian reading we are all sinners who carry within the wilfulness of Adam and Jonah. In the Judaic reading, do we read the unfaithful as 'enemies' for the sake of Israel, and always part of God's elect, as beloved by God 'for the fathers' sakes':

> As concerning the gospel, they are enemies for your sakes: but as touching the election, they are beloved for the fathers' sakes.[80]

Taubes reports that he wrote to Schmitt in 1979 and explained that, in both Jewish and Christian political theology, the enemy was the beloved. Should 'the boundary between spiritual and worldly . . . cease, we will run out of (Occidental) breath'.[81] Taubes is obviously pleased that Schmitt's anti-Semitism prevented him from understanding Paul's own Judaic interpretation of the Pauline Epistle to the Romans; and pleased to have had the opportunity to point this out to Schmitt in person.[82]

[79] Hartwich, Assmann and Assmann, 'Afterword', p. 127. [80] Romans 11:28.
[81] Jacob Taubes, 'Appendix B: Two Letters' in *Political Theology of Paul*, pp. 110–13.
[82] Jacob Taubes, 'Introduction' in *Political Theology of Paul*, p. 2.

The other secrets of the fetish

In the Judaic reading of Paul God is the sovereign who decides on the suspension of the Law or punishment for transgressors such as Paul. Paul is the transgressor or 'enemy' who calls on God to remember his promise made to the children of Moses. Paul repeats Moses' offer of himself as sacrifice to save the unfaithful, just as the modern ritual of the Day of Atonement service repeats the transgression and the plea from those abandoned to bare life. Those forsaken must take up a politics. Just as those abandoned by the civil sovereignty of state financial rule are abandoned to life at risk of death. Nancy argues that 'abandoned being has already begun to constitute an inevitable condition for our thought, perhaps its only condition'.[83] As one reads and interrogates the form of sovereignty repeated as statehood, financial being, intellectual being,[84] in each measure or representation of a different kind of species life there is a limit, an outside, a suspension and an existence abandoned to itself.

Nancy's study of Bataille's work on sovereignty[85] has given us a problematic of 'the recognition of the other' as an impasse. An impasse 'restraining thought, as it were, at the threshold of community, in a certain specularity of the recognition of the other through death'.[86] Nancy argues community does not enjoin me through the mediation of specular recognition, '[f]or *I* do not recognize *myself* in the death of the other'.[87] Nancy writes of the desire for community of a singular being, and 'singularity is the passion of being'. Each of us is alike, not because there is a recognition of the other, but 'because each one of us is exposed to the outside that *we* are for *ourselves*'.[88] Community is for Nancy that 'singular ontological order' in the sharing of identity. We are like in each being exposed to the outside. Each is a singularity felt as a passion for community.

Nancy's work on the 'two secrets of the fetish' can be used to make sense of the idea that the repetition in juridico-theological writing of the form of the sovereign and the suspension can show what has been enclosed

[83] Nancy, *Birth to Presence*, p. 36.

[84] We need to preserve a place for intellectual being, a form of sovereignty in which the measure of intellectual life is not that of financial bodies. While they would be incorporeal things, perhaps angels, or ghosts, they would not impose relentless forms of efficiency and risk upon bare life.

[85] Nancy, *Inoperative Community*, chapter 1; see Georges Bataille, *The Accursed Share: An Essay on General Economy* (New York, 1988); *The History of Eroticism* (New York, 1993); *Sovereignty* (New York, 1993).

[86] Nancy, *Inoperative Community*, p. 33.

[87] *Ibid.* (emphasis in original).

[88] *Ibid.* (emphasis in original).

within the layers of what I would name as Judaic messianism. It is the image of the abandoned being which is finally presented as an image of life to itself.

If we follow the progress of Nancy's writing on the secrets of the fetish this understanding of abandoned being as an image of life can also have the meaning of a fetish. Nancy poses the first secret of the fetish as the one we know as Marx's commodity fetishism, the belief that the commodity is the image of the value of the labour and processes involved in its production. Nancy's second secret is a presence, which retains a secret. He says:

> The fetish is the *being-there* of a desire, an expectation, an immanence, a power and its presentiment, a force interred in the form and exhumed by it. Whether one considers it in the context of magic, of psychoanalysis, or the jubilant and almost incantatory use of the word in Marx, the fetish possesses a double secret: the one that critical analysis shows to be the paltry monetary secret, and the other that which remains in the intensity of a presence, which precisely *as presence* retains its secret, and its presence is in this keeping of the secret.[89]

We have remained as creatures of images of abandoned beings for a long time. I would argue that Nancy repeats the Judaic narrative of Adam's exile, his expulsion from Eden set out in Genesis. Nancy's 'Inoperative Community' reads like another version of Milton's *Paradise Lost*, borrowed from his friend Hugo Grotius' *Adamus Exul*. In Nancy's themes of abandonment and the secrets of the fetish we can reach a point of theorizing law and being as a joy of existence, and a desire for the presence of community. Nancy leaves us with the enigma of his second secret.

Abandoned being uses images of suffering to make present bare life produced by the resources of monotheism. This seems to be how the image of the Rwandan child can be named as a cipher of bare life. The image of suffering is the cipher, or fetish, or the secret writing of the preciousness or infinite price of human life. How a future might be made for this child seems to remain a task of critical scholarship, including critical international law scholarship. In opening a space for human life as infinite value the forsaken can begin again. One might do well here to glean the treasures Taubes gives in his recounting of a moment in a lecture when a student pressed him to give the difference between the

[89] Nancy, 'Two Secrets', p. 6.

Old and New Testaments. His account of his reply reveals how creation is symbolized in a Judaic reading of the Old Testament:

> If I read the Old Testament in search of a leitmotif, it is this: that its barren women and mother asks, clamours for a child. Sarah, Rebecca, Rachel, Hannah, the mother of Samuel, and there are others, too. If you look at the New Testament, there are all kinds of miracles recounted about Christ . . . but one thing is not reported . . . that a woman comes . . . and throws herself before him or tears at his robe and says: 'I want a son'! This doesn't come up.[90]

In Christian messianism the son has been given, but might not the typologies of Sarah, Rebecca, Rachel or Hannah point to new ways of naming the politics and practices of abandonment?

[90] Taubes, *Political Theology of Paul*, p. 60.

9

Human rights, the self and the other: reflections on a pragmatic theory of human rights

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An introductory question: why (still) 'do' human rights?

This question, rare and insolent only a decade ago, has now become one of the refrains accompanying the arduous road from late- to post-modernity. For as long as criticisms of human rights seemed to be safely confined to a few die-hard neo-Marxists, securely departmentalized cultural anthropologists, and friends of the Chinese government, the (transnational) human rights activist – either 'Western',[1] middle class and well endowed with the traits of cosmopolitan *Kultur*, or non-'Western' and aspiring to all of the former – could simply ignore these discordant voices. Indeed, it seemed possible, then, to spend an entire working life 'doing' human rights without ever stepping back to reflect on why one was actually doing them, on what ground and with what final vision of the world and the human beings in it. It seemed self-evident that human rights were both real and good, and that their absence essentially denoted intolerable human suffering. And, as this absence was the usual state of affairs, the need to 'do' human rights seemed never to diminish, with the challenge being so immense that it seemed capricious to engage in petty arguments on relativism or cultural imperialism. Surely, one thought, the pain felt by torture victims was the same across national and cultural boundaries, arbitrary

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[1] For the problematic notion of the 'West', see Charles Leben, 'Is There a European Approach to Human Rights?' in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 69–97 at p. 72; for a more philosophical reflection on the concept of 'Europe', see Jacques Derrida, *Das andere Kap & Die vertagte Demokratie: Zwei Essays zu Europa* (trans. Alexander García Düttmann, Frankfurt am Main, 1991). For simplicity's sake, the term will nonetheless be used, though always as if in parentheses.

and increasingly ephemeral as these appeared to be. And as long as there was an endless supply of the weeping children, frightened-looking women and beaten-up men that, to this day, decorate the websites of the better-known human rights NGOs, there did not seem to be a moment's time for critical reflection.

Yet this (evidently stylized) sketch of the self-perception of 'the human rights activist' has come under enormous pressure in recent times. It is tempting to attribute this pressure solely to external causes, namely the very real competition now faced by human rights from an ever wider-ranging (human) security discourse that has been emerging since the 11 September attacks. The danger of this particular competition does not so much consist of the deliberate curtailment of the enjoyment of various human rights in the name of counter-terrorism,[2] but rather in the gradual and somewhat concealed replacement of human rights as the defining concept of late modern societies by that of (human) security. Yet, even if this shift actually materialized, and if it succeeded in seriously threatening the very concept of human rights, it would, nevertheless, only be capable of having this effect because of the internal contradictions which have always permeated human rights discourse, and which have only superficially been masked by the imagined consensus of earlier periods. Ultimately, terrorism and counter-terrorism, by cruelly manifesting the limits of multicultural cosmopolitanism and intercultural understanding, merely expose the fact that the fundamental questions underlying human rights have never been answered. Long before the clamour of the (counter-)terrorist attacks, post-Wittgensteinian and poststructuralist critics had worked out the epistemological implausibility both of universal rationality and of the supposed commensurability of language and culture upon which the idea of the inter-cultural translatability of concepts such as human rights is premised. And neo-pragmatist commentators had already pointed to the implications of that epistemological implausibility for the 'usefulness' and practical legitimacy of human rights.[3]

[2] See, inter alia, Joan Fitzpatrick, 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 *European Journal of International Law* 241; Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 *Human Rights Quarterly* 932; Anthea Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15 *European Journal of International Law* 721; Frédéric Mégret, 'Justice in Times of Violence' (2003) 14 *European Journal of International Law* 327.

[3] There is a vast literature on these lines of thought; for some indication, however, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1962); Thomas S.

In the midst of that critique stands, of course, the human rights activist. Left uncertain about the foundations of the discourse she or he promotes, accused of being 'part of the problem' rather than celebrated as a missionary imparting its solution,[4] and, perhaps, puzzled by the ambivalent role played by human rights discourse in such places as Kosovo, Afghanistan or Iraq, that activist may simply see the ground upon which she or he has been presuming to stand dissolve under her or his feet. What can, and, indeed, what ought that activist to do if she or he wishes to take these critical insights seriously?

Before attempting to outline a possible response to this question, two issues need first to be elucidated, namely who falls within that broad description of 'human rights activist', and what kind of reflection any potential response to that grand question implies. As to the former, there seem to be essentially three possibilities: either the stereotypical 'human rights activist' is merely a straw person, i.e. a stylized artefact constructed in order to polemicize against the infinitely more complex real-life activists, who can, therefore, safely ignore this critique; or she or he is a member of that relatively small group of people directly involved in cross-cultural human rights talk, i.e. those 'out in the field' trying to convince such (from their perspective) exotic others as Liberian child soldiers, Brazilian *favelados* or Albanian militiamen that they should re-describe their lives in human rights terms; or, finally, she or he is anyone 'doing' human rights vis-à-vis any others, whether exotic or just next door, with the intention of spreading the word and a determination to do good.

Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Chicago, 1977); Paul Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London, 1975); Ruth Chang (ed.), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, MA, 1998); Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London, 1958); Lawrence E. Hazelrigg, *Social Science and the Challenge of Relativism: A Wilderness of Mirrors: On Practices of Theory in a Gray Age* (Gainesville, FL, 1989); Cass R. Sunstein, 'Incommensurability and Valuation in Law' (1993–4) 92 *Michigan Law Review* 779; Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920; see also Drucilla Cornell, 'The Violence of the Masquerade: Law Dressed up as Justice' (1990) 11 *Cardozo Law Review* 1047; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000); Zygmunt Bauman, *Postmodern Ethics* (Oxford, 1993); Richard Rorty, 'Human Rights, Rationality, and Sentimentality' in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York, 1993), pp. 111–34; Tom Campbell, K. D. Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, 2001); on a different line, see also Michael Ignatieff's oft-cited essay *Whose Universal Values? The Crisis in Human Rights* (The Hague, 1999); David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101.

[4] See Kennedy, 'International Human Rights Movement'.

The first possibility will simply be rejected, as the present argument's working hypothesis is that the majority of statements made about human rights in academic, governmental or non-governmental contexts do, indeed, not fully reflect the epistemological and pragmatic critique of human rights, and are, thus, merely reproducing what could be termed a clichéd account of human rights (explored later). The distinction between the second and third possibilities, in turn, poses a question related to that of the possibility of human rights talk, namely whether the epistemological challenge such 'talk' implies is restricted to its cross-cultural dimension, or whether, in fact, any kind of rights talk, to anyone, should be seen as nothing but a 'shot in the dark'. On the one hand, human rights activism seems premised on a rigid and culturally defined 'we'/'they' dichotomy: the 'we' is presumed to have and understand human rights, and the 'they' to lack them and to be in need of them. As will be explored in greater detail below, it is Richard Rorty's great merit to have exposed this inner logic of human rights activism, even if his subsequent espousal of all its implications has brought him the charge of accepting cultural chauvinism. On the other hand, however, there is the often overlooked fact that at the heart of the epistemological critique of cross-cultural communication lies a more radical critique of communication as such which contradicts the very idea of a 'shared understanding' supposedly enjoyed by the members of an imagined community. Perhaps, ultimately, it is as uncertain whether my colleague across the corridor really understands what I mean when I 'talk' human rights to her/him, as it is when I talk to an Iraqi kidnapper of aid workers? Perhaps, then, everyone purporting to 'know' what human rights are about vis-à-vis *any* others ought, for heuristic purposes, to be considered a 'human rights activist'.

The second preliminary issue concerns the nature of a response to the implications of epistemological scepticism for human rights activism. This is an issue because the sought-after response is not clear-cut and one-dimensional, but consists, arguably, of three different dimensions: an epistemological one, a deontological one and an empirical one. The first is the most intuitive response, namely one to the question of whether human rights *can* be inter-personally and cross-culturally significant. This involves the kind of statements on the (in)commensurability of language games and socio-cultural spheres mentioned above. The second, deontological dimension derives from the first, as it concerns the ethical consequences of the acceptance of epistemological scepticism for human rights praxis. It seeks to answer the question of whether and how one *ought* to

'do' human rights once their purported ground of common values and shared understanding is taken to be a mere myth.

On the face of it, these two dimensions appear to account for all possible responses. Yet there is arguably also a third, empirical dimension, which relates to the pragmatics of human rights, i.e. their use in different contexts. For the epistemological and normative responses say nothing about the empirical fact that human rights discourse is being used by a host of different people in diverse socio-cultural contexts. One of the working hypotheses of the present argument is that, to quote an expression by Eduardo Rabossi popularized by Richard Rorty, 'today, human rights are a fact of the world'.[5] They are, in other words, being 'talked' in virtually all places by virtually all kinds of people. Statements about this practical use of human rights are, hence, unrelated to statements about their theoretical foundations. Prima facie, this differentiation between the facticity and the validity of human rights discourse is trivial, as it appears simply to point to two fundamentally separate methodological perspectives, akin to H. L. A. Hart's well-known external/internal distinction: an external perspective analysing human rights discourse from a purportedly neutral observer position with reference to social-theoretical concepts; and an internal perspective hermeneutically seeking to reconstruct its inner logic, or lack thereof.

In contrast to this rigid separation of perspectives, a pragmatic approach seeks to link the facticity of human rights discourse to its epistemological and deontological validity, without, however, re-essentializing it through the post-metaphysical ideals of critical theory. The pragmatic perspective aims to comprehend human rights discourse not in terms of what it could be, or ought to be, but in terms of what it arguably *is*, namely a plural, polycentric and ultimately indeterminate discourse amenable to use by everyone (nearly) everywhere. Wherever individuals and groups wish to challenge what they perceive as oppressive or hegemonic structures, they can avail themselves of that discourse, as they might use a hammer to send shockwaves through a concrete wall. The logic of plurality implies, however, that the effect of these discursive irritations is beyond the control of those creating them, and is ultimately uncertain.[6]

[5] Ernesto Rabossi, 'La teoría de los Derechos humanos naturalizada' (1990) 5 *Revista del Centro de Estudios Constitucionales* 159; Rorty, 'Human Rights, Rationality, and Sentimentality', pp. 116, 134.

[6] The notion of such conceptual 'irritation' has been inspired by the idea of 'legal irritants' as developed by Gunther Teubner; see for example his 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

There is no single 'correct' signification, and, therefore, *use* of human rights, but only context-specific *uses*. This, in turn, means that a pragmatically inspired acceptance of epistemological scepticism need not lead to the summary dismissal of human rights and the abrupt discontinuance of their active promotion. Instead, it may just be a precondition for a new discursive form, one that accepts at once the multiple validities of human rights, and the singular validity of their promotion. The following argument is an attempt to outline this, as yet, rough and uncut new form.

Because . . . they are an omnipresent cliché?

The prima facie content of 'rights talk' is what could be termed the standard cliché of human rights, the textbook answer to the question of what human rights (supposedly) are. It is zealously propagated and tirelessly reproduced by an institutionalized and professionalized human rights movement, both academic and activist. Its main tenets are that there are legally valid and institutionally enforceable human rights, most notably those listed in the 'international bill of rights';[7] that these are universal in the sense that everyone has, or should have, them; that they are indivisible in the sense that the international bill of rights essentially forms a coherent package of claims to a certain type of personhood and community – subsumed precisely under the label of human rights; that, on account of the latter, empirical conditions of human beings can – and indeed should – be measured against the 'standards' set by these human rights norms; and, finally, that the foundations of these human rights norms lie in some mixture of common (rational) morality and cross-cultural equivalence. In particular, this clichéd version of human rights underlies the greater part of the 'standard' legal literature on the topic, and there has been a marked, if not unexpected, apprehension expressed in that literature in response to attempts at reconceptualization or re-description. Frequently, the argument is made that, for as long as even the mainstream canon of human rights is unrealized, and not fully embedded in doctrine, 'playing around' with esoteric concepts is at best useless and at worst detrimental to the 'cause'. Hence, critical, postmodern or, indeed, pragmatic accounts of human rights are essentially taken to amount to

[7] Universal Declaration of Human Rights, General Assembly Resolution 217A(III) (1948) (UDHR); International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

bookish extravagances that fly in the face of the real needs of the victims of human rights violations.

Yet, upon closer analysis, this clichéd account of human rights is but a thin veneer that conceals the concept's deeper foundations – or lack thereof. What are human rights, after all? Are they to be seen as distinct from (just) rights? Are they moral, or legal, or something else, in character? Are they local or global; discourse, ideas, legal/moral prescripts, cultural practices, or, indeed, inverted empirical descriptions of their lack, namely human rights violations? And what assumptions underlie the claim that the concept of human rights can be known in socio-cultural contexts different from those in which it emerged? Behind these seemingly abstract questions lurk many of the most controversial issues surrounding human rights, including questions of universality, hegemony and ethnocentrism. The concept of human rights is not merely a multi-coloured, but nonetheless comfortably stable and static conceptual entity. Instead, what seems to mark reference patterns to human rights is their permanent bind within a multiplicity of overlapping tensions, notably between ahistorical validity and historical particularity, between cultural universality and relativity, between political consensus and hegemony. Human rights would seem to be a fluid concept indeed.

However, despite the haziness and fluidity of the concept of human rights they are nonetheless being *used*, whether in good or bad faith, and with whatever connotations, almost everywhere and by almost everyone. Indeed, no matter how hazy, reference to human rights is an undeniable empirical element of a world which is increasingly marked by global communication streams and material exchanges, a world in which the 'trans-', the 'cross-' and the hybrid has, at least in part, replaced what was previously assumed to be the co-existence of discrete, bounded formations such as nation-states, cultures or identities. Human rights are a firm part of this dynamic global intermixture of vocabularies, actors and institutions. Under such conditions, no particular use or connotation given to the term can have an a priori monopoly on expressing the essential nature of the concept.

This latter assertion becomes clearer when one thinks about the reason for the conceptual haziness of human rights – their discursive character. The meaning of human rights is produced by different linguistic constructions used in specific contexts. Prima facie, the content to which the discourse of human rights refers appears to be what could be termed empirical human rights conditions, i.e. the degree of the realization of those features of individual and collective human life prescribed by human

rights in the so-called real world. Indeed, the symbolic imagery invoked in much of human rights activism – and a good amount of academic reflection, too – is predominantly geared towards those empirical conditions, i.e. to different forms of physical suffering. Evidently, however, there is no empirical reality 'out there' of which human rights discourse would be a one-to-one representation. There are no tortured bodies, oppressed women, gagged journalists or persecuted indigenous peoples; it is only the linguistic structuring of the empirical 'being' of individuals or groups that creates these 'facts' as the reality of human rights. An injured body, for instance, can only be identified as a tortured one by understanding the context in which the injury occurred, i.e. by grasping the specific meaning of the social actions of which the event in question is made up, by means of the concepts provided by human rights. Hence, even where a direct reference to the external, physical world seems to exist, the apparent facticity of the respective rights is ultimately based on socially constructed meanings. In fact, in terms of their discursive constitution, these 'physical' human rights are but special cases within the general discourse, most of which does not at all relate to mind-independent objects – as analytical philosophy would have it – but purely to social facts. Hence, while there may be some rights that appear to refer directly to physical and mental states of individuals, such as the rights to physical integrity,[8] health care[9] or food,[10] and while it is, arguably, this physicality which often turns these rights into stereotypes of human rights as such, they are ultimately no less grounded in the social – and, hence, the discursive – than are most other rights, such as the right to a fair trial,[11] the right to education[12] or the right to marry.[13] This serves to illustrate two important points about human rights both as and in discourse. They are, like all social concepts, 'never fully referential, in the sense of identifying a verbal sign that stands for or refers to (and thus comes to represent) some unambiguously identifiable feature of an external reality'.[14] Instead, human rights discourse arises

[8] See for example UDHR, Arts. 3, 4; ICCPR, Arts. 6, 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (ECHR), Arts. 2, 3; American Convention on Human Rights, San José, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123 (ACHR), Arts. 4, 5.

[9] See UDHR, Art. 25; ICESCR, Art. 12.

[10] See UDHR, Art. 25; ICESCR, Art. 11.

[11] See UDHR, Art. 10; ICCPR, Art. 9; ECHR, Art. 6; ACHR, Art. 8.

[12] See UDHR, Art. 26; ICESCR, Art. 13; ACHR, Art. 26.

[13] See UDHR, Art. 16; ICCPR, Art. 23; ECHR, Art. 12; ACHR, Art. 17.

[14] Trevor Purvis and Alan Hunt, 'Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .' (1993) 44 *British Journal of Sociology* 473 at 474.

from 'the complex of interconnections and relations that constitute the social',[15] which cannot, therefore, be objectively explained but, at most, subjectively – or intersubjectively – understood.

Or, rather, two heuristic concepts: human rights discourse and human rights consciousness?

This 'understanding' of human rights implies a distinction – for heuristic purposes – of two complementary conceptual elements of human rights, namely *human rights discourse* and *human rights consciousness*. The former refers, prima facie, simply to human rights 'talk' in its broadest sense, i.e. to all references to human rights, independent of context or speakers' intentions. Importantly, it is a system or structure of signification which is taken to be analytically distinct from the subjective meaning constructed with it in specific contexts. However, while it broadly denotes the 'objective' linguistic aspects of human rights, it is not a unitary, bounded system of references with a clearly delimited vocabulary – or code – the 'grammar' of which would be determinative of the way it is used. It is rather a discursive formation in the Foucaultian sense, and hence characterized by 'dispersion, choice, division, and opposition'.[16] This means, as Purvis and Hunt point out, that the articulation of discursive elements is always only provisional, that discourses, thus, never fully succeed in securing meaning, and that, indeed, a discursive formation may consist of several individual discourses which stand in a relation of competitive struggle with each other.[17] Objective *human rights discourse*, therefore, has a subjective counterpart, namely *human rights consciousness*, which represents the subjective perception of human rights as an ontological (re-)description of personal identity. The precise content of the latter cannot be formalized, but is bound to remain fluid and non-theorizable. Ultimately, it is individuals who are, within their own consciousness, confronted with the question of what to make of that discourse of human rights which has entered their life-world, and ultimately that subjective sense-making cannot be objectivized. This, in turn, implies that, from a subjective point of view, the understanding of human rights discourse cannot be evaluated according to some objective criteria of correctness or

[15] *Ibid.*

[16] *Ibid.*, p. 492. The distinction between a discourse and a discursive formation has especially been clarified by Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2nd ed., London, 2001).

[17] Purvis and Hunt, 'Discourse, Ideology', pp. 492–3.

fit, and that, indeed, there cannot be such a thing as a subjective misunderstanding of human rights.

Hence, while human rights discourse can only be understood in concrete contexts and through the subjective sense-making of actors within that context, it is not purely constituted by these actors, but has an objective substrate that influences the way it is understood, and by whom it is understood. Yet that influence never reaches the level of full determination by which both the discourse, as well as its 'knowing subjects', are entirely constituted. Even if individual subjectivity is essentially determined by discursive formations, the content of individual consciousness cannot possibly be so fixed. It is, in principle, always capable of subverting pre-assigned subject positions by recombining the discursive elements at its disposal. No set of discourse rules can pre-determine the outcome of such recombinations – they are ultimately chaotic.

Put differently, human rights discourse cannot control the way it is used by actors. Human rights are indissociable from the subjective meanings actors bestow on them in concrete situations. They imply a particular first-person account in which the formula 'I have a right to' is woven into a concrete context. This first-person account is irreducible either to a systemic third-person account or to any pre-determined intersubjective rationality. Yet neither would it, therefore, be entirely controlled by the individual actor, as she or he can only construct that meaning through an always already given language of human rights. The outcome is, hence, from a third-person perspective, both unpredictable and inscrutable. This means, among other things, that there is no 'objective' way to determine the 'correct' use of human rights. Human rights discourse cannot manifest itself other than through the mutually incommensurable human rights consciousnesses of those actors engaged in human rights talk, regardless of the institutional context within which they are situated.

Two objections might be raised to this apparent emptying of objective or even intersubjective substance from the concept of human rights. The first concerns what could be termed the practice of international and domestic human rights protection in courts, commissions, government agencies and other fora. These fora, it could be argued, constitute particular interpretive communities playing a particular language game within which all actors are presumed to understand each other. Here, human rights are spoken in a specific 'dialect' – for example, formal legal argument based on legally positivized human rights instruments as used in legal proceedings – and, within the confines of that dialect, seem to have a reasonably clear core of meaning for all actors involved.

Moreover, anyone not speaking that dialect will be clearly identified as making 'mistaken' references to human rights. In one sense, this argument is, of course, plausible: truth and error need not be defined as relative to individual consciousness, but as relative to the relevant language game, not least because, as the later Wittgenstein has pointed out, that language game determines the way in which its participants can speak, think and understand. Yet, even within language games, there seems to be a potential for indeterminacy and meaning construction which transgresses their boundaries. Law, for instance, held out by so many human rights activists as a solid rock of meaning, is full of indeterminacies, making it in so many ways an essentially result-open process of contingent argumentation – Dworkin's image of the 'hard case'.[18] What makes a case 'hard', as opposed to not a case at all? How can this difference objectively be fixed, if not by the mere fiat of those charged with determining what the law is? Let us take the concrete example of a Brazilian *favelado* alleging, before a parliamentary human rights commission, that his human rights have been violated by a neighbour who 'robbed' him of his twelve-year-old 'lover'. Compare this to the Prince of Liechtenstein, complaining before the European Court of Human Rights about an alleged violation of his right to a fair trial in relation to domestic (German) proceedings concerning a valuable painting formerly in the possession of his father. By what criteria is the *favelado* considered to use human rights incorrectly, and the Prince correctly?[19] Of course, both cases seem intuitively clear-cut, not least since, in the former case, the 'mistake' consists of the fact that the complainant potentially claims a right to violate the rights of a third person (the female minor), whereas, in the latter case, a deprivation of the right to fair trial can potentially always constitute a human rights violation (with regard to the relevant instrument referred to), independent of the object the claimant pursues through the trial. Beyond intuition, though, what is the basis for calling the first use of human rights a 'wrong' redescription, but the second an, at best, clever application of human rights to a new problem set? Ultimately, the decision rests with those empowered to decide right or wrong, i.e. legality or illegality, within a particular language game. There can be no firmer foundation for such an inherently foundationless decision.[20]

[18] See Ronald Dworkin, *Law's Empire* (Cambridge, MA, 1986).

[19] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, 2001-VIII ECtHR (Ser. A) 1; see also Florian Hoffmann, 'Report – European Court of Human Rights – 2001/2002' in Russell Miller and Peer Zumbansen (eds.) (2003) 1 *Annual of German and European Law* 506.

[20] See Derrida, 'Force of Law'.

A second objection would hold up the possibility of (rational) argumentation as a means to tease out a plausible definition of 'rightness' of use that is shared, or at least hypothetically shareable, by all involved. Prima facie, this objection, too, has some force. It would plainly seem possible to engage the *favelado* in an argument which would compel him to rationalize his intuitive sentiments of justice and injustice and, in all likelihood, make him revise some of his earlier assumptions. Yet the point here is not that the *favelado* would not be susceptible to argumentation, but rather that the process of argumentation would not be unidirectional, and that its outcome would not be pre-determined. The interlinking of contexts is always a two-way affair, so that it is not merely the *favelado*'s human rights consciousness that is being 'corrected', but also his interlocutor's. Even if the former's claim to a right to an underaged concubine may not persuade the human rights commissioners, they are nonetheless forced to revise their particular horizon and to adapt their own counter-arguments to it. It is one thing to sense an absurdity in the *favelado*'s claim, yet quite another to try to understand it from his point of view. Both sides are locked in a continuous process of mutual irritation and adaptation which may lead to the *favelado* coming to 'understand' human rights in the way of the commission, or not. Indeed, the reprimand he is likely to receive might cause him to reject human rights discourse as a viable remedy, or his 'learning' might consist not of a genuine (communicative) understanding of human rights as conceived by the commissioners, but of a strategic understanding of how to manipulate human rights discourse and advance his cause more effectively. What is important is that none of these adaptations is ever a one-off renegotiation of meaning and identity. Instead, they constitute a dynamic process of mutual feedback loops. This implies that no particular interlinkage of human rights discourse and human rights consciousness at any one point in time is ever safe from subsequent modification. This is as true for any informal conversation about human rights, as it is for the judgments of domestic or international tribunals. Hence, human rights are only instantiated momentarily, when particular meanings emerge through the interaction of discourse and consciousness.

Thus, towards pragmatism: rights, relativism and Rorty

What, then are the implications of this pragmatic, use-oriented way of describing human rights for human rights activism, i.e. the very concrete practice of promoting and protecting human rights? There is, of course,

the question of the relativism which seems to lurk in the background of most of the preceding argument. Is one conclusion of this focus on the pragmatic ('use') dimension of human rights that they can no longer be conceived of in terms of any supervening objective or intersubjective content? Are they really capable of meaning 'nothing' to some people, and is there, ultimately, no way in which these people can be made to 'understand' a particular meaning of human rights? Are human rights as a particular formal and substantive conception of the social, simply incomprehensible in non-'Western' contexts?

Here, a brief digression into the work of one of the primary exponents of (neo-)pragmatist thought, Richard Rorty, is called for. Rorty offers the most clearly articulated, if, for that same reason, also the most controversial, account of the post-metaphysical and post-epistemological life that is implied in the pragmatic vision of human rights. His starting point is the prima facie relativist assertion that truth, rationality and understanding are constituted within particular 'language games' which cannot be transcended.[21] For Rorty this, however, does not imply a subscription to relativism as the opposite of objectivism (which is ultimately about the nature of truth). Instead, he argues that the dichotomy between the two should be dispensed with altogether and replaced with the figure of conversation; pragmatism, he explains, is a 'doctrine that there are no constraints on inquiry save conversational ones – no wholesale constraints derived from the nature of the objects, or of the mind, or of language, but only those retail constraints provided by the remarks of our fellow inquirers'.[22] Hence, there can be neither any meta-language in which incommensurable beliefs could be compared and evaluated, nor any room for argument. The latter is, for Rorty, only possible within the same logically fixed space,[23] i.e. within the same language game or, as he prefers to call it, the same vocabulary, lest it amount to yet another attempt to re-found an all-encompassing meta-language.

Thus, up to this point, cross-cultural or cross-language game exchange would seem to be an impossibility, with individuals being 'stuck' within their interpretive community without reservation or distance.[24] Yet Rorty

[21] Matthew Festenstein, 'Richard Rorty: Pragmatism, Irony and Liberalism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 1–14 at p. 5.

[22] Richard Rorty, *Consequences of Pragmatism (Essays: 1972–1980)* (Minneapolis, 1982), p. 165.

[23] Richard Rorty, *Objectivity, Relativism, and Truth* (New York, 1991), p. 94.

[24] Indeed, some fellow neo-pragmatist thinkers, notably Stanley Fish, Walter Benn Michaels and Steven Knapp, have taken this radical turn; see Stanley Fish, *Doing What Comes*

does not confine himself to this epistemological second-order observation of human ontology,[25] but, in a remarkable construction, links it to a first-order stance epitomized by his notorious liberal ironist. The second-order account is, of course, about the fundamental contingency of language, self and community. Here, the self, in particular, is seen as a 'web of beliefs without a center',[26] which is, however, in Rorty's view, capable not only of discerning but also of accepting this very contingency of the first-order, or first-person, level. It is this capacity to accept contingency in a concrete and 'practical' way that distinguishes Rorty's account from those of 'adjacent' theorists, notably the poststructuralists on the one side, and Habermas' universal pragmatism on the other. The former, especially through the ground-breaking work of Jacques Derrida, have attempted to deconstruct the linkage of language to subjectivity, thereby placing the traditional notion of agency in epistemological brackets.[27] While subject positions and the (subjective) agency implied by them are, from his perspective, possible, any positive affirmation of subjectivity is always qualified by the discernment of the impossibility of subjectivity in the face of the play of *différance* in language. Like Rorty and the poststructuralists, the universal pragmatists reject the metaphysical view that language is a medium between the subject and the object, but they retain the possibility of language being a medium between subjects, allowing, thus, for genuine communication (under certain circumstances). Moreover, the same inherent properties that enable language to mediate between subjects, also enable it to get behind contingency, not so much in the sense of a transcendental God's eye view, but at least by constructing, step by step, partial intersubjective truths by which the chains of historical and linguistic situatedness can gradually be broken. Rorty stays far away from Habermasian (neo-)foundationalism, but is equally determined to retain the instrumental character of language. Based on his reading of the original pragmatists, and especially Dewey, as well as on his epistemological behaviourism,[28] he sees language as a tool for that which, in his view, must replace argumentation, namely re-description. The latter essentially

Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Durham, 1989); W. J. T. Mitchell (ed.), *Against Theory: Literary Studies and the New Pragmatism* (Chicago, 1985).

[25] Or third-person account, as Meili Steele calls it, see Meili Steele, 'How Philosophy of Language Informs Ethics and Politics: Richard Rorty and Contemporary Theory' (1993) 20(2) *Boundary 2* 140 at 158.

[26] Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, 1989); as discussed in Steele, 'Philosophy of Language', p. 158.

[27] Steele, 'Philosophy of Language', p. 158.

[28] *Ibid.*

consists of 'grabbing hold of causal forces and making them do what we want, altering ourselves and our environment to suit our aspirations'.[29] Contrary to what argumentation presupposes, there is 'no critical terminology to describe our textual strategies, only the metaphilosophical ontology that the self is a holistic web of beliefs'.[30] Accepting contingency, hence, means proactively and continuously engaging in the practice of re-description, not with the aim of ever reaching any higher truth, but of, at best, getting to final vocabularies – expressions of one's fundamental values and beliefs.[31] Of course, these 'final vocabularies' are always in principle also re-describable, and are not outside of contingency; what is outside of contingency is, for Rorty, the commitment one has to them. It is at the interface of these seemingly contradictory positions that the liberal ironist emerges – ironic in the sense of 'recognizing the contingent historical causes of [their] beliefs',[32] so that the

> realization that anything can be made to look good or bad by being re-described, and [the] renunciation of the attempt to formulate criteria of choice between final vocabularies, puts [the ironist] in the position which Sartre called 'meta-stable': never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves.[33]

And liberal in the realization that, as some sort of meta-'final vocabulary', the most practical way to attend to this ironic predicament is by adopting the liberal (Rawlsian) privileging of the right over the good. Only the liberal meta-values of justice and diversity can ensure the free exercise of re-description, though only at the cost, as critics have seen it, of a new form of public/private distinction in which the vocabulary of self-creation is consigned to the private sphere and attends to the maximization of the individual's sense of autonomy, and the vocabulary of justice is reserved for the public sphere, where it provides the basis for argumentation (!) on the best way to reduce cruelty, another final

[29] Rorty, *Objectivity*, p. 81. [30] Steele, 'Philosophy of Language', p. 153.

[31] Rorty, *Contingency*, pp. 78–80; see also John Horton, 'Irony and Commitment: An Irreconcilable Dualism of Modernity' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 15–28; Steele, 'Philosophy of Language', p. 161.

[32] David Owen, 'The Avoidance of Cruelty: Joshing Rorty on Liberalism, Scepticism and Ironism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 93–111 at p. 96.

[33] Rorty, *Contingency*, pp. 73–4.

vocabulary of liberal societies.[34] Rorty is, of course, careful not to make out the ironists' espousal of liberalism as a necessary, non-contingent feature. Rather, it has its ultimate basis in the contingent historical circumstance of the postmodernist bourgeois liberal inhabiting the real existing liberal capitalist democracies. Rorty thereby inscribes the liberal ironist within a double historicist circle: on the one hand, the only warrant for her liberal ironist beliefs is the particular tradition within which she encounters herself – or Rorty himself – while, on the other hand, those beliefs are the most plausible product of that bourgeois postmodernism. Hence, unlike the radical pragmatists, the liberal ironist is fully aware not just of her own situatedness, but of the substantive content of that situatedness. Unlike Habermas, however, she not only does not believe in the possibility of using that insight to emancipate herself or others from the existing state of affairs, but, more importantly, actually has no desire to do so. In fact, as Steele has insightfully observed, Rorty formally admits a duality between first-person (self-understanding) accounts – namely those in the private sphere – and third-person (liberal justice) accounts of oneself as a liberal subject among others – those in the public sphere. But instead of thematizing potential conflicts between the two, i.e. between the inner self and the outer subject, Rorty simply imposes the latter onto the former. Thus, ultimately, Rorty makes the liberal ironist see herself as one because she is one.[35]

The question that arises at this point is on what basis the liberal ironist practises her liberalism vis-à-vis others, given that it is not founded on any objective, or even intersubjective, truths. Rorty's well-known answer is, of course, that only solidarity can replace metaphysical foundations as a motivational force. The latter is, however, closely tied to the group that constitutes one's immediate context – a position connected to Rorty's Wittgensteinian conviction that one's own language game is as far as one can go. It is, in other words, essentially only people who are already in, or can be brought into, that language game to whom some form of solidarity can be extended. Indeed, there is a modestly deontological element within the logic of solidarity, in the sense that, according to Rorty, it is part of liberal ironic solidarity to try to expand, wherever possible, the group of people towards whom commonality is felt. As such, there is what has been

[34] *Ibid.*, pp. 141–3. For such a critique see Steele, 'Philosophy of Language', pp. 166–7.

[35] Steele, 'Philosophy of Language', pp. 166–7; also David Conway, 'Irony, State and Utopia: Rorty's "We" and the Problem of Transitional *Praxis*' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 55–88.

called a liberal humanism inherent in Rorty's thought.[36] Yet Rorty's solidarity stands in not only for epistemological objectivity, but also for some of the latter's brainchilds, such as equality or humanity. It entails, in other words, nothing short of an ethnocentric position, as Rorty freely admits: 'for now to say that we must work by our own lights, that we must be ethnocentric, is merely to say that beliefs suggested by another culture must be tested by trying to weave them together with beliefs we already have',[37] and which, it should be added, Rorty believes we share with other participants in 'our' common culture. Thus, per se, cultures are incommensurable in a strong sense, and 'radical difference is unintelligible'.[38] Yet, somewhat paradoxically, within this incommensurability, Rorty admits the possibility of what he calls comparison between 'societies which exemplify [habits such as toleration, free inquiry, undistorted communication] and those which do not . . . [s]uch justification is not by reference to a criterion, but by reference to various detailed practical advantages'.[39] It is difficult not to be puzzled by this deus-ex-machina appearance of comparability without foundations, based merely on the inner understanding of contingent practices. The only way such an approximation could work, given Rorty's premises, is by what could be termed a bee's eye view – reducing comparison to a crude form of analogizing in which the 'other' is converted into a rough and hazy mosaic of which broadly familiar features, such as colours and shapes, could just about be discerned. The 'other' is, of course, not ever reached in any real way, and is, in fact, internalized at arm's length, without needing to get into its messy concreteness, in correspondence with the necessarily superficial image of the great happy liberal family.

This seemingly celebratory stance on ethnocentrism has, of course, attracted fierce criticism from a variety of corners.[40] On a moral-political level, 'conservatives' have attacked the ironist for allegedly espousing nihilism and cynicism,[41] and 'progressives' the liberal for advocating a self-satisfied complacency with her own privileged status quo, and, of course, for endorsing what they see as the scourge of modernity, notably

[36] Cary Wolfe, 'Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann' (1994) 61 *New German Critique* 101 at 105.

[37] Rorty, *Objectivity*, p. 26.

[38] Steele, 'Philosophy of Language', p. 164.

[39] Rorty, *Objectivity*, p. 29.

[40] Farid-Abdel Nour, 'Liberalism and Ethnocentrism' (2000) 8 *Journal of Political Philosophy* 207 at 207.

[41] See for example Neal Kozody, cited in Richard Rorty, *Philosophy and Social Hope* (New York, 2000), p. 3.

ethnic chauvinism. On the epistemological level, in turn, foundationalists of diverse quarters have attacked Rorty: analytical philosophers for his anti-realism, liberals for basing liberalism on too shaky a ground, and communitarians for not letting substantive conceptions of good enter the public sphere. He has even taken heat from anti-foundationalists, either on account of his pragmatic insistence on language as a tool, or for drawing allegedly wrong or unnecessary conclusions from the correct epistemological premises, thereby re-cementing a transfigured form of essentialism where, instead, a freer and more complex dynamic of forces would seem to follow. Within the latter strand of (constructive and, in part, still sympathetic) critique, two targets emerge in particular: Rorty's alleged reduction of difference, on the one hand, between communities, cultures or language games; and, on the other hand, within the particular 'we' in question. With regard to the former, the main alternative conception broadly within Rorty's epistemological premises has been articulated by Clifford Geertz, in a comment on Rorty's inversion of the commonly negative connotation of ethnocentrism. Geertz, who is an interpretivist, but would not call himself a postmodernist, charges Rorty, by means of the now well-known 'Drunken Indian and the Kidney Machine' example,[42] with a priori rejecting any attempt to overcome or diminish the ethnocentric indignation and distrust which marks the relationship between the Indian and his doctors. In this view, Rorty rightly rejects the universalist reduction of difference to an abstract sameness, only to replace it, wrongly, with a rigid separation of a concrete 'we' pitted against an unreachable 'they'. Here, too, difference, or rather alterity, is treated as something to be avoided at all cost. Geertz, on the other hand, suggests that an encounter with difference should lead to a proactive engagement with it, not to reduce it to either sameness or otherness, but to construct bridges to it in its alterity. This does, of course, correspond to an essentially hermeneutic programme, though one which is well aware that whatever understanding is attained of the other as other is always precarious, subject to revision, and never objective. Such a programme may, of course, run up against the poststructuralist insistence that language cannot possibly function even

[42] In which an alcoholic Native American, after having waited for his turn in the customary queue, receives dialysis treatment despite the fact that he refuses to stop drinking; his irritated but liberal-minded doctors apparently ruminate about the value of giving him this treatment in the face of potentially more cooperative patients further back in the queue, but they refrain from critically raising the issue with him: see Clifford Geertz, 'The Uses of Diversity' in *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, 2000), pp. 68–88.

as an imperfect medium, but the important point is that Geertz inverses Rorty's liberal humanism: the consequences of anti-foundationalism cannot be the withdrawal, however liberal, into an imaginary 'we', but ought to be the urge to engage alterity, and thus one's own situated self, in a constructive and permanent way.

This is, of course, at the heart of the second main line of critique, namely Rorty's alleged reduction of difference even within his 'we' language game. Many critics have not been prepared to overlook what they charge is Rorty's complacency with his own status and position, and an implicit assumption that the whole of 'his' society lives like this. In fact, the accusation goes, by denying the emancipatory power of theory – notably by confining re-description to the private sphere – he seeks to a priori undermine attempts to show that 'we' as fractured, asymmetrical and full of cross-cutting social antagonisms. In this vein, Nancy Fraser has observed that:

> Rorty homogenizes social space, assuming that there are no deep cleavages capable of generating conflicting solidarities and opposing we's. It follows from this absence of social antagonisms that politics is a matter of everyone pulling together to solve a common set of problems. Thus, social engineering can replace social struggle.[43]

The Rortyan contribution to the epistemological debate, and the responses it has triggered, can be seen as the latest incarnation of the rationality debate, ultimately still circling, however, around the same questions. In one sense, Rorty can be understood as the most consequential thinker of incommensurability, precisely because he does not, like the poststructuralists, transfer all agency towards language, making it thereby in the very least difficult to thematize understanding, or its lack, from the subject's position. Yet at least the poststructuralists thereby bring into the picture the seemingly unbridgeable linguistic margin between two language games, whereas Rorty takes the central consequence of incommensurability to be that those margins ought to be respected and not infringed. Geertz's, and in a different vein Habermas', alternative is, of course, to postulate an (albeit heavily circumscribed) possibility of mutual bridge-building. Habermas arguably believes that this effort may be capable of completion, thereby enabling real cross-language game understanding, while Geertz places the main emphasis on the mutual trial, the attempts at bridge-building being made on both sides, without, however,

[43] Nancy Fraser, as cited in Steele, 'Philosophy of Language', p. 167.

necessarily leading to a Habermasian success. Geertz is, like all hermeneuts, not very clear on his own belief, or not, in the real possibility of bridges, but the image he inspires might, nonetheless, be at the core the problem.

For if one accepts, with Geertz, that the 'other' can inspire something more than either acceptance or rejection, namely interest in it as an other,[44] but at the same time rejects both purely hermeneutic and 'critical' accounts for their continuing connection of subjectivity with rationality, as well as purely poststructuralist accounts for their emptying out of the subject position, a space for mutual perturbations between language games emerges. These would be akin to bridge-building attempts, without, however, there being any verifiably shared consonance, and hence with understanding never quite achieved. Rather, it would be a mutual signalling exercise, with the signals neither entirely lost in linguistic transmission, nor transformed into meta-discursive forces. They would cause something on the other side, but neither the sender of the signal nor the medium of its transmission could entirely control that cause or its consequences.

In lieu of an answer: human rights activism without a safety net

Hence, from a Rortyan point of view, the absence of objective, rational, abstract foundations is, in fact, a necessary precondition for a contingency-accepting, self-revising and self-responsible political activism based on personal beliefs and felt solidarity. Only if the 'world outside' is not forcefully pushed into predetermined categories can one freely engage concrete 'others' in ongoing micro-political processes. Yet, if Rorty's ethnocentrism thesis plausibly demonstrates that relativism is not inimical to activism, it also has obvious and grave shortcomings. Indeed, its reduction of the 'I' to a concrete historical 'we' and the (admittedly contingent) foundation of political action on a solidarity strictly tied to that 'we' is unconvincing. It is so, because Rorty seems here to be willing to buy into the highly stylized myth of his particular American 'we' which is all too easily exposed as a grand meta-narrative. It precisely lacks the cultural authenticity upon which he bases the sentiment of solidarity, and therefore brings him close to the chauvinism he otherwise considers incompatible with liberalism. It also makes it all too easy for some critics

[44] Rejecting here not merely Rorty's scheme, but also his Freudian justification of it; solidarity is, for Rorty, not linked to universal values but to a subconscious recognition of similarity: see Rorty, *Contingency*, pp. 31–4; and Steele, 'Philosophy of Language', p. 164.

to reclassify him as just a postmodern variant of old Eurocentric bias. Indeed, a proactive, cross-cultural human rights activism groundlessly founded on Rortyan ethnocentrism can ultimately only base itself on the exercise of at least discursive, if not political or military hegemony.

At this point, Rorty has, arguably, not got it quite right. For, instead of taking epistemological relativism as a cue for a simplification of reality, it might just as well point to the need for complexification. Instead of continuing to subscribe to a logic of the either/or, the unitary, singular, static and organic – whether in a postmodern or another guise – the logic of complexification would be one of the 'both', the hybrid, fluid and the contingently constructed. Three implications of such a logic of complexification can, in particular, be highlighted.

To begin with, first- and third-person accounts of the self and its identity need to be seen as distinct but interrelated. Rorty, as was seen, essentially reduces the first-person account to a clichéd third-person account, which completely misses the complex interaction of the 'I' with the 'we'; the former can never be entirely subsumed in the latter, and there is an irreducible residue of subjectivity which cannot be translated into fully rationalized third-person accounts – hence the necessary category of human rights consciousness, which can never be entirely absorbed by human rights discourse. From this perspective, sentimentality, anointed by Rorty to substitute for human nature as a foundation for human rights (activism), need not be tied to any concrete 'we', but emerges as the result of a complex mixing together of multiple variables within the self. Thus, why an individual feels sentimental towards another cannot be rendered entirely transparent, nor does it need to be.

Secondly, the difference between the 'us' and the 'other', i.e. between different socio-cultural spheres, needs to be de-reified. A useful strategy would be to de-exoticize the 'other', and re-exoticize the 'we'.[45] Both are much more interrelated and marked by mutual confluence than the rigid we/they dichotomy would suggest. The de-exoticization of the 'other' would essentially consist of granting it the same degree of irreducible complexity as is characteristic of the I/we. Hence, instead of, for example, reducing the religiously motivated suicide bomber to an entirely alien being whose inner logic we cannot understand, and whose primary characteristic is her/his belonging to a 'species' of de-subjectivized suicide bombers, she or he could be seen as marked by the same complex mixing

[45] For an interesting reflection on, inter alia, exoticization, see Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion' (1997) *Utah Law Review* 281.

of a multiplicity of variables, only some of which are incommensurable, as any I/we identity. De-exoticization does not, therefore, mean the imposition of (ethnocentric) standards of normality, but simply the refusal to think in simplistic, orientalist-type categories. Exoticizing the we, in turn, would consist of a similar attempt to complexify the familiar and known by self-consciously adopting an anthropological gaze vis-à-vis ourselves. It would involve looking at concepts, practices or institutions from a resolutely third-person perspective, and it would entail a strong historicism. Regardless of the epistemological limits to socio-historical understanding, exoticization would attempt to render the familiar as strange as possible, thereby showing its contingent and idiosyncratic nature. In the case of human rights, this would, for example, entail a deliberately anti-anachronistic reading of their historical emergence, highlighting the nearly alien and incommensurable character of, say, the medieval contexts in which proto-rights concepts were discussed, or the much more communitarian – as opposed to individualistic – character of late-eighteenth-century North American society, a fact almost entirely drowned out by the prevailing historical myth of the 'founding fathers'.[46]

Thirdly, a de-reification of both the 'we' and the 'other' would reveal that the simplistic hegemony thesis does not hold. In the same way as, for example, oriental peoples cannot be reduced to orientalist stereotypes, the real complexity of occidental identities is hardly captured by the all-or-nothing label of Eurocentrism. In this sense, the (non-essential) essence of human rights in postmodernity could be taken to be the concession of an irreducible complexity to all.[47]

Yet this, too, would not be immune from the anti-relativist accusation of disabling any form of (political) action. Respect for the other's complexity amounts, prima facie, to having to accept everything she or he does; thus, we would be back to the 'anything goes' nihilism of which the anti-realists are so fearful. At this juncture, several ways out, or, more properly, ways through, are imaginable. Martti Koskenniemi, for one, comes from a critique of human rights discourse resonant of David Kennedy's 'pragmatic' objections to the human rights movement,[48] which thematize

[46] Hendrik Hartog, 'The Constitution of Aspiration and "The Rights that Belong to Us All"' (1987–8) 74 *Journal of American History* 1013.

[47] In a similar vein, notably on the need to not reduce complexity, but try to live up to it, see Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and Their Effects on Political Culture' in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 117–44.

[48] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989); Kennedy, 'The International Human Rights Movement'; see also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

the fundamental (political) manipulability of human rights discourse – associated by Kennedy with a 'rights-as-trumps' logic[49] – as a consequence of its institutionalization, professionalization and routinization. Arguing against the simple dispensation of the discourse for want of any alternative that would have the same potentially emancipatory properties, Koskenniemi initially sees as the only 'way through' a slightly ill-humoured 'bad faith belief' in human rights which retains the discourse, but more or less openly acknowledges that it rarely gets beyond being a mere masquerade for politics. This 'liberal cynic' would, thus, be an antidote to Rorty's happy, if smug and inadvertently chauvinistic, ironist. At a later stage, though, Koskenniemi develops his earlier vision into a cautiously positive endorsement of what he calls a 'culture of formalism', which, he argues, resists the forcible reduction into substantive policy.[50] It does so by allowing for an 'empty' universality, or the universal articulation of what he describes with Laclau as the lack of fullness and presence which infects all discourse. Hence, not unlike the pragmatics of human rights outlined here, formalism makes it possible to take a position and argue proactively for it – within the formalist framework – while avoiding substantive fixation, since 'every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences'.[51] This is an appealing position, and quite close to the one espoused here. Doubts only arise with regard to formalism itself, since, for all its anti-foundationalist potential, it would appear to derive its ability to provide an 'empty', but nonetheless universal communicative medium from its own, more or less forcible, imposition. Formalism allows for that universality not because its inner logic would, in fact, be universal, but only because the particular language game of which it is made up allows its 'speakers' to use it as a simulacrum for universality. And, what's more, not all those within the formalist 'dialect group' are aware that it is but a placeholder for an unattainable unity. They tend to essentialize formalism itself, treating it as an expression of a higher reason and more objective truth than non-formalist discourse. Indeed, a good part of the (formalist) legal profession – whether in human rights or not – arguably manifests a hegemonic gatekeeperism that does not quite square with the – albeit 'gentle' – transgressive capacities of the uses of formalism endorsed by Koskenniemi.

[49] On which he is contradicted by Philip Alston, 'Introduction' in Philip Alston (ed.), *Human Rights Law* (Aldershot, 1996), pp. xi–xxvi.

[50] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001), pp. 503–9; see also Anne Orford's masterful 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.

[51] Koskenniemi, *Gentle Civilizer*, p. 508.

The slightly distinct position taken here is that there is room for action, precisely on account of the recognition that there is no objective foundation for it. As both Derrida and Laclau, among others, have shown, action is always ultimately based on an unfounded moment of decision, a momentary reduction of all context to the deepest self.[52] And, indeed, such decisionism, insofar as it impinges on the 'other', is nothing but hegemonic, as its basis is no mutual consensus, but a unilateral act. However, if the entirely contingent character of such decisionism is always recognized, it becomes no more than an imposing gesture, a cautious 'jump into the dark', so to speak, which cannot control its consequences. It seeks to establish temporary hegemony – namely by 'succeeding' in the action undertaken – always knowing that it is merely temporary, subject to revision at any moment. And, most importantly, the unfounded decision is always a mutual process. It engages an 'other' in its (or her/his) otherness, and it is, thus, intrinsically political – premised on the irreducible existence of the 'other' as 'other'. This, then, would point to a basis for human rights praxis: 'we' need not construct or presuppose any common basis for defending human rights, and for acting accordingly. As long as any such action is done in full awareness that it will never do more than irritate the 'other', and in full acceptance that the end result will always be an unpredictable, non-linear and non-dialectical blend of 'my' action and the 'other's' response, it does not, in fact, constitute violence and cruelty. The latter only occur where the complexity of the 'other' is forcefully reduced, and where rigid divisions, categories and essentialisms are introduced instead. In this sense, the 'essence' of human rights could, in fact, be taken to be their enabling of transgression; no hegemonic imposition, no rationality, no law, no judgment,[53] no argument is ever safe from being challenged by the many uses of human rights. In sum, human rights could be likened to an ever-rotating kaleidoscope, or, indeed, a recursive algorithm, endlessly re-applying itself to the forms it has itself generated, thereby producing a beautiful, if ultimately unpredictable, 'chaotic' image.[54] And, on this basis, perhaps, the 'human rights activist' may again rise, like a phoenix from the ashes, from the shambles of late modernity.

[52] See Derrida, 'Force of Law'; Ernesto Laclau, *Emancipation(s)* (London, 1996), p. 54.

[53] On this point, in particular, see Julie Ringelheim and Florian Hoffmann, 'Par-delà l'universalisme et le relativisme: la Cour européenne des droits de l'homme et les dilemmes de la diversité culturelle' (2004) 52 *Revue interdisciplinaire d'études juridiques* 109.

[54] See, on this line of thought, Robert L. Devaney, *Chaos, Fractals, and Dynamics: Computer Experiments in Mathematics* (Boston, 1989).

PART III

The relation to the other

10

Completing civilization: Creole consciousness and international law in nineteenth-century Latin America

LILIANA OBREGÓN*

Contemporary studies of international law have revealed the connection between the discipline's civilizing discourse and its parallel expansion.[1] However, they have studied the concept of civilization mainly in relation to the European colonization of Africa, Asia and the Pacific. This chapter hopes to add to the discussion by examining postcolonial Latin America, where ideas of civilization were central to the new nations' emergence as participants in, and contributors to, international law.

The word 'civilization' only came into use in the mid-eighteenth century and was quickly popularized during the French Revolution.[2] The French term *civilisation* expressed the idea of progress and the perfectibility of humanity as a universal fact and, with it, the trust that law and institutions would be able to mould the human character. *Civilisation* was understood as a collective achievement of the human race, while at the

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[1] See for example Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005); Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, 2001); Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford, 1984).

[2] The word 'civilization' originates in the use of the French words *civilité* (civility) and *poli* (polished, refined, courteous, to emit prudent laws). For more about the etymology of the word see Reuel Anson Lochore, *History of the Idea of Civilization in France (1830–1870)* (Bonn, 1935); Philippe Bénéton, *Histoire de mots: culture et civilisation* (Paris, 1975); Jean Starobinski, *Blessings in Disguise; or, The Morality of Evil* (trans. Arthur Goldhammer, Cambridge, 1993), pp. 1–36.

same time the plural form – civilizations – signified the existence of various social groups in development, whose unity and perfection were synthesized only in *European* civilization. The idea of civilization – progress[3] – had Europe as its frame of reference, and barbarism, its opposite, as outside of Europe. By the end of the eighteenth-century, as Norbert Elias describes in a key work on the subject, civilization had become the expression of national self-consciousness, and opened the doors for nineteenth-century European conquest and colonization of other regions – Europe believed itself to have 'an existing or finished civilization', a civilization in expansion.[4]

In Latin America, the civilizing discourse was appropriated by Creole élites to avoid being excluded from the rights and entitlements assigned (by Europe) to other members of the 'community of civilized nations'. Internally, the adoption of civilizational ideas brought policies such as the fostering of white European – more 'civilized' – immigration towards the region, and the management of local populations through, for example, abolition of communal land ownership. At the same time, a Latin American discourse outside of (but in relation to) the European framework necessarily enabled new constructions of civilization. These distinctive Latin American understandings of civilization and its attributes were interwoven with attempts to articulate particular Latin American conceptions of international law.

Creole legal consciousness

Central to understanding the civilizational discourse and its effects on law and society in Latin America is what I term a 'Creole legal consciousness'. Creoles (or *Criollos*[5] in Spanish) are

[3] François Guizot, a professor of modern history, was known for having actively promoted the connection between civilization and progress in his two courses at the Sorbonne University in Paris, that later became two books: François Guizot, *Histoire de la civilisation en Europe* (Paris, 1828) (see *The History of Civilization: From the Fall of the Roman Empire to the French Revolution* (trans. William Hazlitt, 3 vols., London, 1846)); François Guizot, *Histoire de la civilisation en France* (4 vols., Paris, 1830).

[4] See Norbert Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Oxford, 1994), p. 41.

[5] For easier reading in English, I will use the term 'Creole' but it is important to clarify that the Spanish word *Criollo* has a different usage and meaning to its English or French counterpart in former colonial regions such as Louisiana and the Caribbean. In areas where a black presence has been central to the emergence of a public political culture, 'Creole' is associated with persons of partially African descent. In most of Spanish America, on the

the American-born[6] élite of Spanish descent. Creole legal consciousness can be understood as certain ideas about the law held by the Creole literati in the post-independence era.[7] Of course, any implicit or explicit regional awareness or attitude to law spanning more than nineteen countries, in a period of instability and social and political turmoil, could only consist of a very limited set of assumptions shared among the lettered[8] men that headed the newly independent nations.

other hand, *Criollo* involves a presumption of cultural and physical 'whiteness'. Nonetheless, *Criollo* is a deeply ambivalent and profoundly unstable social category; it rests mainly on assumptions of racial purity despite the fact that by the nineteenth century *Criollos* were largely of mixed race. For more on the characterization of the *Criollos* as a social class see Elizabeth Anne Kuznesof, 'Ethnic and Gender Influences on "Spanish" Creole Society in Colonial Spanish America' (1995) 4(1) *Colonial Latin American Review* 153; Bernard Lavalle, *Las promesas ambiguas: ensayos sobre el criollismo colonial en los Andes* (Lima, 1993).

[6] I use the term 'American' to mean 'belonging to or coming from the American continent' and not as referring to someone or something native to the US. The notion of a 'Latin' America developed in the second half of the nineteenth century out of the expanding ideas of 'Panlatinisme' promoted by the French and adopted by Creole patriots in an effort to criticize Anglo (US and British) imperial interventions in the region. With the same purpose, Carlos Calvo was the first to use the term 'Latin America' in his works on international law. The rediscovery of an American connection with Latin roots in Europe was interpreted as a further argument for the advancing state of civilization in the region, during a period when Darwinism and ideas of progress were highly influential. Several books and articles that have researched the origins of the term 'Latin America' date it to the 1850s, with some precedents as early as 1836. Among others see especially Arturo Ardao, *Génesis de la idea y el nombre de América Latina* (Caracas, 1980); Miguel Rojas Mix, *Los cien nombres de América: eso que descubrió Colón* (Barcelona, 1991).

[7] This is deduced from the broader definition of legal consciousness given by Duncan Kennedy as a 'particular form of consciousness that characterizes the legal profession as a social group, at a particular moment' : Duncan Kennedy, 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940' (1980) 3 *Research in Law and Sociology* 23 at 23.

[8] The figure of the *letrado* or 'lettered' functionary (meaning lawyer as well as someone cultivated in the humanities) was important in constructing the prestige of the written word during the colonial period and the nineteenth century. Ángel Rama explains how the *letrados* were the 'restricted group of intellectual workers [who] learned the mechanisms and vicissitudes of institutionalized power and learned, too, how to make irreplaceable institutions of themselves. Their services in the manipulation of symbolic languages were indispensable . . . Servants of power, in one sense, the *letrados* became masters of power, in another.' Ángel Rama, *The Lettered City* (ed. and trans. John Charles Chasteen, Durham, 1996), p. 22. Notice that Rama's formulation presents the Creole *letrados* as being both essential to the colonial project and subjects of it. Their power certainly extended into the independence era and the nineteenth century: see Victor M. Uribe Urán, 'Colonial Lawyers, Republican Lawyers and the Administration of Justice in Spanish America' in Eduardo Zimmermann (ed.), *Judicial Institutions in Nineteenth Century Latin America* (London, 1999), pp. 25–48 at p. 39.

Creole legal consciousness can be said to comprise two sets of premises, arising in different eras. The first set of premises, flexible and inclusive, was inherited from the colonial period. It involved the permissive application of the law to local circumstances, manifest in the practice of using disparate (and even foreign) legal sources to resolve local problems, with the possibility of multiple perspectives, often contradictory – a phenomenon that could be described as the Creole's characteristic ambivalence. In addition, during the colonial period, Creole legal consciousness developed a sense of regional belonging based on the historical sharing of *Derecho Indiano* (law and justice of the Indies) and Spanish laws such as the *Siete Partidas*; an understanding of Roman law as a heritage from Europe that was moulded into something distinctively American; and a 'natural' sense of the Creole's role as law-maker and adjudicator over the rest of the population.

The second set of premises, rigorous and prejudicial, evolved during the nineteenth century, and centred on a 'will to civilization'. Broadly speaking, as part of a Creole legal consciousness, the will to civilization meant not only that choices had to be made between theories of law or forms of government according to what would improve the existing civilization, but also that through law and its application Creoles could eliminate or at least control the barbarism perceived to be unduly prevalent in their societies. The ideal of civilization would appear in the new constitutions and would justify the new laws; it would privilege certain economic practices, religious choices, educational systems and ideas about the racial composition of society.

The flexible and inclusive characteristics of the colonial heritage

Concretely, the Creole legal consciousness of the post-independence period had its colonial roots in the administration of the Indies as part of the patrimony of the Castilian crown. Castilian legislation was automatically applicable throughout the conquered areas; from the fifteenth to the seventeenth century the principal sources of law used to regulate the colonies were old Castilian codes.[9] However, when those laws were not applicable, a judge could resort to the local *fueros* (municipal charters). Finally, in the absence of an applicable royal law or a municipal

[9] These codes or compilations are the Ordenamiento de Alcalá (1348), restated in the Leyes de Toro (1505), Nueva Recopilación de Castilla (1567) and the Novísima Recopilación de Castilla (1805).

fuero, judges could refer to the *Siete Partidas*, a thirteenth-century Castilian compilation based mainly on Roman and canon law that transmitted the *ius commune* to Castilian law and, by derivation, to the New World. Creole and peninsular jurists learned to adapt Castilian law and *ius commune* traditions to the circumstances they found in America, a process described as *derecho vulgar* ('vulgar' or popular justice).[10]

Nonetheless, the complex mixture of peoples, the new social stratifications, the distance from the metropolis, the extensive territory, different forms of land management and economic exploitation posed many new legal issues that the drafters of pre-conquest Castilian legislation had not foreseen. Such particularisms soon became evident to the Crown and by 1614 New World distinctiveness was recognized officially. A royal order ruled that only laws specifically issued for the Indies were applicable.[11] In 1680, these laws were compiled into a new book of laws known as the *Recopilación de Indias* (*Compilation for the Indies*). Parallel to the new compilation, a system of adjudication developed that also became distinctive to the Indies. The laws, together with the way in which justice was applied, became known as *Derecho Indiano*.

Derecho Indiano gave discretion to the magistrate or other government functionary with judicial power, who had to draw on experience, knowledge and prudence in reaching a decision. He could refer to the written law, to *doctrina* (commentaries of Castilian or foreign jurists on Roman, canon and royal law), custom (or local usage and long-standing practice) and *equidad* (fairness, as defined by the satisfaction of the aggrieved party together with the well-being and harmony of the community).[12] Cases were considered individually and decisions were made on the merits of the particular facts. This case-by-case decision-making, not reliant on judicial precedent, and the judge's ample discretion, together with the authority given to local custom, can be singled out as the basis of an extremely flexible system of legal administration. Because of its flexibility and because it was a distinctively American form of justice, this system has also been called *Derecho Criollo* (Creole law or justice). Thus, during Spanish rule, the Creole literati developed a consciousness of their law as distinctly *American*, highly adaptable to local circumstances, though descending from an old tradition of Spanish and Roman sources.

[10] For a more detailed description of this era see Charles Cutter, 'The Legal Culture of Spanish America on the Eve of Independence' in Eduardo Zimmermann (ed.), *Judicial Institutions in Nineteenth Century Latin America* (London, 1999), pp. 8–24.

[11] *Ibid.*, p. 11.

[12] I have taken these categories as conveniently simplified by Cutter, *ibid.*, pp. 12–13.

This is an important point to make in anticipation of the nineteenth century because ample evidence exists that independence from Spain did not mean a complete *tabula rasa* against which new national legislation or forms of interpretation and application of the law would immediately emerge. In fact, many Spanish codes remained legitimate sources of law well up to the mid-nineteenth century and, for some countries, even until the end of the nineteenth century. Often, new constitutions and laws recognized the applicability of pre-independence legislation.[13] In the meantime, heated debates, even civil wars, took place among the Creoles in the region over the form of independent government, the type of constitution to be adopted, the structure of legal education and the organization of a national system of law. Thus the transition between *Derecho Indiano* and *derecho patrio* (patriotic justice and law) was a turbulent one, lasting most of the nineteenth-century, and solid national traditions or professional identities only began to consolidate towards the end of this period.

The rigorous and prejudicial characteristics of the post-independence era

The rigorous and prejudicial aspects of Creole legal consciousness correspond to a new theoretical stance that came strongly and widely into play in the post-independence era. This was the Creoles' 'will to civilization'.[14] Nineteenth-century Creoles argued that, if the civilization of Europe was unified and perfected, theirs was left half-way or lacking after the end of Spanish colonial domination. The Creoles' national mission was to do everything necessary to *complete* the civilization that the Spanish colonizers had brought with them (although the ambivalence of Creole consciousness meant that not all Creoles assumed European civilization as perfected or as the ideal model).[15] More than a consequence of colonization, the Creoles' will to civilization was self-imposed, one of the

[13] See for example the case of Buenos Aires in Osvaldo Barreneche, 'Criminal Justice and State Formation in Early Nineteenth-Century Buenos Aires' in Eduardo Zimmermann (ed.), *Judicial Institutions in Nineteenth Century Latin America* (London, 1999), pp. 86–103.

[14] The 'will to civilization' is described by Cristina Rojas as 'a place of [violent] encounter between the colonial past and the imagined future, as a passage between barbarism and civilization': Cristina Rojas, *Civilization and Violence: Regimes of Representation in Nineteenth-Century Colombia* (Minneapolis, 2002), p. 18. In this sense it is also important to remember Walter Benjamin's statement: 'There is no document of civilization which is not at the same time a document of barbarism': Walter Benjamin, 'Theses on the Philosophy of History' in *Illuminations: Essays and Reflections* (ed. Hannah Arendt, trans. Harry Zohn, New York, 1973), pp. 253–64 at p. 256.

[15] To give one example, Servando Teresa de Mier (1763–1827), one of the intellectual leaders of the Mexican independence movement initiated in 1794, made a life-long effort to

factors they knew to be essential to the recognition of their new nations as sovereign states and as members of the so-called 'community of civilized nations', as well as for national and regional advancement.

The project of *completing civilization* in Latin America began early in the nineteenth century.[16] In fact, by the mid-nineteenth century the discourse of civilization (and its complement, 'barbarism')[17] had been completely creolized, that is, appropriated and adapted to local circumstances.

advance traditional themes of Creole patriotism in laying the foundations of Mexican nationalism. De Mier's writings reversed European narratives presenting Europeans as civilized and Americans as barbaric, in order to provide arguments for Mexican and American sovereignty. He invoked an autonomous American religiosity, affirming that the religion professed by the Aztecs and, in general, all the ancient American peoples, shared doctrines that pointed to a common Christian origin, and asserting that America therefore did not need to look to Europe for a Christian tradition. In order to challenge the 'scientific' theories of the Enlightenment on the barbarism and racial inferiority of Americans, de Mier wrote about the barbarism and racial characteristics of the peoples he encountered on his travels in Europe: the unhealthy climate, the poverty and bad living conditions, the dark skin colour, the deformed bodies, the violent and cannibalistic tendencies, and the incorrect ways in which Europeans spoke Latin languages: see Servando Teresa de Mier, *The Memoirs of Fray Servando Teresa de Mier* (ed. Susana Rotker, trans. Helen Lane, Oxford, 1998).

[16] The notion is borrowed from Andrés Bello's 1823 description of his own project of 'completing civilization' through a literary magazine in which he published selected texts in order to compile the canon of a foundational (Spanish) American literature. The purpose of his project was:

> to examine different ways in which to make the arts and sciences progress in the new world, and the means to complete its civilization; to make useful inventions known so that they may be adopted in new places, so that their industry, commerce and navigation may be perfected, so that new channels of communication may open, and they may broaden and facilitate the previous ones; to facilitate the seed of liberty in order to destroy the shameless worries with which it was fed since birth; to establish, through the indestructible basis of education, the cultivation of morality; to conserve the names and actions of those who appear in our history giving them a rightful place in the memory of time; that is the noble task, vast and difficult that the love for our patria has imposed on us . . . we shall thus adapt everything that, in our opinion, may be useful; and we shall speak the language of truth.

As quoted in Barry L. Velleman, *Andrés Bello y sus libros* (Caracas, 1995), pp. 19–20.

[17] For example, Mariano Ospina Rodríguez, a nineteenth-century Colombian president, gave the following definition of 'barbarism' in an 1875 essay:

> Civilization is the degree of morality, knowledge and well-being that a people enjoy; and being that barbarism is the reverse of civilization, we can define it by saying that it is the degree of corruption, ignorance and misery in which the people are submersed. Civilization and barbarism are always relative terms. Adam in paradise is the ideal of the civilized man. The savage, stupid *antropófago* is the type of the barbarian. Civilization is affirmative, positive. Barbarism is negative.

Mariano Ospina Rodríguez, *La barbarie, La Sociedad* (Bogotá, 1875).

Civilization and Barbarism,[18] a widely read book published in Argentina in 1845 by one of the most influential Latin American intellectuals of the nineteenth century, Domingo Faustino Sarmiento, described the Argentine struggle between the urban civilization of Buenos Aires and the barbarous *pampas* or flatlands. After this book's appearance, the dichotomy civilization/barbarism became the definitive axis through which the past and future of progress in Latin America would continue to be discussed for the entire nineteenth and most of the twentieth century.[19]

Importantly, the Creole's characteristic ambivalence could be seen as an enabling factor of Creole legal consciousness. That is, post-independence Creoles had to identify themselves as different and autonomous from their European counterparts, but at the same time they believed themselves to be righteous inheritors of a European legal, cultural and intellectual legacy.[20] Thus, the myriad of options open to them were selected and appropriated as a new Creole production.[21] For example, some Creoles could defend the British form of liberalism as a progressive national project, while others wanted to conserve Spanish morality and religion as the foundation for civilization; yet a third group argued that a

[18] The original and complete title is *Civilización y barbarie, Vida de Juan Facundo Quiroga. Aspecto físico, costumbres, y hábitos de la República Argentina* (Santiago, 1845). Several editions followed the original one of 1845. There was also a French translation published in 1853: *Civilisation et barbarie; moeurs, coutumes, caractères des peuples argentins* (trans. A. Giraud, Paris, 1853); and an English version in 1868: *Life in the Argentine Republic in the Days of the Tyrants; or, Civilization and Barbarism* (trans. Mary Tyler Peabody Mann, New York, 1868).

[19] Rafael Moreno-Durán emphasizes that 'the "civilization or barbarism" debate . . . is implicit and current in all of the Latin American cultural discussions . . . but the terms of the debate are never questioned . . . no one asks if . . . it responds to what are typically Latin American needs, and therefore, if it is legitimate to appropriate its tenets': Rafael Moreno-Durán, *De la barbarie a la imaginación: la experiencia leída* (2nd ed., Bogotá, 1988), pp. 24–5.

[20] In this sense, it is pertinent to remember a much-cited quote by Creole independence leader Simón Bolívar:

> We are . . . neither Indian nor European, but a species midway between the legitimate proprietors of this country and the Spanish usurpers. In short, though Americans by birth we derive our rights from Europe, and we have to assert these rights against the rights of the natives, and at the same time we must defend them against the invaders. This places us in a most extraordinary and involved situation.

Simón Bolívar, 'The Jamaica Letter' in Harold A. Bierck (ed.), *Selected Writings of Bolívar* (2 vols., Caracas, 1951), vol. I, p. 122.

[21] For a general study of the idea of reception and production of legal theory in Latin America see Diego E. López-Medina, 'Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America', SJD thesis, Harvard Law School (2001) (published as *Teoría impura del derecho: la transformación de la cultura jurídica latinoamericana* (Bogotá, 2004)). Latin America in this context is composed of the nations belonging to the former Spanish colonial empire.

combination of both ideals would be the best scenario.[22] Another example of how European ideas played out in Creole legal consciousness is the debate over the place of Jeremy Bentham's works, and his utilitarian ideas, in the Colombian post-independence legal curriculum.[23] The division among Benthamites and their opponents became one of the reasons for the first divisions between the nascent liberal and conservative parties, as well as a cause for taking different sides in the early civil wars of the nineteenth century.[24]

While for some Creoles the development and consolidation of a national legal system was the most important task for completing civilization in the new nations, for others it was first necessary for the status of sovereign and civilized to be recognized by Europe and the US so as to become an acting member of the community of nations respectful of international law. This presented a dual challenge: representing and legitimizing the Creole images of civilization while at the same time participating in the European centre of production of international law.

[22] Fernando de Trazegnies, a contemporary Peruvian academic and politician, describes the main preoccupation of the Creole élite as being to 'liberate the individual without the excesses of equality, to facilitate modernization without altering the pseudo-aristocratic bases of power in society'. That is, modern Creoles wanted to take advantage of social transformation without losing control over the traditional sites of power: Fernando de Trazegnies Granda, *La idea de derecho en el Perú republicano del siglo XIX* (2nd ed., Lima, 1992), p. 221.

[23] Since Bentham found limited support for his utilitarian ideas in England's ruling class, he began to view the American continent, full of newly forming nations, as fertile ground in which to develop his utopian dream. Bentham seriously considered becoming the legislator of Mexico or Venezuela, both countries to which he tried to migrate: see Miriam Williford, *Jeremy Bentham on Spanish America: An Account of His Letters and Proposals to the New World* (Baton Rouge, 1980), p. 4. Though Bentham's plans to migrate to the Americas failed, he maintained a lengthy correspondence with Latin American leaders, as well as with English correspondents in the region. His home in London became an obligatory stop for visiting Creoles, and in the last decade of his life he wrote extensive codes, laws and plans for the government and education of the new Spanish American republics. In fact, Bentham used the term 'Creolia' to refer to Spain's overseas possessions and 'Creolians' to refer to its inhabitants: see Jeremy Bentham, *Colonies, Commerce and Constitutional Law: Rid Yourselves of Ultramaria and Other Writings on Spain and Spanish America* (ed. Philip Schofield, New York, 1995), p. 148.

[24] The teaching of Bentham in the law schools was associated with opposition to the Catholic religion, and thought to promote conspiracies against the government. For further discussion of the Bentham debate in Colombia see Victor M. Uribe Urán, *Honorable Lives: Lawyers, Family, and Politics in Colombia, 1780–1850* (Pittsburgh, 2000), pp. 108–13; Luis Horacio López Domínguez (ed.), *Obra educativa – la querella Benthamista, 1748–1832* (Bogotá, 1993); Germán Marquínez Argote, *Benthamismo y antibenthamismo en Colombia* (Bogotá, 1983); Ricardo Motta Vargas, *Jeremías Bentham en el origen del conservatismo y liberalismo: la polémica del siglo XIX – utilitarismo inglés y catolicismo en la formación del bipartidismo colombiano* (Bogotá, 1996).

Nineteenth-century Latin American images of civilization and the production of international law

As the participation in and production of international law was validated as a symbol of civilization, it is not surprising that many international law texts and treatises written by Latin American publicists appeared during the second half of the nineteenth century. Most of these works were written in French (though there were a few in English and Spanish) with the purpose of addressing a European audience as well as the Creole élite, and situating the new Latin American states in the civilized community of nations. Perhaps the most well-known works of this genre are those by the Argentine Carlos Calvo (1822–1906).

As an experienced diplomat and member of several European academies,[25] Calvo was an active advocate and practitioner of the professionalized international law of the second half of the nineteenth century, and did much for what he thought would help popularize international law and make the discipline more broadly accessible. He was fully dedicated to all international issues and viewed the history of the nations in Latin America as well as their progress as permanently connected to a foreign sphere of influence.

The ideal of civilization is certainly present in Calvo's descriptions of international law in general and in his particular effort to make Latin American states equal participants in the so-called 'community of civilized nations', both as a region of autonomous *civilized* sovereigns and as a place of production of sources of international law.[26]

In his dictionary of international law, Calvo defines 'civilization' as:

> the assembly of material and moral progress that humanity has accomplished and continues to accomplish . . . *International law is one of the most precious fruits of civilization*: because it has become one of the bases of the organization of societies and therefore an essential element in the harmonious march of humanity.[27]

[25] Calvo was a member of the Real Academia de la Historia, a Foreign Associate of the Académie des sciences morales et politiques, Institut de France (of which only four Americans were members by 1900 – Benjamin Franklin, Abraham Lincoln, Emperor Pedro III and Calvo), and an Honorary Member and co-founder of the Institut de droit international.

[26] For a more extensive analysis of CaIvo's work see Obregón, 'Completing Civilization', pp. 90–170.

[27] Carlos Calvo, *Dictionnaire de droit international public et privé* (2 vols., Berlin, 1885), vol. I, p. 148 (emphasis added).

Further on, Calvo defines the civilized nation as:

> one that has a certain moral, political and economic education and that is organized on a stable and rational basis, on the principles of order, justice and humanity. The *civilized* nation is in opposition to the *barbarous* or *savage* nations. We can admit . . . that it is the duty of civilized nations to promote . . . the civilization of savage peoples, to extend the territory of civilized states . . . and to constitute civilized authorities in . . . barbarous regions, but to obtain that objective the civilized nations do not have the right to expel the savage or barbaric races, to destroy them, exterminate their race, or to take away the lands on which they live.[28]

Though Calvo's definition seems to be respectful of indigenous peoples (or *sauvages*[29] as he describes them), it is most adamantly a justification for the conquest and management of native populations in the region as inherent to the Creole civilizing mission.

Calvo's 'will to civilization' was also present in his pursuit of respect and acknowledgment for the pre-independence history of international law in Latin America. Calvo argued that the history and development of international law could not continue to ignore the role Latin American nations had played and continued to play in its formation. His work, mostly written and published in France, had the intention of incorporating the American continent into the classical history of international law. Indeed, Calvo says that he had added *America* to the title of his first treatise because he wanted to 'correct the oblivion in which our predecessors and contemporaries concur, when they leave out the vast American continent, whose power and influence grows parallel to European civilization'.[30] This self-assertion may seem surprising considering that Calvo spent most of his life in Europe and regarded European lawyers as his peers, but it is fundamental to understanding his personal project of both being at the centre of the production of international law, while obtaining recognition for Latin American particularities.

A more diverse idea of the Creole struggle to participate and be identified as part of the civilized world can be found in the work of another nineteenth-century lettered Creole, Manuel Atanasio Fuentes (1820–89). Fuentes was a lawyer, doctor, journalist, professor, cartoonist, poet and public functionary and perhaps the most prolific Peruvian writer of the nineteenth century. Among his various publications one can find a treatise on international, administrative and constitutional law, as well as a

[28] *Ibid.* [29] For the definition of *sauvages* ('savages') see *ibid.*, vol. II, p. 199.
[30] Carlos Calvo, *Derecho internacional de Europa y América*, p. iii.

work on legal medicine, and a legal dictionary and encyclopedia. The state of civilization is a constant preoccupation for Fuentes. In his legal encyclopedia Fuentes says that a nation is not a participant in international law if she is not 'accepted by the majority of cultured Nations'.[31] Culture in this case is used as a synonym of civilization. In a chapter titled 'Of the Influence of External Circumstances on Law', he states that equality among nations is relative because 'positive law has many variables . . . that continuously send men to the route of the good or bad institutions that reason tends to regulate'. Fuentes then goes on to describe the six external causes that affect law: the degree of social life, climate, race, religion, customs and intellectual culture. When describing social life, Fuentes presents a progressive vision of law and human development in four stages: the state of savagery (man is limited to hunting and fishing, he cannot understand law); the nomadic state (man is more human because he understands some notions of property, such as that of domesticated cattle); the state of agriculture (man's attachment to the land and its value becomes evident); and finally the state of civilization (commerce and industry appear, making social relations complex enough for law to develop and progress).

But perhaps most illustrative of Fuentes' will to civilization is his 1866 book, *Lima: Historical, Statistical, Administrative, Commercial and Moral Descriptions*.[32] The luxuriously illustrated work was also published in English and French (translated by Fuentes) and was addressed to a European and North American public with the purpose of 'showing our political organization, to demonstrate that the institutions that we have give an exact idea of the civilization of a country which is as advanced as it can be'.[33] Through social statistics, historical notes, personal observations, popular sayings and satirical commentary, Fuentes presents Lima's state of civilization but also acknowledges its manifestations of barbarism. Fuentes does not try to hide what in his legal dictionary he labelled as 'external circumstances to the law', but he does try to manage the problems they pose for 'civilization'. For example, instead of speaking about racial differences, he prefers to talk about the colourful aesthetics that abound in the city. He tells his readers that:

[31] Manuel Atanasio Fuentes, *Curso de enciclopedia del derecho* (Lima, 1876).
[32] Originally published as *Lima, apuntes históricos, descriptivos, estadísticos y de costumbres.*
[33] Manuel Atanasio Fuentes, *Lima: Esquisses historiques, statistiques, administratives, commerciales et morales* (Paris, 1866), p. viii.

> Lima is pleasant because she is not only made up of whites and therefore is not all the same, monotone, nor tiring of the senses . . . the population of Lima offers individuals that go through a scale of colouring from the finest and most brilliant black to white and from there to yellow.

On the other hand, Fuentes is also careful to say that blacks are considerably decreasing in numbers, that the majority of natives of Lima have a pale tan skin, with the women being notably whiter than the men, and that, even though there are still some barbarous customs like carnivals, they are gradually disappearing. Illustrations are included to correct the erroneous images that foreigners have of Peru: 'we do not deserve to be judged as rude inhabitants of the jungle, semi-covered with feathers, that receive with arrows those guests that arrive at their homes, to eat them raw in a family banquet'.

Though Fuentes' main construction of a local discourse on civilization was not from within the discipline of international law, his purpose was similar to Calvo's – he too believed it necessary to educate or remind Europeans of how advanced the state of civilization actually was in Latin America (and more specifically in Peru). The purpose of Fuentes' effort was also to secure European acknowledgment of, and respect for, local identities.

José María Samper (1828–88), a Colombian Creole, presents another lively narrative of the civilization/barbarism dichotomy and its relation to international law in the region. In 1862, Samper reviewed Carlos Calvo's work in an article titled 'Latin American Public Law'.[34] In it he describes the north of the American continent as the product of a vital, vigorous and free race and the south as the legacy of a degenerate Spanish race. This legacy leads Samper to identify the urgency of creating an international law proper to the region, because in his words international law is 'as an element of civilization . . . the true symbol, the summary, the most complex manifestation and the most elevated way of being of a people'. In Samper's variant of the Creole legal consciousness, international law now only makes sense if it is appropriated by the American nations in its own regional manifestations, and is no longer identical to European international law.

In a later book, Samper constructs a geographical and ethnographical history of Latin America for a European audience in order to explain

[34] José María Samper, 'Derecho público latino-americano' in *Miscelánea ó colección de artículos escogidos de costumbres, bibliografía, variedades y necrología* (Paris, 1869).

and justify American civilization. Samper admits that the new American nations have problems, but his project outlines a view of progress, proposing the creation of a confederation of American nations in order to unify norms and policies, and 'mix into respectable and homogenous groups . . . advance their civilization and establish their reputation in Europe'.[35]

Samper uses the image of an Andean mountain to illustrate the political and social stratification that exists in the region. Samper says that human groups can be classified in a hierarchical form, according to their cultural characteristics, the climate in which they live, the level of knowledge they have acquired, and their institutions. He then explains how the European conquerors and their African slaves and descendants established themselves in the Latin American geography in proportion to their knowledge of the law, and therefore to their degree of civilization: savage Africans remained in the scorching valleys, mestizos occupied the warm lower and central mountain areas, and the whitest and most European, the law-abiders and law-givers, inhabited the temperate high mountain plateaus.[36]

The progress of Latin American civilization, for Samper, consists in a movement of 'fusion'. Civilization moves down the mountain while barbarity tries to climb up. When they meet, they fuse and gradually eliminate the savage elements, producing a variety of mixtures which will then be the base for a truly democratic society.[37] However, Samper is careful to show that many groups have not entered the process of fusion and thus continue living at the lowest rank of civilization. The indigenous or blacks who have not mixed with whiter races

[35] José María Samper, *Ensayo sobre las revoluciones políticas y la condición social de las Repúblicas Colombianas (Hispano Americanas) con un apéndice sobre la geografía y población de la confederación granadina* (Paris, 1861), pp. 244–7.

[36] According to Samper, this classification can be applied in America as early as the Spanish conquest. When the Spaniards arrived in Colombia, they found the 'great Chibcha race', the most civilized indigenous peoples, on the highest mountain-tops. Samper considers the Chibchas the 'most civilized' because they had a sense of 'law, justice, administration, houses, government, notions of property, marriage, family and inheritance'. Samper continues his stratification by saying that further down the mountains, in the valleys and edges of the Andes, barbarian or intermediate Indians existed who did not have much access to civilization because of their climatic conditions and vegetation. Finally, according to Samper, in the 'scalding valleys at sea level' the Spaniards found Indians who were 'totally savage', who absolutely lacked knowledge of the law, of the concept of work, of property, commerce or the arts: Samper, 'Derecho público latino-americano'.

[37] Samper, *Ensayo sobre las revoluciones políticas*, p. 338.

are the most resistant to civilization, while the purest (whitest) Creoles have the greatest civilizing capacity and most democratic conscience of all.[38]

In his review of Calvo's treatise, Samper further uses this metaphor to stratify international law in an ethnological manner. At the top and to the north is European public law, whose domination is characterized by a civilization powerful enough to 'convert into a universal law that which belongs to a particular situation'.[39] Very close to the peak, and also to the north, Samper finds North American public law, which exemplifies progress because Nordic civilization penetrated the US, producing a mirror image which successfully attained universal influence and was able to 'notably modify many of the most important principles of European law'.[40] Below, conquered by Southern Europeans, lie the Hispanic American countries. Though they have their own constitutions, laws and institutions, they did not receive the 'Nordic light' and therefore fell into legislative barbarity, lacking their own public (international) law.[41]

Samper does not ignore the violence that the self-declared universal laws of Europe and North America entail – he presents European law as 'despotic' and gives as examples the recent European interventions in Central America, México (the Napoleonic Empire) and Santo Domingo. For Samper, it is clear that the greatest gesture of civilization (the construction of an autonomous system of international law) is accompanied by barbaric acts. He asserts, however, that the only way to progress is to create international law for Latin America, to convert what is a 'particular situation' into a 'universal law', as did the Europeans and Anglo-Americans, through 'the historical study and meticulous compilation of international acts that interest us directly' and 'the celebration of treaties, separately or in a general assembly, that will unify the principles of our common or *American* politics of our *continental nationality*'.[42]

[38] In Colombia, the purest Creole for Samper is described characteristically as the one who comes from the capital city, Bogotá. In Latin America, Samper sees the Chileans and Argentines as the most democratic and civilized due to the preponderance of the European 'element', while Mexicans and Peruvians are the most disadvantaged for having a greater degree of mixture with indigenous people. Venezuelans are also considered to be on the lower end of civilization because of their excess of *pardos* (blacks mixed with whites) and their hot climate: *ibid.*

[39] Samper, 'Derecho público latino-americano', p. 350.

[40] *Ibid.*, p. 352.

[41] *Ibid.*, p. 355.

[42] *Ibid.* (emphasis added).

To justify the creation of a regional international law, Samper's discourse naturalizes Latin America's structural problems and social peculiarities, and assigns to the political élite the role of remedying the nation's needs through government, laws and force.[43] Considering the task of generating this regional international law to be essential to the material and moral progress in the Latin American countries, Samper has only praise for Calvo as having taken a first step:

> The first stone of the monument has been laid in place; the monument will be grandiose, and its architect is the notable son of the illustrious Buenos Aires (that New York of South America), Mr Carlos Calvo . . . who will build in Paris, in face of the Europe that has oppressed us with its traditions, the luminous monument, revealing of the international history of *latin* America! . . . the day that Mr Calvo has finished his American monument, we can say that what Martens, de Garden and other publicists did for Europe, will have been done by the laborious son of the liberal and opulent Buenos Aires for the Public Law of the latin America . . . let us not forget that the best proof that a nation or race can give of its vitality and character is precisely the autonomy and the dignity of its public [international] law.[44]

Conclusion

The challenge for Calvo, Fuentes, Samper and other Creoles throughout the nineteenth century was to prove that they were on the same road as (European) civilization and shared its ideals and characteristics, despite the reality of a majority population in the continent still consisting of indigenous peoples and descendants of African slaves.

[43] For Samper, the violent effects of the political and legal international project over peripheral social subjects is not significant in comparison with the broader desire for civilization. To give a concrete example, Samper, like Andrés Bello and many other Creoles of the nineteenth century, was sure that the protection given to indigenous lands during the colonial period (the *resguardos*) had stifled and immobilized the cultivation of land and the creation of individual land owners, and therefore impeded the advancement of civilization. Samper remarks that the excessive protection and isolation of indigenous people during the colonial era condemned them to three 'terrible' things: (1) 'the incapacity of ever being labourers [*obreros*] . . . or anything different from the agricultural labour . . . maintaining them estranged from the contagion of civilization and the movement of social life'; (2) 'being terrible agricultural workers . . . rudimentary and almost as ignorant and imbecile as they are brute'; and (3) 'the difficulty for them to mix with the other two races', leaving the new nations with 'immense masses of stupid and estranged people': Samper, *Ensayo sobre las revoluciones políticas*, p. 63.

[44] Samper, 'Derecho público latino-americano'.

The concept of a Creole legal consciousness allows us to depart from the homogenization of the region and period – Creole consciousness implied, on the one hand, the Creoles' right to belong to the metropolitan centre as descendants of Europeans, while at the same time the need to be recognized as independent and distinct from Europe. It also seems to have implied a certain claim to a culture, a legal tradition or even, as Fuentes claims, a variety of colours and customs, that allowed for a more complex view of the world. In other words, Creole consciousness was not simply instrumental, but one that identified local customs, the local landscape – including, to an extent not always clear, the writing Creole self – as that which differentiated Creoles from Europeans.

Despite the fact that Fuentes and Samper were not international lawyers, they are brought forth here as lettered and interdisciplinary men to illustrate some of the aspects of a nineteenth-century Creole legal consciousness. Though the Creoles maintained a particular regional identity coming from the colonial period, they also incorporated trends towards sociology, national history and culture to come up with new discursive forms of presenting their autonomy in the post-independence era. The Creoles, like many Europeans of their time, were convinced that an international community could be derived from ideas about society, history and human nature, or the development of laws of an institutional modernity. Creoles had a critique of sovereignty, as abused by Europeans, but supported internal imperial attitudes of conquest and colonization. That is, they proposed to reject European and US interventions in their territories, but at the same time supported the national appropriation of indigenous lands in their own countries.

More concretely, Carlos Calvo represents the Creole legal consciousness that was embedded in Latin American's first professional international lawyers. As a result of the flexible and inclusive tradition, Calvo, like other Latin American internationalists, did not perceive international law as a foreign and distant model imposed by Europe, but rather as part of a legal heritage which connected them to Roman law, the backbone of the *jus gentium*, and thus to one of the factors that Europeans acknowledged as the origins of 'civilization'. The type of authorship, the choice of texts, the uses of different languages, and the different international legal problems and doctrines addressed suggest that Latin American international lawyers were preoccupied with different audiences at different historical moments. However, they coincided in their intention to articulate to some extent what they believed represented a regional dimension

of international law, while at the same time wanting the region to be understood as part of the community of civilized nations, and wanting themselves to be recognized as legitimate publicists by their European counterparts. In addition, international law served as a political source with which to legitimate modernizing discourses and practices in the region and in their newly created states.

11

From 'savages' to 'unlawful combatants': a postcolonial look at international humanitarian law's 'other'

FRÉDÉRIC MÉGRET*

> Je crois que le droit de la guerre nous autorise à ravager le pays et que nous devons le faire soit en détruisant les moissons à l'époque de la récolte, soit dans tous les temps en faisant de ces incursions rapides qu'on nomme razzias et qui ont pour objectifs de s'emparer des hommes ou des troupeaux . . . J'ai souvent entendu en France des hommes que je respecte mais que je n'approuve pas trouver mauvais qu'on brûlât les moissons, qu'on vidât les silos et enfin qu'on s'emparât des hommes sans armes, des femmes et des enfants. Ce sont là, suivant moi, des nécessités fâcheuses, mais auxquelles tout peuple qui se voudra faire la guerre aux Arabes sera obligé de se soumettre.[1]

If the goal of the laws of war is to protect all individuals in armed conflict, can one ever be on the 'wrong' side of the laws of war? The answer to that question from many international humanitarian lawyers is an emphatic 'no'. The laws of war protect all; one is always protected under some guise or other. One can never, properly speaking, be considered 'outside' the laws of war. International humanitarian law (as the laws of war are interchangeably known) would strongly deny that it had an 'other', or that there is anyone that could not be brought within its protective, hyper-inclusive mantle – and one might well be tempted to take it at its word.

This vision of the laws of war, in turn, conditions a certain *reading* of international humanitarian law and its violations. If the law is all-inclusive, then any exclusion from its ambit can only be interpreted as a

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[1] Alexis de Tocqueville, 'Travail sur l'Algérie' in *Œuvres complètes* (Paris, 1991), pp. 704–5.

violation thereof, typically as an exercise of violence or power that crosses the boundaries set for it by the law. A good example of this type of reasoning is the various reactions to the fate of those apparently excluded from the protection of the laws of war in the context of the so-called 'war against terror'. The dominant vision of the fate of the prisoners at Guantánamo, for example, is typically that their exclusion from prisoner of war status is a straightforward violation of the laws of war, a manifestation of an unacceptable and dangerous unilateralism in the face of international law's otherwise clear instructions.

But what if the laws of war had a more complex relationship with violence than this simple image suggests? What if the laws of war were simultaneously inclusive and *exclusive*? What if the laws of war were and had always been in some special sense *begging to exclude* so that many perceived exclusions were in fact very much willed by the laws themselves?

This chapter, the first sketch in a larger effort to develop a comprehensive critical theory of the laws of war, seeks to lay the groundwork for a study of international humanitarian law's exclusions. What I want to explore is the possibility that exclusions from the protection of the laws of war might in fact be very much legitimized by some of the founding ambiguities of the laws of war themselves. It may be true, for example, that international humanitarian law has a status for everyone (the combatant and the non-combatant; the fighting and the surrendering; the warrior and the civilian) so that no one is ever entirely without protection. But every protection under the laws of war, every status, might also be gained by denial of an 'other', so that the law is both inclusive *and* exclusive.[2] Specifically, I want to show that international humanitarian law has always had an 'other' – an 'other' that is both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be.[3]

[2] For a number of reasons, there has been scant critical work on the laws of war. Among the few examples is Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49; see also 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35 *Harvard International Law Journal* 387. Apart from the fact that this critique would need to be updated, it pursues a very different line of argument from the one explored here. It is aimed at the idea that the laws of war have tended to regulate areas of warfare (particularly weapons) only by the time they cease to be meaningful for key international players. Af Jochnick and Normand, in other words, are interested in methodologies of legitimation of warfare, but not specifically interested in identifying the 'other' of the laws of war – the goal pursued in this chapter.

[3] In this respect, I very much share Antony Anghie's concern 'with understanding the strategies by which international law rewrites its history, in different phases, and, in particular, how it seeks to suppress the colonial foundations of the discipline': Antony Anghie, 'Finding

International humanitarian law has, of course, many potential 'others', and it is not my goal, by focusing on one, to deny the existence of other 'others'. The 'other' of international humanitarian law is every individual, concrete or imagined, every state of affairs that the laws of war aim to keep at bay.[4] However, the existence of the 'constitutive other' that I am about to introduce is peculiar in that I believe it was central to the *emergence* of the laws of war. This 'other' is none other than the colonial 'other'. My hypothesis here, borrowing from the work of Antony Anghie and applying it to the specific matter at hand, will be that this colonial 'other' was not simply an epiphenomenal problem faced by already extant positive laws of war, but in fact very much part of the constitution of such laws – an 'other' at times barely mentioned, sometimes indirectly so, but which haunts the very beginnings and evolution of the laws of war. It is their dark alter ego, the 'uncivilized', 'barbarian', 'savage' from which the laws seek to distance themselves.[5] Only a focus on this 'constitutive other' allows us to uncover the origins of the continuing reliance by the laws of war on patterns of exclusion.

In order to demonstrate this hypothesis, I propose to do seven things. First, I want to explore the genesis of the laws of war in Europe[6] in

the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1 at 8; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005).

[4] In this respect, women are also an obvious 'other' of the laws of war. Much feminist scholarship has been devoted to the issue of uncovering gender biases in international humanitarian law: see for example Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1992) 12 *Australian Year Book of International Law* 265. However, women and gender issues were largely absent from the foundational debates of the laws of war in a way that the colonial 'other' was not.

[5] In this essay I will use in quotation marks the terms used by international lawyers themselves at various periods to describe the colonial 'other'. The terms 'savages', 'barbarians' and 'uncivilized' were part of the ordinary discourse of many of those participating in the humanitarian debate in the late nineteenth and twentieth century. They were used largely interchangeably and without much conceptual finesse, except perhaps that 'savage' was used more often in connection with tribes and Africa, while 'barbarian' pointed towards the East (but a 'barbarian' could be 'savage' and vice versa).

[6] This chapter will begin by focusing on Europe because, despite the presence of a few non-European states at the Hague Conferences, these were by and large dominated by European states. It was these states, moreover, that were primarily involved in the colonizing process. By 'Europe' I mean less a geographical entity than a certain cultural and ideological *ensemble*. Later in the chapter, when I explore post-Second World War developments, I switch to using 'the West', since by then the laws of war had become a more distinctly global affair, and the role played by Europe in earlier times had moved beyond its confines to include the US, for example. I use 'the West' in opposition to 'the South' more than in opposition to 'the East', aware that this is not an ideally precise term, but confident that it is an acceptable usage.

the late nineteenth and early twentieth century to show how the laws of war, from their inception, were subtly designed to exclude non-European peoples from their protection. Secondly, I will highlight how that exclusion was justified and point to a specific 'anthropology of savagery' as the basis for considering 'uncivilized' peoples unworthy of the protection of the laws of war. Thirdly, I want to tell the conventional narrative of international humanitarian law since the Second World War, namely that, regardless of this 'original sin', it has shed its more racist overtones in favour of universal inclusion. Fourthly, I want to show how the 'war against terrorism', by using exactly the same arguments that were previously used to exclude 'savages', reveals the persistence, despite this shift, of profoundly exclusionary strands in the laws of war. Fifthly, I want to reflect on the significance of this 'return of the savage' and make the case that it is less a violation of the law, than a position based on a complex – but not indefensible – play with some of the law's own ambiguities. Sixthly, I try to offer an interpretation of how the laws of war can be both inclusive and exclusive in a way that may at first sight seem contradictory. Seventhly, in view of this, I seek to advance a theory of the impact of the laws of war as essentially a project of Western ideological expansion. In the conclusion, I reflect more normatively on how we should think about these developments critically.

Throughout this chapter, I seek to draw on insights from postcolonial theory,[7] particularly as it impacts upon and draws on analysis of the law generally,[8] and international law in particular.[9] I am interested in the way postcolonial theory can emphasize the permanence and continuity, beyond formal decolonization, of patterns of colonial domination and power through the production of knowledge and the cultural constitution of 'otherness'. I am interested, in other words, in how the 'colonial

[7] See for example Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (London, 1997).

[8] See for example Eve Darian-Smith and Peter Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor, 1999); see also Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies* (Oxford, 2000), pp. 540–55.

[9] See for example Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia, 2002), pp. 22–7; Brett Bowden, 'In the Name of Progress and Peace: The "Standard of Civilization" and the Universalizing Project' (2004) 29(1) *Alternatives* 43; Anghie, *Imperialism, Sovereignty and the Making of International Law*.

encounter' continues to reverberate through and inform our understanding of the categories of international humanitarian law.

International humanitarian law's original sin

> The laws of war protect enemies of the same race, class, and culture. The laws of war leave the foreign and the alien without protection. When is one allowed to wage war against savages and barbarians? Answer: always. What is permissible in wars against savages and barbarians? Answer: anything.[10]

There is a past that international humanitarian law would rather forget, but which is coming back to haunt it. This is a past that bears the shameful mark of racism and colonialism. It is a past that hardly ever gets more than a passing reference in the literature, probably because it is viewed as having been largely transcended, but also partly because it does not fit the overwhelmingly progressist narrative of international humanitarian law. Although the above description may overstate the case, there is no doubt that this is a past that is very real – and maybe even very present.

It is a fact hardly ever stressed that the emergence of modern international humanitarian law coincided with the apotheosis of perhaps the most outrageous and voracious colonizing spree in world history since the *conquista*. The same year (1876) that the International Committee for the Relief of Military Wounded took the name by which it has been known ever since (the International Committee of the Red Cross), for example, King Leopold II of Belgium, the soon-to-be tormentor of the Congo, convened a conference in Brussels that is widely seen as the opening salvo of the 'Scramble for Africa'. The Hague Conventions,[11] the first attempt at a comprehensive codification of the laws and usages of war, were adopted

[10] Sven Lindqvist, *A History of Bombing* (trans. Linda Haverty Rugg, London, 2002), para. 5.

[11] Convention regarding the Pacific Settlement of International Disputes, The Hague, 29 July 1899, in force 4 September 1900, 32 Stat. 1779; Convention with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 32 Stat. 1803 ('Hague Convention II'); Convention for the Adaptation to Marine Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899, in force 4 September 1900, 32 Stat. 1827; Declaration to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, The Hague, 29 July 1899, in force 4 September 1900, 32 Stat. 1839; Declaration concerning Asphyxiating Gases, The Hague, 29 July 1899; Declaration concerning Expanding Bullets, The Hague, 29 July 1899 (for the text of the Declarations, see James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1915)).

in 1899, towards the end of a twenty-year period that saw the African continent pass from being largely self-governed to being almost entirely under the domination of European powers. Just as Europe was trying to grapple with the problem of violence in war, it seems, it was unleashing unprecedented violence outside its borders. Do the two phenomena coincide fortuitously or might they be related in some way?

The move to codify the laws of war was certainly not triggered by colonial wars. It was the Battle of Solferino, a very European battle,[12] that prompted Henry Dunant to write the famous *souvenir* that led to the first attempts at organizing services for the wounded in war.[13] The wars that all delegates had in mind at the Hague Conference were the Franco-Prussian and Crimean conflicts. These were the wars that had demonstrated that 'as between disciplined troops the nations of Europe had practically reached an accord as to the maximum of severity with which warfare could be carried on'[14] – a consensus that now had to be ratified into law. The laws of war were, originally and superficially at least, part of a purely European story.

At the same time, there does seem to be something to the simultaneous proclamation of grand but abstract humanitarian principles and the sowing of devastation on the African continent – something like the well-rehearsed hypocrisy of a European-centric universalism that coexisted happily with, and was oblivious to, profound exclusions in the international system.

The question of the position of non-European peoples in relation to the laws of war is, in truth, one that arose historically over only a small period of time during the second half of the nineteenth century (and only episodically after that), in situations in which savage peoples could still be considered to be relatively autonomous. By the time the land-grabbing process was completed, colonizing powers would often successfully claim that they were merely maintaining order in territory effectively under their control (whether they exercised formal sovereignty or not). Thus the issue of the treatment of non-European peoples became confined to international law's darker recesses. Colonialism effectively defined the

[12] The Battle of Solferino was fought on 21 June 1859 between the French and Sardinian armies on one side, and the Austrian army on the other. Involving 200,000 soldiers, it was the largest battle since the battle of Leipzig in 1813, and could be said to foreshadow some of the great military clashes to come. The battle was part of the struggle to unify Italy, long divided between France, Austria, Spain and the Papal States.

[13] Henry Dunant, *Un souvenir de Solférino* (Geneva, 1990).

[14] J. B. Atlay, 'Legitimate and Illegitimate Modes of Warfare' (1905) 6 *Journal of the Society of Comparative Legislation* 10 at 12.

'geography' of international law – a phenomenon brilliantly described by Nathaniel Berman.[15] The question became one of law maintenance rather than actual armed conflict,[16] and 'pacification' the euphemism under which massacres could be carried out with impunity. As late as 1945, while delegates assembled at Dumbarton Oaks in the wake of German capitulation to adopt the Charter of the United Nations,[17] the French massacred tens of thousands of Algerians at Sétif under the pretence of 'maintaining order': for many, the Nuremberg trial, which was heralded as a turning point in the enforcement of the laws of war, would distinctly fail to introduce a new era.

During the relatively short interval of conquest, however, this was a question which, although not at the forefront of debates on the laws of war, could be said to constitute the implicit background against which these debates were carried out. It is to these founding moments that we must turn, for they disclose the original face of international humanitarian law, at a time when its implicit ideology was at its crudest, unmitigated by subsequent reformulations. Moreover, it is these founding moments that continue to inform and shape the constitution of international humanitarian law well into the twentieth century and possibly beyond.

It is not absolutely clear in this context, at least initially, whether the exclusion of 'non-civilized' peoples from the laws of war was something that happened despite or thanks to international humanitarian law, and the practice of states in this respect is ambiguous. For example, there are several episodes suggesting that states felt that certain humanitarian conventions would apply to colonial wars, if no specific indication or reservation to the contrary was made. The British, for example, refused to sign the 1899 declaration prohibiting expanding bullets on the ground that these were necessary against African and Asian tribes.[18] As late as 1932, the British Government submitted a Draft to the General Commission of the Disarmament Conference which introduced an exception to the general prohibition that had been anticipated so far 'for police purposes in certain

[15] Nathaniel Berman, '"The Appeals of the Orient": Colonized Desire and the War of the Riff' in Karen Knop (ed.), *Gender and Human Rights* (Oxford, 2004), pp. 195–230.

[16] This is quite clear in Quincy Wright's treatment of the issue following the bombing of Damascus by the French. The French clearly thought that the 'disorders' justified France in enforcing 'police measures outside of international law': Quincy Wright, 'The Bombardment of Damascus' (1926) 20 *American Journal of International Law* 263 at 265.

[17] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67.

[18] See Alex Ogston, 'Continental Criticism of English Rifle Bullets' (1899:II) *British Medical Journal* 752.

outlying regions'[19] – by which the British obviously meant the more turbulent outposts of the Empire.[20] These declarations suggest *a contrario* that the laws of war would otherwise have been applicable. However, it may simply have been that the British were being over-cautious lawyers. There is also plenty of evidence that such reservations were in fact made easy by international humanitarian law itself, as a law that was remarkably ambiguous about its own application to 'non-civilized' peoples.

The early international humanitarian lawyer as colonialist

The laws of war, as an unmistakable product of late-nineteenth-century philanthropic reformism, were above all the brainchild of a few *visionaries* on a deliberate course to remedy what were perceived as some of the international system's worst tendencies. It thus bears mentioning, to begin with, that the great 'humanitarian' lawyers of the second half of the nineteenth century were also very much *men of their time*. They may not have been the worst of their time – in fact they were probably quite generous, forward-looking individuals, imbued with a spirit of historical optimism. But they were certainly no better in that they would have taken as axiomatic such things as Europe's civilizing mission and a more or less articulated discourse on the inequality of races.

There is perhaps no figure in the international humanitarian movement as 'sacred' as Henry Dunant.[21] Yet it is often forgotten that Dunant, in his early years, was himself a colonialist and a colonizer, leading Jacques Pous to speak of his 'rapport souvent ambigu et parfois obscur avec la réalité coloniale'.[22] Dunant was involved in countless business endeavours in Algeria, exploiting at various times mills, mines and forests. His project for a Société Internationale Universelle pour la Rénovation de l'Orient, which he described as 'une nouvelle croisade par la civilisation',[23] included the establishment of commercial *comptoirs* in Constantinople, the

[19] As quoted in P. S. Meilinger, 'Clipping the Bomber's Wings: The Geneva Disarmament Conference and the Royal Air Force, 1932–1934' (1999) 6 *War in History* 306 at 310.

[20] On recourse to almost systematic bombing by the British in the Empire see Sven Lindqvist, 'Bombing the Savages' (2001) 10(3) *Transition* 48.

[21] See Ellen Hart, *Man Born to Live: Life and Work of Henry Dunant, Founder of the Red Cross* (London, 1953).

[22] Jacques Pous, *Henry Dunant, l'Algérien ou le mirage colonial* (Geneva, 1979), p. 13.

[23] Henry Dunant, *Projet de société internationale pour la Rénovation de l'Orient* (Paris, 1866), p. 8.

construction of a harbour in Jaffa and a railway to Jerusalem. Indeed, when he encountered the wounded and dying on the Solferino battlefield, Henry Dunant was, according to at least some accounts, on his way to try to meet Emperor Napoleon III with a view to obtaining concessions in Algeria. International humanitarian law as a footnote to colonial business as usual: it is hard to think of more paradoxical auspices for the birth of the contemporary laws of war.

Nor was Henry Dunant an isolated instance. In fact, the overlap of the international philanthropist and the colonialist could almost be said to be part of a tradition. Gustave Moynier, for example, a Belgian jurist and humanitarian grandee who went on to represent the ICRC in the Hague, had previously excelled himself in promoting various schemes for the Congo before the Institut de droit international. But, perhaps most interestingly, Friedrich von Martens, a Russian diplomat, participant in the 1899 Hague Conference and Nobel Prize winner, reveals the profoundly dual nature of nineteenth-century humanitarianism. International humanitarian law scholarship has made much of the famous 'Martens clause'[24] – a classic of abstract universalist-naturalism – and idolized the man himself[25] as a 'humanist of modern times'.[26] That same scholarship, however, seems entirely oblivious to the fact that de Martens, a Professor at none other than the Imperial School of Law of the University of St Petersburg, was profoundly marked by the paternalistic and racist prejudices of his time, and an unashamed apologist for colonization. In a rarely quoted 1879 article published in the *Revue de droit international*, for example, we find de Martens arguing in favour of Britain and Russia 'convincing themselves that the characteristic trait of civilization' is the 'spirit of cooperation' in the pursuit of the 'noble goal' of their 'domination of Asian people'. As de Martens puts it:

[24] According to the Martens clause:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

[25] See Dieter Fleck, 'Friedrich von Martens: A Great International Lawyer from Pärnu' (2003) 2 *Baltic Defence Review* 19.

[26] Vladimir Vasilievich Pustogarov, 'Fyodor Fyodorovich Martens (1845–1909) – A Humanist of Modern Times' (1996) *International Review of the Red Cross* 300.

> [T]he future of Asia and the future destiny of their possessions compel Russia and Britain never to lose sight of the sublime role which Divine Providence has imposed on them, for the good of the semi-savage and barbaric nations of this part of the world.[27]

This was a man who, against significant opinion in his time, argued that treaties concluded with African kings could be set aside because treaties could only be 'signed between more or less civilized states';[28] who had no doubt that 'thanks to the political genius of King Leopold, the Congo State will be endowed with a regime entirely compatible with the requirements of European culture';[29] and who seemed to think that the greatest argument against colonization was that whites were not very resistant to malaria.[30]

Many of the military men intervening in the proceedings of the 1899 and 1907 Conferences, furthermore, also had a colonial background. The *états de service* of Sir John Charles Ardagh, the British military technical delegate to the 1899 Conference, for example, included participation in the Anglo-Egyptian expeditions to the Sudan in 1884–5, and serving in India as private secretary to the Viceroy from 1888 to 1894; that of Admiral John Fisher, who was born in Ceylon to one of the Governor's aides-de-camp, included serving in the China wars of 1859–60 and the Egyptian war of 1882.

It was these men – steeped as they were in the civilizing mission, colonial exploitation and European adventurism – who were also responsible for the early development of the laws of war.

That said, although the early international humanitarian lawyers may have been colonialists, it would be wrong to assume that there was an automatic correlation between this fact and the exclusion of non-European peoples from the laws of war. Colonialists were not made from one and the same mould. It was in the nature of colonialism as a historical venture, furthermore, to be deeply split between racism and universalism, greed and disinterestedness, exploitation and humanitarianism. The right way to understand the exclusion of non-European peoples from the laws of war, therefore, is not simply as an outgrowth of colonialism: rather it is as a consequence of colonialism's contradictions and inner tensions.

[27] Friedrich de Martens, 'La Russie et l'Angleterre dans l'Asie Centrale' (1879) 11 *Revue de droit international et de legislation comparée* 227 at 233.

[28] Friedrich de Martens, 'La Conférence du Congo à Berlin et la politique des états modernes' (1886) 18 *Revue de droit international et de législation comparée* 147.

[29] *Ibid.*, p. 268. [30] *Ibid.*, pp. 272–5.

Early defences of the inclusion of non-European peoples

The paradoxical nature of colonialism accounts for the fact that there was undeniably a long and respectable tradition of humanitarians arguing *for* the application of the laws of war to all, including in the context of colonial warfare. The humanitarian impulse must at times have seemed unstoppable and even revolutionary, so that, under the patronage of its most enlightened proponents, it was from the start awkward to try and reconcile its aspiring universalism with conscious efforts to carve out exceptions. Henry Dunant, in his later years, largely overturned his initial pro-colonization stance and condemned the way war had been waged against some non-European nations, specifically regretting the asphyxiating by smoke of Arab troops by Maréchal Pélissier in 1845.[31] Quincy Wright, of the Board of Editors of the *American Journal of International Law*, wrote an article criticizing French violations of the laws of war in Syria.[32] At the 1899 Hague Conference, Mr Raffalovich explained 'that the ideas expressed by Sir John Ardagh [defending the use of dum-dum bullets in colonial contexts] are contrary to the humanitarian spirit which rules this end of the nineteenth century'[33] and that '[i]t is impermissible to make a distinction between a savage and a civilized enemy; both are men who deserve the same treatment'.[34] Colonel Gilinsky similarly stated that '[i]t is not proper to make distinction between civilized and savage tribes'.[35] The President of the Second Commission believed that:

> he expresse[d] the opinion of the assembly in saying that there can be no distinction established between the projectiles permitted and the projectiles prohibited according to the enemies against which they fight even in case of savages.[36]

When the German Colonial Department heard of General Trotha's infamous order threatening the Herero with extermination, some were horrified. Count von Bülow, the Imperial Chancellor, cabled the Kaiser requesting that the order be cancelled on the grounds, inter alia, that it would be a crime against humanity and 'demeaning to our standing among the civilized nations of the world', upon which the General was asked to 'show mercy' to the Herero.[37] Hearing of British intentions to use

[31] Pous, *Henry Dunant*, pp. 188–94. [32] Wright, 'Bombardment of Damascus'.
[33] James Brown Scott (ed.), *Proceedings of the Hague Peace Conferences: The Conference of 1899* (London, 1920), p. 287.
[34] *Ibid.*, p. 343. [35] *Ibid.*, p. 83. [36] *Ibid.*, p. 287.
[37] Pakenham, *Scramble for Africa*, p. 612.

dum-dum bullets in colonial wars, *La Semaine Médicale* ran an article, capping a study of these bullets' impact, that deplored the existence of 'two principles of philanthropy, two weights, and two measures, one applied to civilized peoples, the other to barbarian races and distant countries'.[38] The British proposal to allow dum-dum bullets in warfare against 'savages' was, revealingly, ultimately defeated by a majority of nineteen to one.

Weakness of such appeals

The sincerity of such appeals to a coherent universalism are not doubted. It is important, however, to understand their true significance by contextualizing them. First, the very existence of a vigorous debate on the application of the laws of war to 'savage' peoples testifies to the fact that this was still very much an open question. Universalist humanitarians *disagreed* with some of their colleagues' colonial prejudices, but this was still in the nature of a relatively polite controversy about the scope of humanitarian obligations, rather than a straightforward denunciation of violations of the law, operating, as it were, from the safety of commonly accepted premises.

Secondly, all the evidence available to us suggests that this was very much a marginal, specialist's debate. Whether the laws of war actually applied to non-European peoples was still a finer point of detail, something that could be discussed casually and openly. Even in the minds of those who defended the more generous understanding of the laws of war, it was a secondary issue in comparison with the momentous task of defending civilization in the 'European world' itself.

Thirdly, the defence of the universal application of the laws of war was rarely based on a critique of the basic anthropological conceits of colonization. Defence of the 'uncivilized' did not include any discussion of whether they *were* uncivilized, something which was '[r]arely questioned as a premise'.[39] Even Wright's fairly spirited defence of the applicability

[38] As quoted in Ogston, 'Continental Criticism', p. 755. It should be pointed out, however, that colonial rivalries might have played a role in this controversy, which came on the heels of the Fashoda incident. One author, for example, saw the whole episode at the Hague Peace Conference as part of an 'attempt to place Great Britain at a disadvantage': see Alex Ogston, 'The Peace Conference and the Dum-Dum Bullet' (1899:II) *British Medical Journal* 278 at 279.

[39] Edward M. Spiers, 'The Use of the Dum Dum Bullet in Colonial Warfare' (1975) 4 *Journal of Imperial and Commonwealth History* 3 at 12.

of the laws of war to the actions of the French in Damascus relied on superficial formalistic arguments,[40] whilst almost obscenely dabbling in Lorimer's pseudo-scientific distinctions between 'civilized', 'barbarous' and 'savage' humanity.[41] Humanitarians and colonialists had different views about how to deal with 'savages', but little doubt that 'savages' they were.

Fourthly, for all the occasional passionate defences of humanitarianism, many of the arguments put forward by those who favoured including 'savages' within the ambit of humanitarian law reflected a sort of weak instrumentalism. One fear was that use of certain means or methods of combat in the colonies might be a prelude to their use on the European battlefield. As Edward M. Spiers puts it, concerns about uses of dum-dum bullets against the Afridis by the Tirah Expeditionary Force were fuelled by the possibility that '[f]uture wars would become even more atrocious if all armies, especially the well-armed forces of Continental Europe, procured this kind of ammunition'.[42]

Another concern was the 'ugly practice' of using colonial troops from the 'weaker races of Africa and Asia'[43] in a European context. US General Tasker H. Bliss insisted at the 1899 Hague Conference that '[t]he United States . . . should demand as its right, the right of civilization, that . . . millions of men of savage races shall not be trained to take part in possible wars of civilized nations'.[44]

Others were merely concerned about the practicality of using different types of weapons against different types of enemies. For Raffalovich, for example, being able to use explosive bullets against 'savages' but not against 'civilized' troops 'would necessarily induce complications of equipment'.[45] In fact, it would be possible to

[40] Wright reminds us that 'China, Japan, Liberia, Persia, Siam, and Turkey were members of the Hague Conferences': 'Bombardment of Damascus', p. 267.

[41] Wright considered that Arab Syrians typically fell in the second category on account of their immaturity: *ibid.*, pp. 265–6.

[42] Spiers, 'Use of the Dum Dum Bullet', p. 6.

[43] As quoted in Ray Stannard Baker, 'Savages in Modern War', *New York Times*, 12 February 1922, Special Features, p. 1.

[44] *Ibid.* General Bliss added the following rather extraordinarily insightful line to his plea: 'If civilization wants to destroy itself it can do it without barbarian help.' A related fear was that 'now that natives had been trained and disciplined in army matters what was to prevent their turning this knowledge against their white neighbors?'.

[45] Scott, *1899 Proceedings*, p. 287.

> contemplate the case of soldiers stationed outside of Europe and armed with bullets for use against 'savages', who would be called upon to fight against the regular troops of a civilized nation. They would then have to have two kinds of cartridge belts.[46]

The Ordnance Department of the British Army also thought that keeping a double stock of ammunition would 'pose immense problems', especially where a force was 'expected to quell disorder in lands coveted by another colonial power'.[47] Clearly, this would be a nuisance.

The relative weakness of the case put forward by advocates of the extension of the laws of war to 'savage' peoples, and their failure to engage critically the very concept of civilization, meant that the whole issue of the application of the laws of war remained shrouded in ambiguity. This was an ambiguity which was more effectively used by those who would have done without the laws of war than by their opponents.

The theoretical and effective exclusion of non-European peoples from the laws of war

The one thing that defences of the applicability of the laws of war beyond Europe may have managed to do is make it marginally harder explicitly and publicly to defend the idea that they were not so applicable. This probably explains why the question of the exact position of non-European peoples in the laws of war was avoided in international instruments themselves. The non-applicability of the laws of war beyond the European world, in this context, must be understood less as the product of an explicit authorization, than as a function of persistent structural ambiguities of the laws of war, occurring in the context of the very real international legal prejudices of the time and against the background of the colonial mindset.

The idea that the laws of war did not apply to non-European peoples was simply the application to a specific field of the then dominant concept of international law. The notion that the law of nations did not apply, at least not in its entirety (but often not at all), to non-European peoples, was well accepted in the nineteenth century. As John Stuart Mill put it, with a tone of self-evidence:

[46] *Ibid.*, pp. 343–4. [47] Spiers, 'Use of the Dum Dum Bullet', p. 7.

> [t]o suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into.[48]

This was an idea that was enthusiastically endorsed by many early humanitarians. It was in many ways a continuation of earlier ideas that the usages of war did not apply to non-Christian peoples.[49] The 1914 British military manual, co-authored by none other than a certain Oppenheim, noted that '[i]t must be emphasized that the rules of International Law apply only to warfare between civilized nations . . . They do not apply in wars with uncivilized States and tribes.'[50]

Humanitarian lawyers' ambiguous stance on these issues was all the authorization that colonial adventurers needed, and if one thing is certain it is that words were almost systematically followed by deeds. Throughout the non-European world, means and methods of warfare were used and new ones experienced that were increasingly considered despicable in European warfare, and which evidenced a flagrant disregard for other peoples. Although in Namibia, the Hereros 'at least were prepared to conduct war on civilised lines . . . [t]he Germans shrank from no acts of treachery or breaches of the laws of war', including the murder of 'Herero

[48] 'A Few Words on Non-Intervention' in *Collected Works* (ed. John M. Robson, 23 vols., Toronto, 1984), vol. XXI, p. 118. This was, interestingly, an idea which met with approval from de Martens, for example, who found it shockingly implausible that international law would apply vis-à-vis 'semi-savage nations' given the sheer differences between 'the populous countries of Europe and America' and the 'desert reaches of Asia'. Surely, given such differences, international law 'would not remain immutable and intact'. De Martens, after reviewing what other authors had had to say on the issue, faulted the 'generous and enlightened cosmopolitanism' of those who would have had international law apply to the whole humanity, for 'taking away from international law any positive basis and depriving it of all practical reach'. De Martens concluded: 'It is necessary to make only one observation: virtually, international law is not applicable to the whole human genre.' De Martens, 'La Russie et l'Angleterre', pp. 234–6.

[49] Denial of quarter to Muslims, for example, was largely accepted: see Ronald C. Finucane, *Soldiers of the Faith: Crusaders and Moslems at War* (London, 1983). Vitoria considered this to be a matter of military necessity: see Francisco de Vitoria, 'On the Law of War' in Anthony Pagden and Jeremy Lawrance (eds.), *Vitoria: Political Writings* (Cambridge, 1991), pp. 293–328 at §§ 44–8.

[50] J. E. Edmonds and L. Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army* (London, 1914), para. 7 ('British Military Manual of 1914').

leaders who came to negotiate under promises of safe-conduct'.[51] The 'Hun letters' revealed to the world the atrocities committed by German soldiers under the orders of General Field Marshal Alfred von Waldersee against the Chinese, including the slaughter of civilians, women and children. The British decided to use dum-dum bullets (or bullets infected with smallpox) in colonial operations, as 'ammunition more suitable to the conditions of savage warfare',[52] and inaugurated the practice of aerial bombardments of rebel tribes. The French resorted to extreme violence to subdue Algeria, Madagascar and Morocco.[53] The Italians used gas against the Ethiopians at a time when such use had been all but abandoned in the European context.

In its proto-fascist variant, as expounded by Heinrich von Treitschke, a leading German intellectual of the turn of the nineteenth century, the case for non-applicability involved saying that:

> [i]nternational law becomes phrases if its standards are also applied to barbaric peoples. To punish a Negro tribe, villages must be burned . . . If the German Reich in such cases applied international law, it would not be humanity or justice but shameful weakness.[54]

Even though this sort of explicit apology of ruthlessness was relatively exceptional, it may not have been so far removed from what many thought, even if they did not say so as clearly.[55] One clue to the mood of the times is how open military men were about announcing their intentions. The opinion that 'savages' had to be treated ruthlessly was one that could clearly be held openly and few attempts were made to cover a paper trail. General von Trotha, for example, had no qualms about publicly proclaiming and signing as 'the Great General of the Mighty Kaiser' his infamous 'extermination order' (one

[51] Albert Gray, 'The German Colonies of Africa' (1919) 1 *Journal of Comparative Legislation and International Law* 25 at 33.

[52] Mr Arthur Lee (Hampshire Fareham) in Parl. Deb., vol. LIII, Ser. 4, p. 461, 8 February–24 February 1898.

[53] See Sadek Sellam, *Parler des camps, penser les génocides* (Paris, 1999).

[54] Peter H. Maguire, *Law and War: An American Story* (New York, 2000), p. 50.

[55] See Geoffrey Best, *War and Law since 1945* (Oxford, 1994), p. 59 ('A Briton would like to think that only fascism could have devised the ingenious spraying of liquid mustard gas over the semi-naked tribal warriors of Abyssinia, but there is plenty of evidence that some British imperial minds were attracted by the idea of doing something similar to troublesome Afghans and Somalis').

which Pakenham points out had 'few parallels in modern European history'):[56]

> I, the great general of the German troops, send this letter to the Herero people . . . All Hereros must leave this land . . . Any Herero found within the German borders with or without a gun, with or without cattle, will be shot. I shall no longer receive any women or children. I will drive them back to their people or I will shoot them. This is my decision for the Herero people.[57]

The order turned out to be very much a statement of intention, which was implemented with vigorous Prussian efficiency.

The fact that using different tactics against the 'civilized' and 'non-civilized' might cause significant training or logistical problems was in the end clearly not seen as an insurmountable problem. Lord Lansdowne, when confronted with suggestions that having two types of ammunition (ordinary and dum-dum) might actually be impractical, recommended to the Cabinet 'that we must make and keep a stock of both kinds of ammunition, with the intention (which we can keep to ourselves) of using the expanding bullet when we have to deal with savages'.[58] Thus was created one of the most notable yet forgotten cases of double standards in the history of international law.[59]

The resulting purely voluntary character of application of the laws of war to non-European peoples

Despite the non-applicability *stricto sensu* of the laws of war, these might still be applied on other grounds – '[t]he discretion and the decency of the commander are also factors', as one author put it.[60] If the laws of war were to be applied to 'savages' at all, and in accordance with a broader tradition of discretionary application of international law outside the

[56] Thomas Pakenham, *The Scramble for Africa: The White Man's Conquest of the Dark Continent 1876–1912* (New York, 1991), p. 611.

[57] Order of 2 October 1904, as quoted in Jon M. Bridgman, *The Revolt of the Hereros* (Berkeley, 1981), p. 129.

[58] Quoted in Spiers, 'Use of the Dum-Dum Bullet', p. 7.

[59] This is analogous to the double standard by which liberal thinkers in Europe, for example, praised self-determination when it came to European countries but felt incapable of defending a similar principle beyond Europe, where they held that a right of conquest and subjugation still held sway: Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, 1996), p. 62.

[60] Elbridge Colby, 'How to Fight Savage Tribes' (1927) 21 *American Journal of International Law* 279 at 288.

'civilized' heartland,[61] it was to be merely as a result of charity or chivalry.[62] The British war manual, for example, emphasized that the decision to apply the laws of war in colonial contexts 'is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case'.[63] 'May these rules be observed . . . better observed than in the past, and even with regard to races who we have been accustomed to regard as inferior to our own',[64] concluded the decent-minded M. Beernaert (a Nobel Prize winner under whose Prime Ministership the independent state of Congo was created) as the President of the Second Committee of the Hague Conference of 1907.[65] The application of humanitarian principles, in other words, would be a measure of the commander's charity, rather than the result of legal compulsion.

International humanitarian lawyers, of course, in the tradition of liberal humanistic optimism, seemed to have considerable faith in the humanitarian character of the colonial officer. For example, Westlake, after recognizing that targeting the civilian savage populations was acceptable in law, suggested that 'no humane officer will burn a village if he has any means of striking a sufficient blow that will be felt only by the fighting men'.[66] This was, of course, at a time when US officers (although obviously not the humane ones) were routinely torching villages in the Philippines.[67]

Even when such humane treatment was exceptionally extended to the 'uncivilized', however, authors insisted that this should in no way be seen as a recognition or upgrading of the degree of civilization of the 'uncivilized'.

[61] See L. Oppenheim, *International Law: A Treatise* (1st ed., 2 vols., 1905), vol. I, p. 34; Amos S. Hershey, *The Essentials of International Public Law and Organization* (revised ed., New York, 1927), p. 166 ('The Law of Nations can be only partially applied to barbarians or half-civilized peoples, and still less to savages; but it should be applied to the greatest extent practicable' (citations omitted)).

[62] A sense of paternalistic honour and civilizational pride seems to have been at the heart of various arguments in favour of moderating one's behaviour when it came to non-civilized peoples. See de Martens, 'La Russie et l'Angleterre', p. 240 ('Would it be fair, would it be worthy of European civilization to declare that its representatives, in their international relations, are free of all restraint . . .?').

[63] British Military Manual of 1914, para. 7.

[64] James Brown Scott, *Proceedings of the Hague Peace Conferences: Conference of 1907* (3 vols., London, 1920), vol. III, p. 89.

[65] Auguste Mélot, 'Beernaert et le Congo, 1884–1894' (February 1932) 127 *La Revue Générale* 147–67. It is noteworthy that Beernaert's relationship with Leopold soured specifically because Beernaert opposed the exploitation of Congo.

[66] John Westlake, *International Law* (2 vols., Cambridge, 1914), vol. II, p. 59.

[67] See Russell Roth, *Muddy Glory: America's 'Indian Wars' in the Philippines, 1899–1935* (West Hanover, MA, 1981).

If American officers gave strict orders in 1900 against theft in Beijing, it was not because Chinese civilization was 'really advanced' and therefore worthy of protection, but 'because of the internal necessity for military discipline and control, as well as an innate sense of decency'.[68]

One American author in the 1920s described the right attitude when confronted with 'savages':

> It is good to be decent. It is good to use proper discretion. It is good to observe the decencies of international law. But it is a fact that against uncivilized people who do not know international law and do not observe it, and would take advantage of one who did, there must be something else. The 'something else' should not be a relaxation of all bonds of restraint. *But it should be [a] clear understanding that this is a different kind of war, this which is waged by native tribes, than that which might be waged between advanced nations of western culture.* Ferocity and ruthlessness are not essential; but it is essential to recognize the different character of the people.[69]

The Martens clause would seem to have marginally improved the condition of 'non-civilized' peoples. Few for example would have gone so far as to advocate that the clause did not apply to 'savages', and the consensus was that it did.[70] But, whereas in its supplemental, gap-filling function, the Martens clause was a welcome safety net for European combatants whose protection on the field of battle was otherwise guaranteed by abundant rules, the fact that for 'savages' it was the only legal protection they could rely on would have made it a meagre consolation. The benefit of precisely what the Hague Regulations had sought to achieve – the moving of humanitarianism from the province of moral or chivalrous compulsion to positive law – was thus denied to non-European peoples, effectively leaving Europeans' relations with them in a pre-modern realm of fragile natural obligations.[71]

[68] Colby, 'Savage Tribes', p. 286. Of course, the wonderful irony of citing this point is that this particular Western military intervention ended in the sacking of Beijing.

[69] *Ibid.*, p. 287 (emphasis added).

[70] See Hershey, *Essentials of International Public Law*, p. 578.

[71] This is consonant with a general idea in international law, expressed by some humanitarians elsewhere in their writings. According to de Martens, for example, it is not because European nations are not bound by international law in their relations with 'barbarians' that 'Christian nations are obliged to follow no rule towards savage peoples'. 'It is natural law, not international law, which is applicable to the relations between civilized nations with the nations of Asia . . . In Asia, international law transforms itself into natural law': de Martens, 'La Russie et l'Angleterre', pp. 240–1. Hall considered that 'European States will be obliged, partly by their sense of honour, partly by their interests, to be guided by their own artificial rules in dealing with semi-civilised states, when the latter have learned

The rationale for excluding 'non-civilized' peoples from the protection of the laws of war

The fact that non-European peoples were excluded from the protection of the laws of war because international law did not apply in the relations of 'civilized' with 'non-civilized' nations does not by itself explain how that position was arrived at so uncritically, or what its foundations were, particularly when it came to the laws of war. In order to understand how that exclusionary stance might conceivably persist even in very different times, furthermore, it is necessary to understand its basis in a number of deeply held beliefs about the nature of international law, 'civilization' and 'savagery'. It is these structuring beliefs which, once incorporated deep into the law, would continue to condition its operation, even when the law would be formally purged of such biases.

It is hard to find a single dominant reason why the laws of war were effectively not applied to non-European peoples. It seems that, as a matter of fact, the non-application resulted from the convergence of several intertwined and mutually reinforcing trends. Each layer of argument was backed by further layers of prejudice, so that the more formal ideas (absence of treaty ratification) were in fact backed by a certain world vision (the opposition between 'civilization' and 'non-civilization') which was itself rooted in a certain anthropology (the savage as incapable of respecting the laws of war).

Absence of treaty ratification

At the most superficial level, the exclusion of non-European peoples from the laws of war was a direct function of the adoption by the nascent 'international community' of legal positivism, with its emphasis on the state as the sole source of law and thus as the methodological and substantive framework of international law. At a formal and explicit level, the laws of war were considered to apply only between states, and only to the extent that states were party to them. The great founding international humanitarian instruments reflect that consensus. According to the St Petersburg Declaration of 1868, '[t]he *Contracting Parties* engage mutually to renounce, *in case of war among themselves*, the employment . . . of

enough to make the demand, long before a reciprocal obedience to those rules can be reasonably expected': William Edward Hall, *A Treatise of International Law* (Oxford, 1924), pp. 48–9.

any projectile of a weight below 400 grammes'.[72] Article 2 of the 1899 Hague Convention II anticipates that '[t]he provisions contained in the Regulations mentioned in Article 1 are only binding on the *Contracting Powers*, in case of war between two or more of them'.[73] The Preamble to the 1907 Convention respecting the Laws and Customs of War on Land describes its goal as averting 'armed conflicts *between nations*'.[74]

If those that European powers were fighting were not parties to the relevant instruments, then there would be little scope for applying the laws of war (or any international law) to them: '[s]trictly speaking, and in a fine legal sense, [the commander] is not bound to observe the precepts of international law against any nation that is not a co-signer of the conventions'.[75] A fortiori, if enemies were not even nations, prospects for applying the laws of war would have been remote. At the 1899 Conference, we have specific evidence in the *travaux préparatoires* that delegates had no doubt that non-participation in the relevant treaties clearly excluded at least non-European peoples: 'It is evident that there is a gap in the St Petersburg Declaration, a gap which enables not only dumdum bullets but even explosives to be used against savages.'[76] Non-European peoples' lack of participation in relevant treaties would prove a stumbling block much later for claims made by colonized peoples alleging violations of the laws of war.[77]

The perversity of this whole situation is, of course, that the non-participation of 'non-civilized nations' in humanitarian treaties was not their choice, but simply a consequence of the fact that, since they were not considered sovereign (a quality from which they were excluded by 'civilized nations'), they could not possibly join these treaties even if they

[72] Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, St Petersburg, 29 November 1868, in force 11 December 1868 (for an English translation, see (1907) 1 *American Journal of International Law Supplement* 95).

[73] The Hague, 29 July 1899, in force 4 September 1900, 32 Stat. 1803 (emphasis added).

[74] The Hague, 18 October 1907, in force 26 January 1910, 36 Stat. 2277 (emphasis added).

[75] Colby, 'Savage Tribes', p. 287.

[76] Scott, *1899 Proceedings*, p. 314.

[77] See Sidney L. Harring, 'German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?' (2001–2) 104 *West Virginia Law Review* 393. According to Harring, Germany would have to argue that 'there was, after 1899, one set of rules for European nations conducting wars with each other and a completely different set for those same nations conducting "colonial" wars, or even more bluntly put, wars against "ethnic" peoples' to deny the applicability of the laws of war. Such an argument would be based on the fact that since 'the Herero were not represented at the Hague, and could not, therefore, sign the convention', whatever 'systematic violations' occurred could not be actionable: at pp. 406–7.

wanted to. An otherwise 'non-civilized nation' could not have elected to do the 'civilized' thing. 'Non-civilization' was both the cause and the consequence of not being party to international humanitarian instruments, a seemingly inescapable trap.

'Civilization' v. 'non-civilization'

In truth, however, the non-applicability of the laws of war to non-European peoples did not need such rationalizations, and European reluctance ran much deeper. More than simply a formal question of participation in treaties, what seems to have been at stake is a sense of distance, a distance that was of course geographic but also and mostly civilizational. If gases were used against the Somalis by the Italians, for example, it was because the 'war took place in a far away and isolated country and against populations that were considered an inferior race and culture'.[78] A contrario, a sense of civilizational commonality could easily substitute for lack of participation in a common treaty. As Sir Thomas Barclay noted:

> The European operations in China consequent on the 'Boxer' rising showed how distance from European criticism tends to loosen that restraint [in waging war]. On the other hand, it was significant that both the United States and Spain, who were not parties to the Declaration of Paris, found themselves, in a war confined to them, under the necessity of observing provisions which the majority of civilized states have agreed to respect.[79]

If the laws of war were not applied to colonial wars, it was in fact less for some principled legal reason than ultimately because of a hypertrophied distinction between the 'civilized' and the 'uncivilized' world. Behind the idea that it was states that were party to international humanitarian treaties, was also the idea that it was states who waged war, and that to be a state was to be 'civilized'. At heart, the underlying argument behind the promotion of the laws of war was that this was *what 'civilized' nations did*. As the Martens clause makes evident, 'the usages established *between civilized nations*' was the yardstick by which the behaviour of all should be judged. To uphold 'civilization' and 'civilized nations' as the benchmark, in turn, one necessarily had to point to the 'non-civilized', presumably to be found in the darker recesses of Asia and Africa. The

[78] Giorgio Rochat, 'L'impiego dei gas nella guerra d'Etiopia 1935–1936' (1988) 1 *Rivista di Storia Contemporanea* 74 at 103.

[79] Thomas Barclay, 'War' in *Encyclopaedia Britannica* (11th ed., 28 vols., London, 1910), vol. XXVIII, pp. 305–16 at p. 316.

unavoidable corollary was that 'non-civilized nations' were incapable of 'civilized' warfare.

In this, the colonialist and the humanitarian were of one mind. What made colonization possible was also in effect what made the exclusion of non-European peoples logical: these would be civilized by force if need be, while being denied the benefits of civilization, on account of their 'non-civilization'. The contrast between 'civilized nations' and 'barbarians' or 'savages', therefore, is a constant theme of the early modern literature on the laws of war. It is, in many ways, only a secularized version of the contrast between Christians and non-Christians in an earlier age of international law.[80] Francis Lieber summed up a certain contemporary mood perfectly when, *in the Lieber Code itself*, he made the following contrast:

> 24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized peoples, the exception.
>
> 25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.[81]

One theme that emerges often in this context is that 'civilized' nations will refrain from revenge in favour of a more modern doctrine of reprisal (retaliation for the purposes of making a violation cease). 'Civilized nations' in their dealings with each other should therefore avoid '[u]njust or inconsiderate retaliation [which] removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps *leads them nearer to the internecine wars of savages*'.[82] According to General Halleck, '[a] savage enemy might kill alike old men, women and children, but no civilized power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation'.[83] Indeed, arguing that '[t]here are some infringements which can never be met with reprisals in kind', Baty commented that '[*n*]*oblesse oblige*, and a

[80] See Finucane, *Soldiers of the Faith*.

[81] US War Department, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100 (24 April 1863) ('Lieber Code').

[82] *Ibid*., Art. 28 (emphasis added).

[83] Henry Wager Halleck, *Elements of International Law and Laws of War* (Philadelphia, 1872), p. 200.

self-respecting commander will not follow the example of an antagonist, should that example unfortunately be set, in reducing a civilized army to the rank of a band of massacring savages'.[84]

This constant contrasting of the 'civilized' and the 'non-civilized', and association of civilization with the laws of war, is what then made it easy to take the next step – to consider that the laws of war were not applicable to 'non-civilized' peoples. It is important to note that there is nothing automatic or absolute about this next step. The fact that 'civilized warfare' is what 'civilized nations' do does not by itself allow 'civilized nations' to wage indiscriminate warfare against 'non-civilized nations'. It might well be (and we have certainly come to understand it this way) that the measure of 'civilization' is precisely that one will wage 'civilized warfare' even against 'non-civilized peoples' (or 'civilized peoples' led momentarily astray).

But the fact that 'civilized warfare' becomes associated with a strong sense of identity and intra-European solidarity (the Hague Conference itself is often viewed as 'fortifying the sentiment of solidarity among civilized nations')[85] is also what sets the stage psychologically for a releasing of constraints outside Europe. As one British colonel put it: '[i]n small wars against uncivilized nations, the form of warfare to be adopted must tone with the shade of culture existing in the land, by which I mean that, against peoples possessing a low civilization, war must be more brutal in type'.[86] General Robert Hughes justified the murder of women and children in the Philippines on the ground that these were 'not civilized', while President Theodore Roosevelt described the war, one fought against 'Chinese half-breeds', as 'the most glorious . . . in our nation's history'.[87] Essentially, the idea was one of a sliding scale; that standards in warfare should be dependent on whom one was fighting against.

Such was the belief that waging 'civilized warfare' was what European nations did between themselves, that there was little fear and in fact a quiet confidence that practices experimented in the colonies would not somehow spill over, and come back to haunt Europe.[88]

[84] T. Baty, *International Law in South Africa* (London, 1900), p. 86.
[85] Scott, *1899 Proceedings*, p. 314.
[86] John Frederick Charles Fuller, *The Reformation of War* (London, 1923), p. 191.
[87] As quoted in William Loren Katz, 'Splendid Little War; Long Bloody Occupation: Iraq, the US and an Old Lesson' (28 April 2004), http://www.ccmep.org/2004_articles/iraq/042804_little_war.htm (accessed 1 November 2005).
[88] See Richard Price, 'A Genealogy of the Chemical Weapons Taboo' (1995) 49 *International Organization* 73 at 96–7:

An anthropology of the 'savage' as incapable of respecting the laws of war

Apart from a general idea of racial inferiority, there was also something very specific about the 'savage' that made him unworthy of the benefit of international humanitarian law. It is this specific something to which we must pay attention in order to understand the constitution of the laws of war and some of its resulting vulnerabilities – vulnerabilities that may well resurface in very different contexts many years later. The central idea behind the non-applicability of the laws of war is the idea that the savage is an 'other' specifically in that he is *incapable of showing restraint in warfare*.[89]

In order to show how prominent and central that idea is to the whole enterprise of 'excluding the savage', I want to draw principally on an article written by one Captain Elbridge Colby, a US army lawyer, in the wake of the bombing of Damascus by the French in 1925.[90] Elbridge Colby is an interesting, contrasted character. Colby denounced the acquittal by an all-white jury of a man who had, in 1925, shot a black soldier for refusing to step off a sidewalk to let a white man pass, an event that was to have significant negative repercussions on Colby's career. He was also an early apologist for aerial warfare, arguing that, since bombardments from the air would lack the requisite precision, the laws of war should be reformed (rather than air warfare abandoned). One interesting thing about this article is that it was written at a time when the tides were beginning to turn and when those in favour of not applying the laws of war to 'savages'

> The use of CW against Ethiopia led some to expect – and fear – that their employment would be a matter of course during World War II. For others, however, the assessment was different: war among the industrialized nations of Europe was a different matter than conflicts involving less technologically advanced areas, such as the colonies. The surprising lack of gas warfare during World War II can thus be understood as implicated in a process by which the conduct of war among 'civilized' nations was demarcated from that involving 'uncivilized' nations . . . [CWs] were implicated in the process of the hierarchical ordering of international politics into the civilized and uncivilized arenas.

[89] Note that an anthropology of savageness was also behind other attempts at excluding non-Western peoples from the benefit of the laws of nations. See for example G. C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartolome De Las Casas' (1990–1) 13 *Australian Year Book of International Law* 1 at 28 ('There is a vital connection between the question of the status of the indigenous inhabitants – their alleged "barbarism", "primitiveness", "backwardness", etc. and the territorial concept of *terra nullius*. By defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land to empty land – *terra nullius* – available for the first taker').

[90] Colby, 'Savage Tribes'.

were called upon to rationalize arguments that had until then been simply the unquestioned assumptions of the field.

A word on the context is in order because of the subtle and not so subtle similarities between these particular incidents and some current events. After the First World War, an independent kingdom of Syria had been briefly proclaimed in 1920. France, however, had reoccupied Syria forcefully on the basis of the mandate it had been granted at Versailles, 'sacrificing herself' in defence of the civilizing mission, with a view to bringing democracy, development and human rights. The Syrians, who were unreceptive to the idea that the occupation was for their own good, showed consistently in polls that a majority wanted the occupation to end.[91] Syrians sent petitions to the League of Nations complaining about French exercise of power under the mandate. When these petitions went unheeded, uprisings erupted. In 1925, a more significant uprising broke out after the French high commissioner failed to handle properly Druze complaints against Captain Carbillet, a French officer who – although he also built roads, bridges and dams – tended to manipulate tribal factions in a way that threatened the feudal authority of Druze sheikhs. The French repressed the insurgency brutally. Insurgents were designated as 'brigands', villages that had harboured them were burned and the bodies of twenty-four rebels were paraded in the streets on camel backs before being exposed in a Damascus public square. After more fighting from the Syrians, the counter-insurgency took a new dimension. The French sent tanks into the streets and systematically bombed Damascus from the hills. Whole neighbourhoods were razed. Between 500 and 1,000 locals were killed. Priceless Islamic cultural artifacts were lost.[92]

Following the bombing, a controversy unfolded in the columns of the *American Journal of International Law*. The article by Colby is in fact a response to an earlier article published by Quincy Wright in favour of the applicability of the laws of war. The Colby article constitutes one of the last systematic attempts at excluding 'non-civilized peoples' from the laws of war, one which seeks to articulate, on the basis of existing sources, precisely what it is that makes 'savages' unworthy of such protection.

Colby starts off his article by reaffirming the founding dichotomy: there is 'one matter which must be faced', namely the fact that the distinction between 'civilized' and 'non-civilized' in warfare 'is existent'.[93] According to Colby, the difference in treatment between 'civilized' and

[91] Wright, 'Bombardment of Damascus', p. 263.
[92] *Ibid.*, p. 264. [93] Colby, 'Savage Tribes', p. 279.

'non-civilized' is 'based on a difference in methods of waging war and on different doctrines of decency in war'.[94]

The first thing that 'savages' fail to do, according to Colby, is to have a differentiated concept of combatant and non-combatant among their own populations. Colby is thus an early critic of guerilla or 'unlawful' warfare. According to Colby, 'among savages, war includes everyone. There is no distinction between combatants and non-combatants. Whole tribes go on campaign. This is the primitive method of applying armed force.'[95] This, for Colby, was the end of the law: 'When the distinction vanishes in fact, it likewise vanishes in law. When the distinction is not readily apparent to a field commander, that commander is perfectly justifiable in ceasing to observe it, for the safety of his own troops is his paramount consideration.'[96] Therefore '[a]gainst elusive savage or semisavage people, and against tribal units which wage war as complete tribes, the method must be, as the British Colonel Fuller has said, "more brutal"'[97] because:

> When combatants and non-combatants are practically identical among a people, and savage or semi-savage peoples take advantage of this identity to effect ruses, surprises, and massacres on the 'regular' enemies, commanders must attack their problems in entirely different ways from those in which they proceed against Western peoples.[98]

This finding that 'savages' simply could not be relied on to distinguish themselves from the rest of the population as combatants is also something that one finds in justifications for not abiding by the laws of war in battles with Indians in the US.[99] As a result, Colby ends up justifying Kitchener's suppression of the Boers by claiming that 'those who understand the task imposed upon the British Army must realize that such was the only available course, and cannot actually condemn such suppression of such irregular resistance as contrary to international law'.[100]

Secondly, and apart from the issue of *who* wages war, the point is that 'savages' wage war in a way that is very different from 'civilized nations' – in a way that is, in fact, more murderous, cruel and lawless. According to Colby, 'we find many incidents in history to support the British theory

[94] *Ibid.* [95] *Ibid.*, p. 281. [96] *Ibid.*, p. 282. [97] *Ibid.*, p. 283. [98] *Ibid.*, p. 279.

[99] See Guenter Lewy, 'Were American Indians the Victims of Genocide?' (2004), http://hnn.us/articles/7302.html (accessed 1 November 2005): '[R]ules were soon abandoned on the grounds that the Indians themselves, failing to adhere either to the laws of war or to the law of nature, would "skulk" behind trees, rocks, and bushes rather than appear openly to do "civilized" battle.'

[100] Colby, 'Savage Tribes', p. 283.

that when natives go to war, they do not observe the individual decencies of civilized regular soldiers'.[101] Colby draws heavily on the American experience to point out 'the almost universal brutality of the red-skinned fighters'[102] and more generally the fact that 'devastation and annihilation is the principal method of warfare that savage tribes know'.[103] In conclusion, according to Colby:

> The fact simply is that when a tribe on the war-path measures its victories by the number of houses burned and the number of foes, combatant or non-combatant, cut up, you must use a different method of warfare. When Oriental peoples are accustomed to pillaging and being pillaged, accustomed to torturing and flaying alive distinguished prisoners, you are dealing with opponents to whom the laws of war mean nothing.[104]

This is not an isolated justification. It is a kind of anthropology that one finds paving the way to other contexts of brutal repression as well. One leading German ethnologist of the early twentieth century, for example, noted that '[i]n war the Herero, when he gains the upper hand, becomes a wild animal'.[105] An international law textbook written in the 1920s pointed out that '[a]mong savages, prisoners are often tortured and killed, sometimes sacrificed or eaten'.[106] Similar ideas had been used by the British to justify total warfare against the Irish,[107] and by American colonists to justify the brutal slaying of Indians.[108]

One Italian officer who sought authorization to use gases in Somalia insisted that '[a]gainst barbarian hordes ready to commit any horror, such as those that are advancing, I believe that no weapon should be spared'.[109]

Closely related is the idea that, if 'savages' do not know any better, it is simply because they are too limited intellectually and therefore fail to see the sophisticated utilitarian rationale for respecting the laws of war.[110] This sort of opinion could count on a long tradition in which featured

[101] *Ibid.*, p. 284. [102] *Ibid.* [103] *Ibid.*, p. 285. [104] *Ibid.*

[105] Karl Dove, as cited in Dan Stone, 'White Men with Low Moral Standards? German Anthropology and the Herero Genocide' (2001) 35(2) *Patterns of Prejudice* 33 at 41.

[106] Hershey, *Essentials of International Public Law*, p. 585.

[107] Ronald Dale Karr, '"Why Should You Be So Furious?": The Violence of the Pequot War' (1998) 85 *Journal of American History* 876 at 886.

[108] *Ibid.*, pp. 888–9.

[109] See Rochat, 'L'impiego dei gas nella guerra d'Etiopia', p. 96.

[110] See Carl von Clausewitz, *On War* (ed. and trans. Michael Howard and Peter Paret, Princeton, 1976) ('if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods [than was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct').

many prominent humanitarians.[111] As Sir John Charles Ardagh put it, in an effort to justify his opposition to the ban on dum-dum bullets:

> In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the decision of the Hague Conference, he cuts off your head. For this reason the English delegate demands the liberty of employing projectiles of sufficient efficacy against savage races.[112]

Tribal warriors are therefore either too cruel or too imbecile or both to be able to respect the laws of war.[113] These shortcomings among 'savages' – non-distinction, cruelty, imbecility – lead to a final unifying point (common to international law generally),[114] which was that, in addition

[111] See de Martens, 'La Russie et l'Angleterre', pp. 237–9. De Martens argued that '[n]on-civilized peoples . . . are incapable of understanding the fundamental ideas, legal and moral, upon which the society of European or civilized nations was built'. Indeed, he noted that 'the life of barbarians knows of neither commerce, agriculture or professions'. Each individual being 'his own protector' and completely devoid of the 'intelligence of the need of mutual cooperation', not only can barbarian peoples not 'possibly understand the need for well established interaction' but it is 'impossible for them to recognize which legal rules they should bend their will to'.

[112] Scott, *1899 Proceedings*, p. 343. The idea that 'savages' could not be stopped by ordinary bullets was a very persistent one, as shown by later Parliamentary debates: see Parl. Deb., vol. LIII, ser. 4, p. 992, 8 February–24 February 1898 (ordinary bullets 'had very little effect upon savages' and were 'not sufficient to stop the Sudanese in their wild charges'. 'A savage could not be disabled by an ordinary bullet. Therefore, it was necessary to use greater force').

[113] The anthropology changed tone when dealing with the Far East, but this does not mean that the Chinese in particular fared better. Ideas of primitiveness and lack of sophistication were replaced by a depiction of Asians as characterized by 'scoundrelish behavior' as well as the 'trickiness and unreliability of the yellow race' (Admiral Otto von Diederichs, as quoted in George Steinmetz, '"The Devil's Handwriting": Precolonial Discourse, Ethnographic Acuity, and Cross-Identification in German Colonialism' (2003) 45 *Comparative Studies in Society and History* 41 at 67). Again, the idea was that the radical difference between 'us' and 'them' justified a releasing from the bonds of the laws of war. On 27 July 1900, Emperor William II delivered his infamous 'Hunnenrede' or 'Hun speech' (comparing the Chinese to the Huns), as he bid farewell to the first three navy vessels transporting the German East Asia Expeditionary Corps to repress the Boxer Rebellion in China. 'Be aware', warned Wilhelm, 'that you shall fight against a cunning, courageous and well armed, and cruel enemy. Once you arrive, keep in mind: no pardon shall be given, and no prisoners taken': Johannes Penzler (ed.), *Die Reden Kaiser Wilhelms II* (4 vols., Leipzig, undated), vol. 2, *1896–1900*, pp. 209–12.

[114] The absence of reciprocity is more generally one of the unifying themes behind the denial of the applicability of international law to savages: see Hershey, *Essentials of International Public Law*, pp. 165–6:

to the fact that they were of course not parties to the relevant treaties, no reciprocity could realistically be expected from them.[115] Colby strongly commends 'the experience of the red-coated army that has fought perhaps in more corners of the globe with more uncivilized and savage peoples than any other military organization in modern times'[116] for showing us that 'the rules of International Law apply only to warfare between civilized nations, where *both parties understand them and are prepared to carry them out*'.[117] This echoes the answer given by the air force when asked by the chief of India's Northwest Province, 'What are the rules for this kind of cricket?': international law does not apply 'against savage tribes *who do not conform to codes of civilized warfare*'.[118]

Indeed, the risk if the laws of war were respected scrupulously vis-à-vis the 'non-civilized', as one delegate put it during the 1899 Conference, is that 'civilized nations' might well be put 'in a disadvantageous position in time of war with less civilized nations or savage tribes'.[119] Would it be reasonable to ask of 'our soldiers' to refrain from 'avert[ing] an impending disaster that [would] entail their annihilation, or even, it may be, lead to English men and women falling human sacrifices to some African Juju, in some African city of blood' by denying them the use of 'small-arm projectiles more efficient than they would employ against a civilised nation, kindred, perhaps, to ourselves in blood'?[120]

The central point here seems to be that 'savages' do not wage 'civilized war', therefore 'civilized warfare' cannot be waged against them. According

> Only States with a certain degree of civilization somewhat resembling that of Western Europe and America are held to be entitled to full recognition as members of the international community. This is because a certain amount of mutual understanding and reciprocity of interests is essential to advantageous and continued international intercourse, and the existence of States with the will and capacity to fulfill their international obligations is a necessary qualification for membership in the modern family of States.

[115] This echoes a more general point often made in the international legal literature on relations with 'savages'. According to de Martens, for example, 'all relations between civilized nations rest on the idea of reciprocity', an idea that was 'incomprehensible to barbarian nations': de Martens, 'La Russie et l'Angleterre', p. 239.

[116] Colby, 'Savage Tribes', p. 280.

[117] British Military Manual of 1914, para. 7 (emphasis added); see also Lieber's reference to 'barbarous armies': Lieber Code, Art. 24.

[118] As quoted in Lindqvist, 'Bombing the Savages', p. 52 (emphasis added).

[119] See Scott, *1899 Proceedings*, p. 293; see also Sir John Fisher, at p. 295: 'As regards wars with savage peoples, these restrictions will be solely to the detriment of civilized nations'; also p. 364.

[120] Ogston, 'Continental Criticism', p. 756.

to Colby, there is no reason to respect the laws of war vis-à-vis peoples 'who do not know international law and do not observe it'.[121]

On the path to redemption? The conventional narrative of international humanitarian law's de-Westernization

How are things supposed to have changed since those relatively early days of the laws of war? International humanitarian lawyers are reluctant to mention some of humanitarian law's darker antecedents; if they do, it is to dismiss them as old history. But are they?

The argument that the laws of war have come a long way since their inception is a familiar one. As is well known, after the Second World War and particularly in the 1970s, the Third World, and particularly newly decolonized states, contributed to a veritable 'de-Westernization' of the laws of war, by promoting a broad agenda of inclusiveness. Several other circumstances had arguably also contributed to destabilizing the vision of 'civilized warfare' as a monopoly of the West: the use of 'coloured' troops in colonial wars,[122] the stunned discovery that non-Western powers might occasionally be more 'civilized' than European ones[123] in a context where Europe had seemingly descended into 'barbarity', and the use of colonial troops on the European theatre[124] (the common threads uniting these episodes would be worthy of a book on their own).

If the non-participation of certain 'territories' in international humanitarian treaties, an 'anthropology of difference' and an insistence on reciprocity were the three pillars of exclusion of 'savage' peoples, then the effective challenging of these three is what in due course brought all under the protection of the laws of war.

The period of decolonization opened the way to ratification of major humanitarian instruments by increasing numbers of recently decolonized

[121] Colby, 'Savage Tribes', p. 287.

[122] Willard B. Gatewood, Jr, *Black Americans and the White Man's Burden 1898–1903* (Urbana, IL, 1975).

[123] The behaviour of the Japanese inspired Sir John MacDonnell to note that 'a non-Christian State has set an example to Christian nations in the conduct of war (as far as it is possible) on the lives of civilisation . . . International law cannot be quite what it was if it henceforth expresses the consent of powerful Asiatic non-Christian States as well as of European nations': quoted in Henry Dyer, *Dai Nippon, The Britain of the East* (London, 1905), p. 152.

[124] Sally Marks, 'Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience' (1983) 13 *European Studies Review* 297; Modris Eksteins, *Rites of Spring: The Great War and the Birth of the Modern Age* (Boston, 1989), p. 235.

states. These states could claim the benefits that their populations could not have claimed much earlier as the savage inhabitants of a *terra nullius*. In fact, Third World states ratified the Geneva Conventions[125] with utmost speed, intent on obtaining this protection in some of the conflicts that might still oppose them to colonial powers. Thus was removed, from a strict legal point of view, one of the single most important obstacles to the international spread of the laws of war. But, more generally, it was deep changes in the conception of the laws of war, and how these related to humanity, that made it increasingly hard to deny their applicability beyond the West (the relevant actors had ceased to be mostly European and could by then be described as broadly 'Western'). One of the greatest conceptual influences behind this transformation was the rise of international human rights law, although the 'humanization' of the laws of war is also part of a dynamic that is endogenous to these laws.

The gradual abandonment of the requirement of reciprocity probably proved a crucial step in relaxing some of the conceptual apparatus that had made it so conveniently easy not to apply the laws of war to non-European peoples. This abandonment can be traced to a series of fundamental developments, beginning with the rejection of the *si omnes* clause.[126] More importantly, the idea began to emerge that states should still be bound notwithstanding violations by the other party and therefore decreased prospects of reciprocity. The Vienna Convention would in due

[125] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135 ('Geneva Convention III'); Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (collectively, '1949 Geneva Conventions').

[126] The *si omnes* clause, contained in earlier instruments, stipulated that international humanitarian law instruments would be applied only 'between Contracting Powers and then only if all the belligerents are parties to the Convention': Convention respecting the Rights and Duties of Neutral Persons in Case of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 36 Stat. 2310. It had gradually been abandoned in the inter-war period in such conventions as the Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, in force 19 June 1931, 118 LNTS 343. The 1949 Geneva Conventions, following Nuremberg, insisted that: '[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations': Geneva Convention III, Art. 2.

course codify what had by then become the accepted norm, namely that termination or suspension of a treaty was *not* an appropriate remedy in cases of 'treaties of a humanitarian character'.[127] The gradual decline and desuetude of the doctrine of reprisal is part of the same trend. It gradually became accepted that in their fundamental structure the laws of war were more like international human rights law than public international law: based on a fundamental obligation of the state owed to humanity or potential war victims, rather than on the execution of synallagmatic obligations. This in turn led to much speculation about the erga omnes or jus cogens nature of many norms of international humanitarian law. This abandonment of the requirement of reciprocity was a capital development because it meant at least that Western powers could not argue that the incapacity of 'savages' to reciprocate, justified their own refusal to apply the laws of war.

However, something more important was at hand in the decades following the Second World War. Non-European voices had already sought to deconstruct the notion of civilization as applied to warfare. A Japanese diplomat commented, following the end of the Russo-Japanese War, that 'We show ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men'.[128] By the end of the Second World War, a consensus was emerging that made any suggestion that different standards might apply beyond the Western or industrialized world than within it simply unacceptable. From an attribute of civilization, restrained warfare was fast on its way to being recognized as an attribute of humanity.

The great accomplishment of the post-Second World War period, therefore, is to have brought the whole of humanity, at least theoretically, into the fold of the laws of war. In fact, so successful was the Third World that it obtained significant additional benefits that went far beyond the merely mechanical application of equality. If one of the effects of the development of the international laws of war had been to put the emphasis on international violence, the increasingly developed regime of regulation of non-international armed conflict ensured that many conflicts occurring beyond Europe would henceforth fall under the protection of international humanitarian law. Strikingly, the Third World secured the 'upgrading' of wars of decolonization to the status of international

[127] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Art. 60(5) ('Vienna Convention').

[128] As quoted in B. V. A. Röling, *International Law in an Expanded World* (Amsterdam, 1960), p. 27.

conflicts.[129] And, in an early, albeit contentious, recognition of the specificity of warfare in some areas beyond the West, due notice was taken of the specificity of guerilla warfare.[130]

Although in practice violations of the laws of war might have been rife, the one significant accomplishment was that, at least at the level of principle, it seemed to have become impossible to exclude the 'savages'. The laws of war were well on their way to redemption.

The 'fall': the return of the 'savage'?

Given the momentous changes in the laws of war since 1945, one might think that the rhetoric of the 'savages' had disappeared altogether, at best remaining as a slightly embarrassing relic, to be mentioned only briefly in order to emphasize how the laws of war had since moved on. Yet I want to use the events surrounding the so-called 'war against terror' as a case study of the persistence of the exclusionary strand embedded within the laws of war, an attribute that remains latent or dormant but which is promptly reawakened in times of crisis.

Indeed, in the wake of the attacks launched on 11 September 2001, a rhetoric has surfaced which, in its structure and tone, bears striking similarities to that of earlier days.[131] I want to argue that the rhetoric of the Bush Administration concerning 'unlawful combatants'[132] mimics in

[129] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 7 December 1979, 1125 UNTS 3, Art. 1(4) ('Protocol I').

[130] See *ibid.*, Art. 44(3).

[131] This is a point that has been noticed in passing by several authors. See, for instance, Dean P. McFadden, 'Why the Laws of Armed Conflict Are No Longer the Ties that Bind' (2003) (copy on file with author) (noting that the term uncivilized 'may assume renewed legal relevance with regard to the status and treatment of terrorists: namely, those who deliberately reject the civilizing principle of moderation in war, and who neither respect strictures upon the targeting of civilians nor seem to expect legal protections for themselves'); Heather Anne Maddox, 'After the Dust Settles: Military Tribunal Justice for Terrorists after September 11, 2001' (2002–3) 28 *North Carolina Journal of International Law and Commercial Regulation* 421 at 426 ('Just as the current administration characterizes al Qaeda, Taliban, and other extremist groups or sympathizers, early American leaders also characterized slaves and Native Americans, through simplification and distortion. If groups or individuals are systematically denied their humanity, then they can be denied their natural rights, or so the justification proceeds'); also Peter Maguire, *Law and War: An American Story* (New York, 2001), p. 20 ('Before there were "war criminals," there were "barbarians," "heathens," and "savages" who did not qualify as equals in the arena of "civilized warfare"').

[132] I voluntarily put aside the issue of whether these individuals could also be qualified as 'terrorists', as this question, unlike the denial of combatant status, is not determined on the basis of the laws of war alone.

every shade the arguments that I have highlighted as being typical of the earlier exclusion of non-Western peoples from the laws of war. Here, I seek to reconstruct briefly the Administration's standpoint on the applicability of the laws of war to members of both the Taliban and al Qaeda, in order to make that point. I will draw on the memorandum of 22 January 2002 by Jay S. Bybee, Assistant Attorney General,[133] as well as various subsequent pronouncements in the press and academic publications by John C. Yoo, then Deputy Assistant Attorney General, and others.

Bybee and Yoo begin by sketching the conventional argument that the adversary, as was the case with savage tribes, is not a party to the relevant treaties: 'the conflict with al Qaeda is not governed by the Geneva Conventions, which applies [sic] only to international conflicts between states that have signed them. Al Qaeda is not a nation-state.'[134] In addition, Bybee makes the point that Afghanistan, a country 'divided between different tribal and warning [sic] factions, rather than controlled by any central State'[135] was at the time of the US invasion a 'failed state' and that US obligations towards it could be suspended,[136] echoing the old idea that non-Western lands, being non-sovereign, are lands where no laws apply.

But as John Yoo puts it, 'even if al Qaeda were a nation-state and a party to the Geneva Conventions, *its members would still qualify as illegal belligerents due to their very conduct*'.[137] In the same way that nineteenth-century military lawyers thought that, aside from the issue of treaty membership, there were good, fundamental policy reasons why one should not uphold the laws of war when fighting the 'non-civilized', John Yoo argues that '[t]he reasons to deny Geneva status to terrorists extend beyond pure legal obligation'.[138]

[133] Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, 'Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees' (22 January 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 81–117.

[134] John C. Yoo, 'Terrorists Have No Geneva Rights', *Wall Street Journal*, 29 May 2004, p. A16; see also Bybee, 'Memorandum': 'Al Qaeda is merely a violent political movement or organization and not a nation-State. As a result, it cannot be a state party to any treaty' (at p. 81); 'Al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions' (at p. 89).

[135] Bybee, 'Memorandum', p. 96.

[136] *Ibid.*, pp. 95–104.

[137] John C. Yoo and James C. Ho, 'The Status of Terrorists' (2003) (University of California Berkeley, Public Law and Legal Theory Research Paper Series, Research Paper No. 136), p. 11 (emphasis added).

[138] Yoo, 'Terrorists Have No Geneva Rights'.

The reasons are, first, that unlawful combatants fail to distinguish themselves: 'They operate covertly by intentionally concealing themselves among the civilian population; they deliberately attempt to blur the lines between civilians and combatants.'[139] Secondly, they have no intention of respecting the laws of war: 'Al Qaeda violates the very core of the laws of war . . . Most importantly, they have attacked purely civilian targets with the aim of inflicting massive civilian casualties.'[140]

Finally, the argument proceeds, as was the case with 'non-civilized peoples', that all these deficiencies point to the fact that unlawful combatants cannot benefit from the laws of war because they cannot possibly be expected to reciprocate:

> The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda. It has never demonstrated any desire to provide humane treatment to captured Americans. If anything, the murders of Nicholas Berg and Daniel Pearl declare al Qaeda's intentions to kill even innocent civilian prisoners. Without territory, it does not even have the resources to provide detention facilities for prisoners, even if it were interested in holding captured POWs.[141]

According to Yoo, '[a] treaty like the Geneva Convention makes perfect sense when it binds genuine nations that can reciprocate humane treatment of prisoners . . . But the Geneva Convention makes little sense when applied to a terrorist group or a pseudo-state.'[142]

If otherwise unlawful combatants are to be given the benefit of the laws of war, therefore, it is on a purely discretionary basis, in the same way that the sovereign or the military commander might occasionally have condescended to extend the protection of international humanitarian law to 'savages'. Bybee makes it clear that:

> [t]o say that the President may suspend specific provisions of the Geneva Conventions *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied *as a matter of U.S. Government policy*.[143]

[139] Yoo and Ho, 'Status of Terrorists', p. 10. [140] *Ibid.*

[141] Yoo, 'Terrorists Have No Geneva Rights'. See also Yoo and Ho, 'Status of Terrorists', p. 10: that the al Qaeda members 'are not under the control of a nation-state' means, crucially, that no one 'will force them to obey the laws of war'.

[142] Robert J. Delahunty and John C. Yoo, 'Rewriting the Laws of War for a New Enemy; The Geneva Convention Isn't the Last Word', *Los Angeles Times*, 1 February 2005, p. B11.

[143] Bybee, 'Memorandum', p. 105 (emphasis in original).

And, indeed, as Secretary of Defense Donald H. Rumsfeld put it:

> technically unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner reasonably consistent with the Geneva Conventions, to the extent they are appropriate.[144]

'Thanks to' or 'in violation of' the laws of war?

The rhetoric of the Bush Administration therefore seems to resuscitate a lexicon that one might have thought had been long abandoned. The dominant response is simply to condemn this as a terribly regressive and morally contemptible move. To the extent that there are actually forces at work with an agenda profoundly to undermine or overturn the laws of war, the cries of alarm are welcome.

There are indeed some elements in the US authorities' assessment that are highly questionable or downright shocking. When Yoo emphasizes the role of reciprocity as 'the primary enforcer of the laws of war',[145] he cleverly confuses a common factual–sociological explanation for *why* the laws of war are ever actually respected with a legal–dogmatic justification for not respecting them. As I have shown, contemporary doctrine rejects the notion that failure by the one party to conform with the laws of war relieves the other from the duty to do so.[146] The idea propounded by Bybee and Yoo that even a state's regular forces have to pass the test articulated for irregular troops (i.e. respect for the laws of war) to qualify as combatants is also plainly at odds with the clear meaning of the Geneva Conventions. This reasoning – which could in theory lead to an entire army losing combatant status simply because of violations of the laws of war committed by some in its midst – was specifically rejected after the Second World War. Protocol I also makes it clear that one does not lose one's status as a POW merely because one has committed war crimes.[147]

The significance of the resurgence of the 'savage', however, is at least ambiguous. Typically, the issue is formulated as the US simply refusing to grant certain individuals the status that they otherwise deserve.[148] But

[144] Transcript of Department of Defense News Briefing, 11 January 2002, http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html (accessed 1 November 2005).
[145] Yoo, 'Terrorists Have No Geneva Rights'.
[146] Vienna Convention, Art. 60(5). [147] Protocol I, Art. 44(2).
[148] The more sophisticated analysis finds that the US is especially in violation of its obligation under Art. 5 of Geneva Convention III to determine captured individuals' status: see for

humanitarian lawyers often fail to acknowledge as readily as they should that there is a strong legal case that the Geneva Conventions would simply not grant POW status to many of those caught in Afghanistan. In fact, it is important to acknowledge what many international humanitarian lawyers know but loathe to concede, which is that the rhetoric of the Bush Administration is often merely mimicking the law. Indeed, the US authorities' case is often not a case simply to violate or do away with the law, as much as it is a characteristically strict, *almost legalistic* interpretation of the law – one that may simply not partake of the relatively benign background understanding of the 'invisible college' of international humanitarian lawyers.[149]

Given the non-ratification by the US of Protocol I and its persistent opposition to some of its provisions concerning the status of combatants, it is quite clear that these do not apply in the present case. It is therefore the Hague Regulations and the Geneva Conventions which set the applicable legal framework.

The Geneva Conventions, however, only apply to 'High Contracting Parties', something that al Qaeda clearly is not. Nor are al Qaeda members part of the armed forces of a state. Members of al Qaeda might nonetheless be considered belligerents as a militia, volunteer corps or resistance movement under certain conditions. These requirements are that one has:

> (a) to be commanded by a person responsible for his subordinates;
> (b) to have a fixed distinctive emblem recognizable at a distance;
> (c) to carry arms openly; and
> (d) to conduct . . . operations in accordance with the laws and customs of war.[150]

There may be a strong case that many al Qaeda members do not fulfil these criteria.[151] As Bybee puts it in his memo:

example International Committee of the Red Cross, 'Official Statement: The Relevance of International Humanitarian Law in the Context of Terrorism', 21 July 2005. This argument rarely comes across in the public debate however (indeed, if the debate were only what constitutes a tribunal for the purpose of Art. 5, then it is unlikely that the issue would ever have attracted as much attention), and even if that is the debate then most humanitarian lawyers are hardly sanguine about spelling out the very real possibility that many unlawful combatants are being legitimately denied POW status.

[149] Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217.

[150] Hague Convention II, Annex: Regulations Respecting the Laws and Customs of War on Land, Art. 1; see also Geneva Convention III, Art. 4A(2).

[151] I do not wish, here, to explore all the factual detail associated with this question; I merely note that such a case is plausible.

> Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly . . . and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat.[152]

It bears emphasizing that stressing these points does not reflect a neoconservative reading of the law; it is of course very much premised on what the law says and nothing more. The case that al Qaeda members should not be entitled to POW status is hard to defeat, and on that specific point one would have to be in bad faith not to agree with the likes of Bybee, Yoo and Rumsfeld (although what should be done with al Qaeda members as a result of this conclusion is a totally different issue which I will not address here). There are of course very good normative reasons why this should be so: failure by combatants to distinguish themselves, after all, is the single biggest risk to civilians in warfare.

Change and continuity: how the laws of war both include and exclude

It seems, therefore, that one ends up with a paradox: although international humanitarian law is supposed to have shed its racist past, the laws of war nonetheless clearly end up excluding a category of individuals on exactly the same grounds that they previously excluded 'savages'. How can the laws of war both include and exclude? At what discrete levels do these apparently irreconcilable operations occur?

What I want to do in this section is suggest an interpretation of what I call this body of law's 'natural propensity to exclude'. The role of the laws of war – or so goes the conventional narrative – is not to eliminate warfare but simply to take warfare as it is and seek to alleviate its consequences. But it is not hard to see the dizzyingly misleading character of such an apparently obvious proposition. There was never, nor is there any 'taking warfare for what it is': there has only ever been a constant process of defining by the laws of war what warfare – as the relatively improbable artifact of a culturally contingent tradition of violence – is. It is true, in this context, that since the Geneva Conventions there is no doubt that one cannot discriminate between different types of combatants. One of the great merits of the contemporary laws of war, as I hope to have shown, is to have removed a shameful and dangerous

[152] Bybee, 'Memorandum', p. 90.

ambiguity about this issue. But there is a huge blind spot to this assertion, which is that it presumes that *we know what a combatant is*. Of course, combatants do not exist in nature, any more than war exists as a natural condition waiting to be 'regulated' by the laws of war. What is and what is not a combatant is an elaborate normative and social construct. Although the laws of war tell us *what to do* with combatants, they also simultaneously, and perhaps more importantly, tell us *what and who combatants are*.[153]

The laws of war, thus, determine the legitimate participants in warfare. It is arguably at this stage that the discrimination that had been abolished at the level of the actual operational rules of warfare, sneaks back in and niches itself at the heart of the laws of war. From 'how should one deal with "savages" in war?', the question becomes 'who is a combatant?' (and the implicit answer, as will have become clear, is 'not a savage'). What we witness with the gradual codification of the laws of war is the recycling of the issue of what the applicable rules are (for example, whether obligations are owed on the basis of reciprocity), into the definition of who is entitled to their benefit (for example, capacity to reciprocate as a condition of combatant status).

The determination of who is a combatant is necessarily both inclusive and exclusive; more precisely, *it is necessarily exclusive of something if it is to be inclusive of anything*. The laws of war would cease to be a meaningful normative activity if they applied to any form of violence perpetrated by any actor. The laws of war, like a language, must assist us in recognizing war when we see it, and transform the perception of inchoate violence into a legally intelligible concept. In determining who the legitimate actors of warfare are, the laws of war necessarily promote *a certain idea of what legitimate warfare is*, as that warfare for the benefit of which the laws of war were invented. It is therefore not a surprise that the definition of what a combatant is, for instance, became such a bone of contention at the series of meetings that preceded the adoption of Protocol I.

As it happens, the contemporary laws of war, as the culmination of centuries of European thought expressed in the language of nineteenth-century positivism, are necessarily a by-product of the specific conditions that gave rise to them. In this context, the laws of war do not so much challenge the reality of statehood (as just possibly the cause of the violence) as

[153] I intend to make this idea, which one might call the 'constitutive' idea of the laws of war, the centrepiece of a future monograph developing a comprehensive critical theory of the laws of war.

they incorporate, legitimize and propagate the public/private distinction on which it thrives. International humanitarian law thus clearly expresses a preference for a strong monopoly of the use of legitimate international force by the state and therefore for the large, standing, organized and at least semi-professionalized armies which by the nineteenth century had become the hallmark of Western states. The laws of war in the nineteenth century are part of a reordering of war which leads the 'international community' to reaffirm, in face of the *levée en masse*, spontaneous resistance under occupation and use of guerilla tactics from South Africa to Cuba, that the sovereign and its official military agents are the only ones that can be entrusted with the exercise of international violence.[154] For the humanitarian, the laws of war are above all about regulating warfare; but the realist, the underdog or the anti-colonialist might well all tell a different story, one in which the role of the laws of war is above all to reinforce the state's unshakeable stranglehold and express the dominant consensus about the state's incontrovertible legitimacy. The contemporary laws of war, therefore, are an integral part of the crystallization of the world into a world of states, part and parcel of the very constitution of that world.

As a result, the only persons to be unconditionally, ipso facto recognized as belligerents (even if they fail to respect the laws of war) are members of a state's armed forces. Partly in recognition of how things have changed and in response to Europe's own problem with irregular troops (much more, at least originally, than in deference to non-Western ways of waging war), the Hague Regulations and Geneva Conventions do define the conditions under which one may be considered a combatant even though one is not strictly a member of the state's armed forces. This is of course a significant improvement in itself: in the nineteenth and early twentieth centuries, the supposed inability of 'savages' to respect the laws of war was considered intrinsic and beyond redemption. There was no clear test (except that of the passing of time and the gradual incorporation into the family of nations) by which one might prove one's ability to be treated on a par with 'civilized' states. In the contemporary world, however, it is no longer

[154] See for example the interesting resolution adopted by the Institut de droit international at its Zurich Session ('Application du Droit des Gens à la guerre de 1877 entre la Russie et la Turquie; Observations et voeux'), following the use of 'irregular troops, Bachi-Bozouks, Tscherkesses and Kurds' by Russia and Turkey in their 1877 war ('there is a question of responsibility, which may arise . . . from the employment of savage hordes, incapable of conducting regular warfare. It is a duty incumbent upon states which call themselves civilized, and form part of the European concert, to reject the employment of such auxiliaries. A Government which should owe its victory to such means would place itself, by its own acts, outside the pale of international law').

possible (at least publicly) to simply assume that the 'uncivilized' are always 'uncivilized' – although it certainly remains possible to define the conditions of civilization.

The conditions laid out by international humanitarian law for the protection of persons involved in combat yet not members of a state's regular armed forces are the ones already mentioned which, in all likelihood, disqualify al Qaeda members caught in Afghanistan from benefiting from combatant status. As will have become evident, these conditions are precisely the elements that were supposed to be absent in 'savages'. One can no longer deny the benefit of the laws of the war to one who has otherwise been determined a legitimate combatant; therefore, to be a legitimate combatant one must already have shown that one intends to wage war very much along Western lines.

The requirement that one be 'commanded by a person responsible for his subordinates', for example, refers to the defining characteristic of a modern European military: the existence of a hierarchy and of discipline.[155] The requirements that one 'have a fixed distinctive emblem recognizable at a distance' and that one 'carry arms openly' point to the distinguishability criterion (the uniform in particular, with its barely repressed homoerotic fetishism, having become since the Renaissance a focus of pride, *esprit de corps* and national identity).[156] Unsurprisingly, this is the requirement that came under most assault as Protocol I was being negotiated, as one unduly privileging the regular armies of the West. Third World states obtained that the requirement be relaxed in 'situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself'.[157] Unsurprisingly as well, this has proved the single biggest stumbling block to ratification of the Protocol by countries such as the US. Moreover, even the added leeway thus granted is still more in the manner of a certain facility granted to

[155] See Clifford J. Rogers (ed.), *The Military Revolution Debate: Readings in the Military Transformation of Early Modern Europe* (Boulder, CO, 1995); Maury D. Feld, 'Military Professionalism and the Mass Army' (1975) 1 *Armed Forces and Society* 191; Geoffrey Parker, *The Military Revolution: Military Innovation and the Rise of the West, 1500–1800* (Cambridge, 1988).

[156] See John Mollo, *Military Fashion: A Comparative History of the Uniforms of the Great Armies from the 17th Century to the First World War* (New York, 1972), p. 240. Also, more specifically, Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War' (2005) 33 *Philosophy and Public Affairs* 148; Toni Pfanner, 'Military Uniforms and the Law of War' (2004) 86 *International Review of the Red Cross* 93.

[157] Protocol I, Art. 44(3).

the aspiring *guerillero*, than anything like a radical redefinition of what a combatant is.

The requirement that irregular troops 'conduct their operations in accordance with the laws and customs of war' is perhaps the most interesting of all. As we saw, reciprocity has clearly ceased to be a general condition for the applicability of the laws of war as between legitimate participants. For the state's regular armed forces, for example, protected combatant status inheres as of right and cannot be withdrawn as a result of momentary (or even ongoing) violations of the laws of war. For irregular troops, however, protected status is conditional upon respecting the laws of war, thus reinscribing into the law the fundamental concern about 'savages' – that one should only ever be obliged to afford them the protections of the laws of war to the extent that they can reciprocate.

As can be seen, these requirements merely incorporate into the law what had been the common prejudice at the time when the various instruments were adopted, namely that to be a combatant one must conform to what is essentially a Western stereotype about what waging war is. The laws of war, fundamentally, project a fantasy about soldiering that is ultimately *a fantasy about sameness*. They represent Western aspirations to have one's armies confronted by other, analogously constituted armies: adversaries rather than enemies, endowed with the same military ethos and mores, and who fundamentally situate their violence in the context of the exercise of sovereign prerogatives. It is against enemies of such calibre that one's losses can be mitigated,[158] heroism validated and the ultimate respectability of warcraft upheld.[159]

[158] See Best, *War and Law*, p. 15 (noting that '[r]estraints enjoined, and even enforced, in dealing with a respected and culturally related foe have usually had nothing to do with what is expected in conflict with those perceived as barbarians, savages, infidels, subhuman, and so on').

[159] This is a motivation clearly identified early on by the Institut de droit international which, upon introducing a manual on the laws of war, commented that:

> The Institut has not sought innovations in drawing up the 'Manual'; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable. By so doing, it believes it is rendering a service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts – which battle always awakens, as much as it awakens courage and manly virtues – it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.

Of course, the laws of war no longer exclude non-Western peoples from participating in that fantasy. But there is little doubt that *this is the stereotype*, and that only by conforming fully to it will one be accepted as a legitimate player in the game of war. It is in this way that the laws of war can be seen as continuously excluding that which does not conform to the image they project of legitimate warfare.

The laws of war as a project of Western imperialism

That the laws of war project a fantasy about what it means to make war should perhaps not be too much of a concern. On the face of it, it is clearly a good thing that combatants should distinguish themselves from non-combatants. Having a responsible command is better than not having one, and respect for the laws of war is something that should be encouraged.

Be that as it may, it is also important to understand how this regulation is only achieved at the price of promoting a certain model of violence. The inclusion of combatants within the confines of the laws of war only operates as a result of a larger exclusion of modes of warfare that do not fit the Western stereotype. In that respect, the laws of war are *also* and unmistakably a project of Western expansion and even imperialism, one that carries its own violence even as it seeks to regulate violence. To the extent that the laws of war project a fantasy about what it means to make war, they are also part of the dissemination and realization of that fantasy – one which, inevitably, is not initially shared universally.

The laws of war, in that respect, can be seen as having been historically one – in fact probably one of the foremost – instruments of forced socialization of non-Western nations into the international community,[160] one whereby non-Western peoples have been called upon to wage war on the West's terms, by adopting Western military mores (thus almost inevitably reinforcing Western supremacy).[161] To respect the laws of war or to be seen as capable of doing so became a sought-after badge, testifying to true

See *The Laws of War on Land* (adopted by the Institut de droit international at Oxford, 9 September 1880), preface, http://icrc.org/ihl.nsf/FULL/140?Open Document (accessed 1 November 2005).

[160] See generally Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (Oxford, 1984).

[161] The universalization of the model implicit in the laws of war would arguably have played to Western strengths, giving the West a head start in all things military since it effectively had the original blueprint for warfare. In that respect, the 'power to define' or to 'name' appears crucial in the West's world domination, a little in the same way that from a military point of view the power to 'choose the battlefield' is considered significant.

membership of the family of nations. Thus Japan, for example, staked much of its bid to join the 'civilized world' on its ability to conform to the laws of war. After it had been sent stumbling down the ladder of civilization following the revelation of the Port Arthur massacre,[162] its behaviour in helping quell the Boxer Rebellion, and in the Russo-Japanese war of 1904–5, was widely noted,[163] eventually earning it the enviable nickname of the 'Britain of the East'. One commentator gushed that 'the assimilation, rapid and complete, of the best traditions, the courtesies and amenities of European warfare' was even more remarkable than Japan's newfound military might.[164] Although '[h]ow far China might be held to have forfeited her position by the gross breach of law involved in the assault on the Pekin Legations in the summer of 1900 was for some time a matter of speculation', Hall thought that 'her inclusion among the Powers invited to the Hague in 1907 set the matter at rest'.[165] Eric Myles has convincingly argued that Russia's role in the promotion of the laws of war in the second half of the nineteenth century can be explained in terms of an aspiration to prove its 'Western' credentials: 'may [Russia], accepting and proclaiming the need for these laws of war, give the example to all civilized

[162] As Creelman wrote in *The New York World*: 'The defenceless and unarmed inhabitants were butchered in their houses and their bodies unspeakably mutilated. There was an unrestrained reign of murder which continued for three days. The whole town was plundered with appalling atrocities. *It was the first stain upon Japanese civilization. The Japanese in this instance relapsed into barbarism. All pretences that circumstances justified the atrocities are false. The civilized world will be horrified by the details*' (emphasis added): *The New York World*, 12 December 1894, p. 1.

[163] Creelman even emphasized that:

> [w]hatever I may have written of that three days' slaughter at a time when Japan was seeking admission to the family of civilized nations, it is only just to say that the massacre at Port Arthur was the only lapse of the Japanese from the usages of humane warfare . . . The humanity and self-control of the Japanese soldiery during the historic march of the allied nations to Peking, seven years later – notwithstanding the cruelty and barbarism of some of the European troops – have redeemed Japan in the eyes of history. *The Japanese have demonstrated to the world that their civilization is substantial.*

James Creelman, *On the Great Highway* (Boston, 1901), p. 50 (emphasis added); see also Hall, *Treatise on International Law*, p. 49 ('The right of Japan to rank with the civilised communities for purposes of international law, so questionable when the first edition of this book was published, has long since been clearly established. . . . During the course of hostilities against China . . . she adhered to the recognised laws of war'); A. Berriedale Keith, *Wheaton's Elements of International Law* (6th ed., 2 vols., London, 1929), vol. I, p. 32.

[164] As quoted in Dyer, *Nippon*, p. 417.

[165] See Hall, *Treatise on International Law*, p. 49.

Europe.'[166] In fact, when Russia and Japan came head to head during the Russo-Japanese war, the issue was framed very much in terms of 'which is the civilized power?', based on how each was supposed to have respected the laws of war.[167]

Later on, the idea that the laws of war were primarily designed to regulate international armed conflicts would be used effectively to exclude wars of national liberation from the ambit of most of the Geneva Conventions. So conspicuous was the victory of the West in making the laws of war the frame of reference, that even by the time the Third World sought to make its newfound presence felt and to reverse the tide, it would do so unmistakably in the language of the laws of war rather than by challenging them. Even such victories as were obtained in 1977, for example, such as the partial recognition of the fact that guerilla warriors cannot be asked to distinguish themselves at all times, were firmly encased in the otherwise mainstream language of distinguishability.[168]

Although conforming to the laws of war brought benefits, namely their protection, it is also clear that the worldwide expansion of the laws of war was a culturally violent, fundamentally imperialistic and essentially militaristic phenomenon. I would not go as far as saying that the Third World built up armies in order to conform to the fantasy implicit in the laws of war, but the suggestive power of these laws has certainly been one of the fundamental legitimizing ideological forces behind that shift. In most societies, war would not have been the specialized activity of a professionalized warrior class working for the sovereign. Taking up arms as the enemy approached was simply something that all able-bodied men would have done when the community was confronted with a danger. The promotion of hierarchy, distinguishability, and the ability to respect the laws of war, on the contrary, militated strongly in favour of the model of the modern, sizeable standing army, with all the well-known risks in terms of international but also domestic stability (from which, of course, the Third World has suffered most). Soon enough, military parades and grand uniforms would become part of the status symbols of statehood, and having big guns the sign that one was a true sovereign.

[166] Prince N. M. Romanovsky at the spring 1881 meeting of the Imperial Russian Technical Society, as quoted in Eric Myles, '"Humanity", "Civilization" and "the International Community" in the Late Imperial Russian Mirror: Three Ideas "Topical for Our Days"' (2002) 4 *Journal of the History of International Law* 310 at 316.

[167] George Kennan, 'Which Is the Civilized Power?' (1904) 78 *Outlook* 515.

[168] According to Art. 44(3) of Protocol I, the rule characteristically remains that 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack'.

More importantly, the laws of war have exported and universalized a highly particular form of inter-state violence. In their contemporary international positivistic variant, the laws of war are a very specific response to a peculiarly Western problem. The emergence of the very idea of war is a result of medieval theologians' attempts at distinguishing between prohibited private violence and licit ('just') public violence.[169] From the start, war is linked to the state, a uniquely Western construct: war is the specific form of violence of the state in its external relations. War is in fact so central to the Western state that it becomes, de facto, an essential part of its domestic coming into being.[170] The French Revolution, the advent of conscription, the Napoleonic wars, the emergence of nationalism and liberalism as political forces profoundly transformed the conditions of warfare in the nineteenth century by pitting entire nations against each other, with potentially devastating consequences. These radical developments, largely unknown anywhere else, and extending as they did the theatre of operations to the territories of entire states, announced the total wars of the twentieth century. As such they threatened the very fabric of the nascent international community. It is in this context of breakdown of communal values and anxiety about the ravages of war that the need for enforcing positive restraints on warfare arose.

Specifically, the laws of war reaffirmed the need to entrust the conduct of warfare to a warrior class capable of enforcing restraint. International law provided the very culturally situated way in which these norms were to be enforced, 'in accord with both the progress of juridical science and the needs of civilized armies'.[171] Thus the regulation of war took the specific form, in the West – and in the West only – of the standard machinery of international law-making, from solemn diplomatic conferences to sophisticated international treaties, and the various organizations entrusted with their enforcement.

Early international humanitarian lawyers, haunted perhaps by a forewarning of worse things to come in the twentieth century, were above all responding to a particular European challenge – but they formulated their prescriptions in the language of universalism, so convinced (and rightly so, as it turns out) were they that the model of European international relations was destined for global acceptance.

[169] See M. H. Keen, *The Laws of War in the Late Middle Ages* (London, 1965).

[170] See Charles Tilly, *Coercion, Capital and European States, AD 990–1990* (Cambridge, MA, 1990); Michael Mann, *States, War, and Capitalism: Studies in Political Sociology* (Oxford, 1988).

[171] Institut de droit international Law, *Laws of War on Land*, preface.

Conclusion: the legacy of exclusion and expansion

Far from being merely a perversion, I have sought to show how exclusion and the creation of an 'other' may have been at the very foundation of international humanitarian law, a phenomenon bound to re-emerge in times of strain. I have tried to show how the laws of war have always stood for a particular vision of what legitimate warfare is which is almost entirely informed by the European experience. Although the laws of war have accomplished something of a Copernican anthropological revolution over the last fifty years, there is more to practices such as Guantánamo than the mere onslaught of power and violence against the Law: something like the discreet exclusionary work of law itself.

It is this model – putatively universal but profoundly exclusive – that has been expanded the world over, to the point of saturating legal and moral public discourse about war. It is this model that exercises a monopoly over our imaginations about state violence and what can be done about it. In the process of expansion of the laws of war, warfare the world over has become something very much like (if not much worse than) what nineteenth-century humanitarians had sought to avert. In that respect, humanitarian lawyers rightly prophesized the danger, but that prophecy also ended up being a startlingly self-realizing one. In many ways, international humanitarian law was the solution to the problem it simultaneously crystallized (something that could be said of much of international law).

It may be that such is the price to pay if one is ever to achieve a modicum of regulation in warfare. It is also important, however, to assess what has been lost in embracing a regulatory model that is so tainted with the ideology that gave rise to it, and so committed to the entrenchment of state power. In the nineteenth century, one of the aforementioned fathers of international humanitarian law, de Martens, felt it was axiomatic that 'the mission of European nations is precisely to inculcate oriental tribes and peoples ideas about the law, and to initiate them to the eternal and benevolent principles that have placed Europe at the head of civilization and humanity'.[172] The question international humanitarian lawyers should be asking themselves as a matter of some urgency is: how have the laws of war been instrumental in reinforcing the very categories from which they supposedly withdrew and, with the benefit of hindsight, what is the balance sheet of international humanitarian law's mediation of the colonial encounter?

[172] De Martens, 'La Russie et l'Angleterre', p. 234.

Through colonization, did the non-Western world at least get the benefits of forms of regulation which were either unknown to them or in bad need of being updated for the purposes of international interaction? The laws of war beyond the West have been simultaneously enthusiastically embraced as part of the standard baggage of civilization, and routinely trampled. They have often proved far less effective than had been hoped at protecting the victims of armed conflict. The improbability of legal transplants is partly to blame. The laws of war presuppose a number of social ideal-types – the responsible commander, the chivalrous officer, the reliable NCO, the disciplined foot-soldier – that cannot be recreated at a moment's notice once the laws of war have been cut off from their cultural base. Much of the sustainability of the laws of war relies on these shared assumptions about role-playing to make sense of otherwise enigmatic legal injunctions. By transferring only the thinnest of superstructures, the risk is that non-Western militaries will have inherited legal forms uninhabited by social purpose. The irony, of course, is that by the time the non-Western world had committed to some of the archetypes implicit in the laws of war, international humanitarian law turned out to not be very good at restraining warfare at all and, in fact, particularly hopeless in regulating warfare among or within the recent converts.

But perhaps more attention should be paid to what the laws of war have excluded or obscured, instead of simply to what the laws of war have failed or succeeded in doing. Much international humanitarian scholarship over the past thirty years has been devoted to the worthy task of showing how traditions of restraint in warfare have existed in many non-Western cultures.[173] This is undeniably a welcome (re)discovery that was long overdue. Maybe the laws of war were indeed merely giving a universal expression to what was otherwise an extremely widespread aspiration, in which case no culture could be said to have been specifically dispossessed of anything.

But typically this scholarship may well end up overemphasizing the similarities between such traditions, at the expense of what was specific about the development of the contemporary laws of war. That traditions of restraint in the use of violence by social entities against each other have existed almost universally is quite clear. The modern version of the laws of war, however, that which became globalized, is clearly, as I hope

[173] See, amongst more recent works, V. S. Mani, 'International Humanitarian Law: An Indo-Asian Perspective' (2001) 841 *International Review of the Red Cross* 59; James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations' (2002) 847 *International Review of the Red Cross* 597.

to have demonstrated, about more than a simple intuition that not all is permitted in times of war. The particular way that fundamental idea was expressed (through international law, through the language of statehood), for example, will often have been as important as the message (the disincarnated idea that restraint in warfare is an obligation).

One fruitful and so far hardly pursued avenue of research, therefore, would try to assess the extent to which the contemporary laws of war ended up displacing existing, richly situated traditions for the benefit of a relatively decontextualized universalism. A history of how the laws of war have consequently impoverished cultural registers to deal with organized violence is still to be written, but it might shed light on the devastating consequences of conflicts in places like Africa.

In the meantime, it is tempting to think that the universalization of the laws of war has often left the non-Western world in the worst of places: one where existing traditions have been sufficiently destabilized to be discredited, but where the promise of 'civilization', hailed as the prize for massive societal transformation along Western lines, has failed to materialize.

The (missed) encounter between colonialism and the laws of war has also had implications for the 'civilized world' itself and our understanding of the emergence and development of international law. The exclusion of the non-civilized was obviously a consequence of international law's prescriptions. But it was also a *cause* of the tonality of these prescriptions, part of a complex dialectical process of *constitution* (in the sense of 'coming into being') of international law, which conferred its particular civilizational hue. The relation of public international law to the problem of war was never, needless to say, that of an already constituted set of norms to be applied to a novel and, to a degree, extraneous social problem. Instead, international law became what it eventually became by upholding itself as a vision of 'civilization' against the simultaneously constituted 'savagery', fantasized or not, of the non-Western warrior, so that this contrast, recycled through the ages and the endless echo of repetition, would be received as the original matrix through which international law 'saw the world'. As such, the emergence of the modern laws of war was as much about identity as it was about norms.[174] The 'law of humanity', as Ruti Teitel put it, 'did the work of drawing the line between the "civilized" and the

[174] See for example de Martens' rationalization of international law: 'Nations, in recognizing the compulsory force of certain juridical principles, ratify by the same token their *awareness of a community existing between themselves*': 'La Russie et l'Angleterre', p. 237 (emphasis added).

"barbarians"' and 'supplied the sense that there was such a thing as international law'.[175] Indeed, because of the centrality of the problem of war to international relations, the laws of war became central to international law's self-image and still retain a unique place in the framing of a distinct reformist sensibility, not to mention the discipline's relatively good conscience.

It is in this light that the curious and tragic unravelling of the war-humanizing project in its very place of birth must be analyzed. Ironically, what came to haunt European nations was not the warfare of 'savages', as had been feared. Rather, it was the West's own savageness, revealed to itself in the process of repressing the colonial 'other'. Wars of colonization kept alive the savagery within that which the laws of war were supposed to have expunged. This is so in the sense that the violence of colonization (both symbolic and actual) inexorably set the stage for wars of liberation that would be mimetically violent in their desire for enfranchisement, turning the violence of the colonizer against it – and in turn triggering an ever-more violent response by the colonizer himself, a legacy that would come back to haunt many newly independent states. But it is also more crucially in the sense that colonial wars constituted a testing ground for the denial of the 'other' at home, the transformation of warfare into genocide, the experimental blueprint for 'civilized savagery'. These tactics, honed in the streets of Damascus or the Ethiopian desert, would one day be turned by the West against itself, whether it be in the repression of resistance, the waging of total war, or the planning of the Holocaust.[176] In the end, it was less the 'savages' who were 'civilized', than the 'civilized' who 'savaged' themselves, through no responsibility other than their own.

But there is a deeper point at stake that has implications for both the West and the rest of the world. The West's denial of the applicability of the laws of war to non-Western peoples was firmly grounded in the supposed 'civilization' of the 'civilized' and the 'savagery' of 'savages' as the founding and structuring dichotomy of the attempt to regulate warfare. Whatever humanitarians of the nineteenth century may have thought, this is a dichotomy that must surely appear under a very different light in our era.

The perceived 'savagery' of 'savages', perhaps even more than Europe's self-perception as 'civilized', was the initial moment of the laws of war,

[175] Ruti G. Teitel, 'For Humanity' (2004) 3 *Journal of Human Rights* 225 at 225.

[176] Manfred F. Boemeke, Roger Chickering and Stig Förster (eds.), *Anticipating Total War: The German and American Experiences, 1871–1914* (Cambridge, 1999).

the instant glimpse of 'otherness' that allowed the constitution of the 'civilized' self. It is far from clear, however, as has emerged from various contemporary anthropological and historical debates, that 'savage' warfare was ever that 'savage'.[177] It is not my purpose to comment on these debates in detail but suffice it to say that, at the very least, the image that can be garnered from specialized discussions on the relative 'savagery' of 'civilized' and 'savage' warfare challenges any stark contrast between the two. It would of course be dangerous to fall into the trap of idealizing the 'noble savage': the evidence of 'barbarous' conduct in non-Western warfare is simply too obvious to be denied. But there is consistent evidence that, although they may have been proportionally more violent, primitive conflicts were also much less destructive. This is partly because of the ritualized nature of much internecine violence,[178] and partly, more relevantly, because the weak logistical base of primitive non-statal entities ensured that campaigns were short-lived.

The state, on the contrary – and this is arguably what nineteenth-century humanitarians saw before everyone else – introduced the prospect of wars that would draw on the massive economies of scale brought about by greater territory and modern technology. It should be fairly clear, in this context, that even the most violent of 'tribal' skirmishes paled in comparison to the systematic onslaught of the state's war machinery.

Whatever the case may be, even as we rediscover the relativity of 'savagery', we are inexorably led to find the claim of 'civilization' increasingly indefensible on its own terms. The 'civilization' of 'civilized' warfare was already a dubious claim when it was first made. The 'modern European wars' that Lieber mentions would presumably have included various Napoleonic wars, wars that were rife with cities set ablaze, mass killing, and rape of civilians. When it comes to their 'descendants in other portions of the globe', it is worth reminding ourselves that the Lieber Code was promulgated at the outset of the US Civil War, a conflict in which irregulars committed countless atrocities and where thousands died in dismal conditions in prisoners' camps. Moreover, it is a contention that

[177] This is an intensely debated issue among specialists. I merely note that this is highly contentious: see Lawrence H. Keeley, *War before Civilization: The Myth of the Peaceful Savage* (New York, 1996); Martin L. van Creveld, *The Transformation of War* (New York, 1990).

[178] This is a point I cannot explore in any depth here, but an interesting lead is the idea that the transformation of warfare in the West from the nineteenth century onwards involved above all a 'de-ritualization' of violence, from the joust-inspired wars of the Middle Ages for example. The state system, in other words, could be faulted for 'taking war seriously' and losing sight of its symbolic–regulatory function.

must seem almost obscene with the benefit of hindsight, two World Wars and the Holocaust. Paradoxically, the formalization of the laws of war turned out to be the prelude to a deluge of violence, as if the rules had only been formulated to be broken.

It may well be, therefore, that the spread of the West's own model of centralized, industrialized violence – essentially the fabrication of a dehumanized war machinery – to the rest of the world, manifested itself in an exponential increase in the overall amount of violence experienced by humankind.

The crumbling of the founding dichotomy between 'civilization' and 'savagery', moreover, can only send the laws of war stumbling down into a spiral of decomposition, and inaugurate the crisis that we may now be witnessing; it may also explain why, paradoxically, the laws of war need their 'savages', whether they be war criminals, terrorists or unlawful combatants, and go through periodic 'crises of otherness' that lead them to reassert, almost spasmodically, their foundational counter-image.

12

Lost in translation: re-scripting the sexed subjects of international human rights law

DIANNE OTTO*

International human rights law 'sexes' its subjects, (re)producing unequal relations of gender power, but at the same time providing important opportunities for contestation and change; at least that is the hope that has sustained feminist human rights advocacy. Around the world, women's human rights campaigners have engaged assiduously with the discourse as activists, victims, policy-makers and lawyers, pushing against its masculinist and imperial underpinnings in their efforts to glimpse its emancipatory potential. This engagement has revealed that, through a variety of techniques and historical residues, women are systematically marginalized by the masculine standards and conceptions of the regime and therefore not constituted as fully human for the purposes of guaranteeing their enjoyment of human rights.[1] The allegedly neutral universal subject of human rights law also reproduces other hierarchies, including those of race, culture, nation, socio-economic status and sexuality, which intersect with constructions of gender to produce subjects that bear the markings

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[1] V. Spike Peterson, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15 *Alternatives* 303; Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517; Rebecca J. Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 *Human Rights Quarterly* 230; Hilary Charlesworth, 'What Are "Women's International Human Rights"?' in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia, 1994), pp. 58–84; Charlotte Bunch, 'Transforming Human Rights from a Feminist Perspective' in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (New York, 1995), pp. 11–17; V. Spike Peterson and Laura Parisi, 'Are Women Human? It's Not an Academic Question' in Tony Evans (ed.), *Human Rights Fifty Years On: A Reappraisal* (Manchester, 1998), pp. 132–60; Arvonne S. Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) 21 *Human Rights Quarterly* 853.

of complex histories of subjugation and resistance.[2] While being attentive to these intersections, and the part that feminist human rights advocacy has played in reproducing other hierarchies,[3] my goal in this chapter is to focus on the lineage of the dualistic and hierarchical production of sexed subjectivities in human rights discourse in order to examine how the exclusionary effects of a discourse that makes the highest claims to inclusivity have been legitimated.

I use the terms 'sex' and 'gender' interchangeably because I want to disavow the idea that either of these categories might be natural and thus immutable,[4] which is not a new insight, but one which remains deeply unacceptable to conservatives, as well as to many feminists. As Simone de Beauvoir insightfully observed in her seminal work on women's oppression, one is not born a woman but rather becomes one.[5] Drawing on the work of Michel Foucault, which develops this idea, Judith Butler has argued that sex, like gender, is a social category; that the 'naturalness' of sex is produced discursively.[6] To accept the idea of a sex/gender distinction that is reflective of a nature/nurture divide, as in the official UN definition,[7] is to limit the manifold creative possibilities for the expression of identity, desire and sexuality opened up by releasing the category of sex from its biological foundations. Distinguishing between sex/gender in this way also misunderstands how law produces its subjects.[8] There is no natural subject who precedes representation in law. Instead, legal texts and practices constitute the subjects of law, playing a particularly powerful role in the processes that (re)produce and naturalize dominant social

[2] Caren Kaplan, Norma Alarcón and Minoo Moallem (eds.), *Between Woman and Nation: Nationalisms, Transnational Feminisms, and the State* (Durham, 1999); Lisa A. Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1997) 40 *Howard Law Journal* 619.

[3] Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581; Vasuki Nesiah, 'Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship' in Adrien Katherine Wing (ed.), *Global Critical Race Feminism: An International Reader* (New York, 2000), pp. 42–52.

[4] For a persuasive development of this position see Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J. Owens (eds.), *Sexing the Subject of Law* (Sydney, 1997), pp. 25–46.

[5] Simone de Beauvoir, *The Second Sex* (ed. and trans. H. M. Parshley, New York, 1974), p. 295.

[6] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York, 1990), pp. 7–8.

[7] See UN Office of the Special Adviser on Gender Issues and Advancement of Women, 'Concepts and Definitions', http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm (accessed 1 November 2005).

[8] Davies, 'Taking the Inside Out', p. 32.

norms and practices, including those that normalize women's inequality.[9] In order to understand how law constitutes unequal gender taxonomies and how this might be challenged, another poststructuralist insight is necessary. Building on the structuralist recognition that meaning/knowledge is created by patterns of dualistic or oppositional relationships in language,[10] Jacques Derrida explains how the dualisms are organized hierarchically so that one side is dominant (the 'standard') and the other side is subordinate (the 'other').[11] Derrida also emphasizes the relational quality of the dualisms; that they are interdependent.[12] This means that men and women are defined in terms of each other and that changing what is understood by the feminine necessarily involves change in the masculine, and vice versa. My interest is to examine more closely the dynamics of the dichotomized and hierarchical gendered subjectivities that are brought into being by human rights law in order to ask how, despite a range of feminist challenges, they continue to survive.

I trace a genealogy of the female subjects of human rights law, from the earliest international instruments until the present, and examine the feminist strategies that have been employed in efforts to realize the emancipatory promises of human rights law. What emerges is not a unitary trope of 'woman', but three recurring female subjectivities, which also overlap and have otherwise complex and productive interrelationships. They are, first, the figure of the wife and mother, who needs 'protection' during times of both war and peace and is more an object than a subject of international law; secondly, the woman who is 'formally equal' with men, at least in the realm of public life; and, thirdly, the 'victim' subject who is produced by colonial narratives of gender, as well as by notions of women's sexual vulnerability. These subjectivities are produced in contradistinction to the dominant male representations that they sustain: the protected subject is constituted by her 'protector' in the form of the head of the household and, in times of war, the combatant; the formally equal subject is produced by the masculine standard against which her claims to equality are assessed; and the 'victim' subject is created by the masculine bearer of 'civilization' who rescues 'native' women from 'barbarian' men. The shifting representations of men and women achieve a remarkable

[9] Carol Smart, *Feminism and the Power of Law* (London, 1989).
[10] Margaret Davies, *Asking the Law Question* (Sydney, 1994), pp. 231–4.
[11] Jacques Derrida, *Positions* (trans. Alan Bass, Chicago, 1981), p. 41.
[12] *Ibid.*, p. 26; see also Joan Wallach Scott, 'Gender: A Useful Category of Historical Analysis' in Joan Wallach Scott (ed.), *Gender and the Politics of History* (revised ed., New York, 1999), pp. 28–50.

sense of unity from the consistency of the hierarchies they produce; the privileged subject always bears the masculine characteristics of the gendered duality. In fact, his dominance *depends* on his dissimilarity with the discourse's feminine 'others'.

These gendered personas, and their attendant hierarchies, have displayed an uncanny ability to survive, despite the best efforts of feminist legal strategists. Even as conceived by feminists, the differences of gender have repeated women's marginalization and exclusion from full humanity. The genealogy leads me to the unsettling observation that women's full inclusion in universal representations of humanity may be an impossibility so long as the universal subject (the 'standard') continues to rely for its universality on its contrast with feminized particularities (the 'other').[13] While I am not yet ready to suggest that feminist engagement with human rights law is a futile endeavour, it must be admitted that the enduring nature of these marginalized female subject positions presents a serious conundrum for women's human rights advocates. In conclusion, I offer some initial thoughts on how this conundrum might be addressed.

A genealogy of international law's sexed subjects

My starting point is that women have always been present in international legal texts; that for as long as masculine subjects have been constituted by international law, so too have women been produced as the necessary 'other' against which the masculinity of the regime's normative actors can be projected. Therefore, in 1946, when efforts to give content to the references to human rights contained in the Charter of the United Nations ('UN Charter')[14] commenced with the drafting of the Universal Declaration of Human Rights (UDHR),[15] advocates for women's rights did not start with a clean slate. Women had already been constituted as a subjugated category, more often implicitly than explicitly, by international legal instruments, which helped to shape what was possible in the post-war 'moment'. I begin by examining the antecedent representations of women produced by early international treaties dealing with concerns as diverse as the regulation of war, the promulgation of international labour standards and the prevention of trafficking for the purposes of

[13] Karen Engle, in a similar vein, wonders 'whether the periphery could ever become a part of the core without both the periphery and the core losing their appearances of coherency': Engle, 'International Human Rights and Feminism', p. 531.

[14] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67.

[15] General Assembly Resolution 217A(III) (1948).

prostitution, which came to bear on the way the UDHR was to gender its subjects.

To the extent that these early legal instruments could be characterized as concerned with human rights, their preoccupation was patently with the rights of men, which meant that women were brought into being as objects of international law, rather than as its full legal subjects. Many feminists have described this object status of women as erasure or silencing,[16] but this can be misleading if it is taken to mean that women were absent altogether from the legal imagination. While women were seldom produced explicitly by early legal texts, they were implicit in every representation of masculinity, as I have already suggested. Many of the boundaries, concepts and metaphors that inform international legal thinking have also played a role in the legal reproduction of the dualisms of sex, such as the division between public and private spheres and the idea of the sovereign nation-state, which privilege masculine forms of power over those associated with the feminine.[17] The early treaties took a paternalistic or 'protective'[18] approach to women, reconstituting traditional gender hierarchies as 'natural', thereby misrepresenting the constructed nature of human experience and removing it from discursive contestation.

The first international instruments that set out to regulate war illustrate the reproduction of sexed subjects in hierarchical relations. They were concerned almost exclusively with (male) combatants, despite the already long history of war-time sexual abuse of women.[19] The only references to women were indirect, in the context of requiring an occupying power to respect 'family honour and rights'.[20] In conflating women

[16] This view is linked to the poststructuralist understanding of language that I have alluded to, which is that the repressed 'other' is literally unable to speak. I am not entirely in agreement with this view, although I would agree that the 'other' is unable to speak on her own terms, from a position of full subjectivity.

[17] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, 2000); V. Spike Peterson, 'Security and Sovereign States: What is at Stake in Taking Feminism Seriously?' in V. Spike Peterson (ed.), *Gendered States: Feminist (Re)Visions of International Relations Theory* (Boulder, CO, 1992), pp. 31–64.

[18] Natalie Kaufman Hevener, 'International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women' (1978) 1 *Harvard Women's Law Journal* 131 at 133, used the term 'protective' as one of three analytic categories she developed to characterize treaty provisions concerned with women's status. Her other two categories were 'corrective' and 'non-discriminatory'.

[19] See Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, 1997), pp. 202–3.

[20] Brussels Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Art. XXXVIII; Manual of the Laws and Customs of War on Land, Oxford, 9 September

with 'family honour', women were implicitly constituted as part of the family property, making crimes against them, such as military rape or forced prostitution, an abuse of the honour of the family – a violation of the rights of the male family head – rather than abuse of women's dignity and autonomy. Women were located, together with children, the elderly and sick, in the domestic sphere as feminized civilian objects in need of manly military protection.[21] Thus, the law of war naturalized a gendered distinction between the combatant and those other 'vulnerable' members of families and communities in need of his protection.

A second example of international law's early production of women as objects of masculine and legal protection is provided by the international labour standards developed during the years of the League of Nations.[22] Already constituting the normative figure of the 'worker' as masculine, the 1919 Constitution of the International Labour Organization (ILO) described its goals as 'the protection of the worker against sickness, disease and injury arising out of his employment, [and] the protection of children, young persons and women'.[23] The ILO went on to adopt protective instruments that banned women from night work,[24] from exposure to lead[25] and from working in mines,[26] and mandated maternity leave for six

1880, Art. 49; Convention respecting the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803, Art. XLVI; Convention respecting the Laws and Customs of War on Land, 18 October 1907, entered into force 26 January 1910, 36 Stat. 2277, Art. XLVI.

[21] See further, Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict, and International Law* (The Hague, 2001), pp. 97–8. For a poststructural analysis of the gendered production of the 'combatant' and 'civilian' see Helen M. Kinsella, 'Securing the Civilian: Sex and Gender in the Laws of War' in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance* (Cambridge, 2005), pp. 249–72.

[22] Article 23(a) of the Covenant of the League of Nations calls for the provision of 'fair and humane conditions of labour for men, women, and children': Covenant of the League of Nations, as contained in Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919, in force 10 January 1920, 2 USTS 43 ('Treaty of Versailles').

[23] Preamble to the Constitution of the International Labour Organization, as contained in the Treaty of Versailles.

[24] Convention No. 4: Convention concerning Employment of Women during the Night, Washington, 28 November 1919, in force 13 June 1921. The Convention was revised in 1934 (see Convention No. 41) and again in 1948 (see Convention No. 89), recognizing some exceptions.

[25] Recommendation No. 4: Recommendation concerning the Protection of Women and Children against Lead Poisoning, Washington, 28 November 1919.

[26] Convention No. 45: Convention concerning the Employment of Women on Underground Work in Mines of All Kinds, Geneva, 21 June 1935, in force 30 May 1937.

weeks following the birth of a child.[27] Despite claiming to be in women's best interests, these instruments reinforced stereotypes of women's inadequacies, including assumptions about their physical weakness and their susceptibility to corruption in male-dominated workplaces. That women might need to work for their economic survival was not part of the calculus and protective policies meant that many women suffered great hardship, driving some to disguise themselves as men in order to earn a living.[28] Because women's paid work was conceived as secondary to their domestic roles, it followed that men needed the 'real' jobs that provided them with a 'family' wage and women required special rules to safeguard their role in the family and reproduction.

A third set of protective instruments was concerned with regulating trafficking for the purposes of prostitution.[29] The impetus for these conventions, made explicit by the terminology of 'white slavery', was the trafficking of 'white' women from Europe and North America for the purposes of prostitution in Asia, Africa and South America.[30] Fuelled by racism and Victorian ideas about women's sexuality, the conventions took a moralistic stand against prostitution, and the slavers were depicted as immigrant or foreign men.[31] By constructing the 'problem' as one of

[27] Convention No. 3: Convention concerning the Employment of Women before and after Childbirth, Washington, 28 November 1919, in force 13 June 1921; revised in 1948 (see Convention No. 103).

[28] Sandra Whitworth, *Feminism and International Relations: Towards a Political Economy of Gender in Interstate and Non-Governmental Institutions* (London, 1994), pp. 130–1.

[29] International Agreement for the Suppression of the White Slave Traffic, Paris, 18 May 1904, entered into force 18 July 1805, 1 LNTS 83; International Convention for the Suppression of White Slave Traffic, Paris, 4 May 1910, 211 Consol. TS 45; International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September 1921, 9 LNTS 415; International Convention for the Suppression of the Traffic in Women of Full Age, Geneva, 11 October 1933, in force 24 August 1934, 150 LNTS 431. See further Nora V. Demleitner, 'Forced Prostitution: Naming an International Offense' (1994) 18 *Fordham International Law Journal* 163 at 164–72.

[30] Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18 *Gender Issues* 23 at 30, notes that the term 'white slavery' was first used in 1839 in an anti-Semitic context where Jewish men were seen as responsible for trafficking European women. Demleitner, 'Forced Prostitution', pp. 165–70, has a different account. She credits the use of the term to Victor Hugo, who employed it in a letter to Josephine Butler in 1870, saying '[t]he slavery of black women is abolished in America [as if this were so!]; but the slavery of white women continues in Europe' (quoted at p. 166). Demleitner notes that delegates to the Madrid Conference, which drafted the 1910 Convention, acknowledged that it did not include women of all races, but nevertheless decided to continue to use the term, reflecting the emphasis of the reformers on 'their' women either at home or abroad.

[31] Doezema, 'Loose Women or Lost Women?', pp. 29–31.

slavery rather than prostitution, these instruments projected the idea that European women could not conceivably 'consent' to sex work, especially not with foreign clients. As Jo Doezema observes, the underlying motivation was not to address the problems of exploitation and abuse that women were likely to face in the unregulated sex industry, but to regulate female sexuality in the guise of protecting women.[32] By ignoring the distinction between forced and voluntary sex work, these instruments produced women as unable to take care of themselves; as helpless victims needing masculine/state supervision in the form of special rules for their protection.

There is a remarkable stability in the female subjects produced by these and other early legal instruments,[33] who were valued for their chastity, their prioritization of motherhood and domesticity, their acceptance of the heterosexual family hierarchy and the paternal protection of the state, its laws and its wars. In contradistinction, male figures were produced as women's defenders and moral superiors (apart from the racialized criminals who trafficked them) and the active, public, protecting masculine subject was fashioned as the marker of full humanity, autonomous and self-determining, and in no need of special rules for his protection.

Protective approaches are inconsistent with liberalism's fundamental commitment to equality, but this did not prevent their promulgation into international law by mainly European states, long after the liberal revolutions of the eighteenth century. How this can happen so seamlessly is the question at the heart of this chapter. There is a vast difference between protective measures, which treat women's secondary and dependent status as given, and affirmative measures consistent with liberal conceptions of equality, which are designed to accelerate women's enjoyment of equality with men. For example, maternity leave as a compulsory incident of motherhood is reflective of a hierarchical paternal tradition, while maternity leave available to women as of right is consistent with a framework of sex equality. Using the lens of Wesley Hohfeld's characterization of rights, protective measures directed at women are akin to a disability, as the correlative of men's immunity from being subjected to them, while affirmative measures are claim rights, which entail corresponding duties

[32] *Ibid.*, pp. 36–7.

[33] See also the Hague Conventions of 1902, which addressed conflicts in national laws on marriage, divorce and custody of children in a protective mode: Convention du 12 juin 1902 pour régler les conflits de loi en matière de mariage; Convention du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière de divorce et de séparation de corps; Convention du 12 juin 1902 pour régler la tutelle des mineurs.

of performance by other parties.[34] A claim right is clearly more consistent with women's full humanity than placing them under a disability. Protective measures are also reminiscent of the feudal tradition in which women's submission to the family hierarchy was justified as part of the tradition of chivalry whereby obedience, and even servitude, produced a 'noble equality' and 'exalted freedom'.[35] Today, protective measures might be more persuasively defended by progressive communitarian arguments, which overlap with some feminist arguments in their emphasis on the embeddedness of individuals in their social context and prioritization of certain collective or public goods over individual rights, such as the provision of child-care.[36] However, such measures are more aptly conceived as affirmative action.

Feminist debate about protection goes back to the years of the League of Nations. The protective approach was supported by many feminists who drew a parallel with the League's policies on 'natives' and 'minorities', which they understood as laying the groundwork for self-determination and eventual equality,[37] in this instance misunderstanding protection as affirmative action. Indeed, women's advocates, and the gender-based non-government organizations (NGOs) they established, often played key roles in the adoption of protective treaties,[38] which they argued were for women's benefit. Other feminists disagreed and instead sought to promote women's equality and non-discrimination in the enjoyment of rights, drawing from the liberal tradition. The Inter-Allied Suffrage

[34] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. Walter Wheeler Cook, New Haven, 1923), pp. 35–64; Jeremy Waldron (ed.), *Theories of Rights* (6th ed., Oxford, 1995), pp. 6–7.

[35] Edmund Burke, 'Reflections on the Revolution in France', reprinted in Jeremy Waldron, *'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man* (London, 1987), pp. 96–118 at p. 110.

[36] Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal–Communitarian Debate* (New York, 1993), pp. 107–12.

[37] Marilyn Lake, 'From Self-Determination via Protection to Equality via Non-Discrimination: Defining Women's Rights at the League of Nations' in Patricia Grimshaw, Katie Holmes and Marilyn Lake (eds.), *Women's Rights and Human Rights: International Historical Perspectives* (New York, 2001), pp. 254–75 at p. 257.

[38] Felice D. Gaer, 'And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights' in Carol Elizabeth Lockwood, Daniel Barstow Magraw, Margaret Faith Spring and S. I. Strong (eds.), *The International Human Rights of Women: Instruments of Change* (Washington DC, 1998), pp. 1–89 at p. 5; Jane Connors, 'NGOs and the Human Rights of Women at the United Nations' in Peter Willetts (ed.), *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (London, 1996), pp. 147–80 at p. 149.

Conference[39] persuaded the drafters of the Covenant of the League of Nations to support equal opportunity for women in the employment policies of the new international institution,[40] but failed to have women's equality more broadly recognized. From the mid-1920s, women's groups became increasingly insistent in their opposition to protective labour legislation, pursuing instead women's equal right to work.[41] The notion of women's equality and rights, as distinct from their tutelage, was discussed at the 1930 Hague Conference for the Codification of International Law in relation to promoting equal rights for women and men to retain their nationality on marriage.[42] Although this proposition was rejected, it led to the adoption of a resolution that established the League's first ever committee of women to advise it on nationality issues and urged states to study the possibility of 'introduc[ing] into their law the principle of the equality of the sexes in matters of nationality'.[43] Pressed by women's NGOs, ten South American states then took the initiative at the international level in 1935 and presented a proposal to the League's 16th General Assembly to promulgate a convention that would promote women's civil, legal and political equality with men.[44] Although action was deferred because many states remained adamant that the question of women's rights was a domestic issue, two years later the League established a Committee of Experts to undertake a comprehensive enquiry into the legal status of women worldwide.[45] Unfortunately, due to the outbreak of the Second World War, the Committee met only three times and the study was never completed. The point is, however, that by the mid-1930s a nascent discourse of sex non-discrimination and women's equality was gaining ground, fostered by a growing number of women's organizations and some states. This new account emphasized the common humanity

[39] Margaret E. Galey, 'Forerunners in Women's Quest for Partnership' in Anne Winslow (ed.), *Women, Politics and the United Nations* (Westport, CT, 1995), pp. 1–10. The Inter-Allied Suffrage Conference was a joint organization of the French Women's Suffrage Union, the International Women's Suffrage Alliance and the International Council of Women.

[40] Covenant of the League of Nations, Art. 7.

[41] Whitworth, *Feminism and International Relations*, pp. 136–7.

[42] Lake, 'From Self-Determination', p. 258.

[43] Resolution on the Nationality of Women, 24 January 1931, reprinted in Carol Elizabeth Lockwood, Daniel Barstow Magraw, Margaret Faith Spring and S. I. Strong (eds.), *The International Human Rights of Women: Instruments of Change* (Washington DC, 1998), pp. 125–6.

[44] Lake, 'From Self-Determination', pp. 259–62; Galey, 'Forerunners', p. 7. The states involved were Argentina, Bolivia, Cuba, Dominican Republic, Haiti, Honduras, Mexico, Panama, Peru and Uruguay.

[45] Lake, 'From Self-Determination', p. 262.

of women and men, offering women the hope of full legal subjectivity in international law, as autonomous individuals, like men, and as formally equal participants in public life.

The tension between the gender narrations of protectionism and the embryonic equality principle was, however, not the only historical dynamic that informed the drafting of the UDHR. There was also the ideological baggage that had accompanied earlier feminist efforts to improve women's status internationally as part of the 'civilizing mission' of European imperialism.[46] As historian Clare Midgley notes, the formative period for modern feminism in Britain coincided with the massive expansion of British imperialism between 1790 and 1850;[47] the history of Western feminism in general, like that of international law, unfolded hand-in-hand with the colonial project whereby two-thirds of the world's population came to be subjugated to European domination.[48] While early feminists, on the one hand, identified with colonized men and women by drawing on analogies with slavery to describe their own treatment, they simultaneously disavowed any identification with colonized peoples by contrasting the 'progressive' nature of British society with the backwardness of the colonies, in appealing for women's rights.[49] Later, British women campaigning for suffrage drew attention to their social reform agenda for colonized women as a way to justify their inclusion in Parliament, because it would strengthen their capacity to continue the task of civilizing black and Indian women, saving them from the 'barbarian' men of the colonies and converting them to Christianity.[50]

Thus early British feminists produced two female prototypes: in their own image they produced the female subject who bears the rights associated with 'civilization', and in the image of the women of the colonies they produced the 'victim' subject of her 'uncivilized' culture and male compatriots, whom they could better speak for and save as a result of exercising these rights. These liberal rights were, however, also committed to the project of patriarchy. While European men were full subjects of the rights, European women were placed in the contradictory position

[46] See Valerie Amos and Pratibha Parmar, 'Challenging Imperial Feminism' (1984) 17 *Feminist Review* 3.

[47] Clare Midgley, 'British Empire, Women's Rights and Empire, 1790–1850' in Patricia Grimshaw, Katie Holmes and Marilyn Lake (eds.), *Women's Rights and Human Rights: International Historical Perspectives* (New York, 2001), pp. 3–28.

[48] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' in Eve Darian-Smith and Peter Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor, 1999), pp. 89–107.

[49] Midgley, 'British Empire', p. 7.

[50] *Ibid.*, p. 12.

of being denied the exercise of many of those rights themselves, while willingly working as the adjuncts and helpers of 'civilized' men in the mission of imperialism, which systematically denied many others those same rights.

When the UN Charter was adopted in 1945, a new space was opened for feminist engagement with international law with the recognition of the importance of 'the equal rights of men and women'[51] and the commitment to 'promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[52] The vision of the inclusion of all women in the global community as bearers of 'equal' rights, together with the Charter's promotion of the 'principles of equal rights and self-determination of peoples',[53] promised a significant reorientation away from the protective and colonial traditions that had preceded it. The process of drafting the UDHR set the stage to test this potential, but the drafters carried with them the trappings of a complicated history of international engagement with the question of women's rights. In addition to the uneasy relationship between the discourses of protectionism and equality, they bore the markings of an imperial history that had bequeathed a woman bifurcated by colonialism. Could the idea of universality provide an opening for the emergence of a discourse that would jettison the earlier exclusionary gender tropes and constitute, instead, a fully inclusive subject in the new law of human rights? Or would the exclusionary tropes be repeated in the new guise of universal human rights?

The strategy of promoting women's specificities in the new era of universality

The newly established Commission on Human Rights (CHR) commenced the task of drafting the UDHR in 1946. Members of the Commission on the Status of Women (CSW), also established in 1946,[54] were active

[51] UN Charter, preamble.

[52] *Ibid.*, Art. 1(3); similar references are in Arts. 13(1)(b), 55(c) and 76(c). The inclusion of sex as a category of non-discrimination was due to the efforts of women delegates from Brazil, the Dominican Republic and Mexico working through the Inter-American Commission on Women and with the NGOs who attended the Charter negotiations in San Francisco as advisers to the US delegation: see Gaer, 'Never the Twain Shall Meet?', p. 7.

[53] UN Charter, Art. 1(2).

[54] Margaret E. Galey, 'Women Find a Place' in Anne Winslow (ed.), *Women, Politics and the United Nations* (Westport, CT, 1995), pp. 11–27 at pp. 13–14.

participants in the drafting sessions, making recommendations aimed at ensuring the inclusion of women. The CSW was made up entirely of women who, according to John Humphrey, the first Director of the Division for Human Rights, were all 'militants in their own countries' and 'acted as a kind of lobby for the women of the world',[55] which made the Commission an unusually independent Charter-based body.[56] The active participation of women, together with Eleanor Roosevelt's involvement as Chair of the CHR, also made the drafting process unusual. In formulating their recommendations the CSW members worked closely with women's NGOs, drawing directly on their own experience and feminist efforts during the preceding years of the League, and indirectly on at least five centuries of women's struggles for emancipation.[57]

At the first session of the CSW, members agreed that their goal was to 'elevate the equal rights and human rights status of women, irrespective of nationality, race, language, or religion, in order to achieve equality with men in all fields of human enterprise'.[58] In committing themselves to promoting women's equality, they rejected the idea that sex was an entirely natural category. Their strategy was to ensure that explicit reference was made to rights that were specific to women's experience, but within the framework of women's equality with men rather than as protective measures.[59] They understood their project primarily in the context of the tensions between protectionism and equality, but their perspective was also at odds with certain premises of classical liberalism, particularly its formal approach to equality and its distinction between public and private spheres. It emerged that the CSW's views clashed with those of the

[55] John P. Humphrey, 'The Memoirs of John P. Humphrey: The First Director of the United Nations Division of Human Rights' (1983) 5 *Human Rights Quarterly* 387 at 405.

[56] The CSW's proposals to the CHR, during the drafting of the UDHR, were shaped collectively by the CSW. Among the early CSW members who played a significant role were Bodil Begtrup (Denmark, first Chairperson of the CSW), Minerva Bernardino (Dominican Republic), Hansa Mehta (India) and Amalia de Castillo Ledón (Mexico).

[57] Fraser commences her historical account of the emergence of women's human rights with the publication of Christine de Pizan's *The Book of the City of Ladies* (*Le Livre de la Cité des Dames*), in Europe five centuries ago: 'Becoming Human', pp. 855, 858.

[58] Margaret E. Galey, 'Promoting Nondiscrimination against Women: The UN Commission on the Status of Women' (1979) 23 *International Studies Quarterly* 273.

[59] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, 1999), pp. 116–29. For more critical analyses see Helen Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights' in Carol Gould (ed.), *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa, NJ, 1983), pp. 250–64; Hilary Charlesworth, 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 *Washington and Lee Law Review* 781.

majority of the CHR, including Roosevelt, who felt that the general prohibition of discrimination based on sex (Article 2) was sufficient to ensure women's equal enjoyment of universal human rights,[60] and that explicit references to women would weaken the position of women by undercutting the meaning of 'everyone', and introduce rights that were not 'universal' in nature.[61] This majority failed to understand that their imagined universal subject was gendered; that their abstract bearer of human rights possessed masculine characteristics, which would be reflected in legal standards of equality and non-discrimination. Not unreasonably, the strategy of the CSW was to try to solve this problem by having women's specific human rights recognized as universal.

An initial concern for the CSW was the use of masculine pronouns in the early drafts of the UDHR, which explicitly gendered the universal subject;[62] a linguistic point that is often trivialized, but has often proved to be determinative. In the tradition of Olympe de Gouges, who rewrote the French Declaration of the Rights of Man and the Citizen by using gender-inclusive language in 1791,[63] they refused to accept anything less than explicit inclusion. As Roosevelt later recalled, the CSW representatives argued: 'If we say "all men," when we get home it will be "all men".'[64] Eventually, it took an unprecedented intervention from the UN Secretary-General, at the urging of the CSW, before the CHR agreed to change the opening words of the first article from 'all men' to 'all people, men and women' at its third session in 1948.[65] The wording that was transmitted to the Economic and Social Council for approval, and eventually adopted by the General Assembly, used 'all human beings'.[66] The CSW's concern with inclusive language was consistent with their equality approach because, as they saw it, if women were explicitly included as bearers of all human rights, it would be more difficult to relegate them to special categories requiring protection (or salvation). Their victory on

[60] Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *Human Rights Quarterly* 229 at 231–2.

[61] Lake, 'From Self-Determination', p. 265.

[62] For a feminist analysis of the use of masculine terms as generic, see Holmes, 'Feminist Analysis', pp. 259–61.

[63] Olympe de Gouges, 'Declaration of the Rights of Woman and the Female Citizen' (1791), reprinted in Carol Elizabeth Lockwood, Daniel Barstow Magraw, Margaret Faith Spring and S. I. Strong (eds.), *The International Human Rights of Women: Instruments of Change* (Washington DC, 1998), pp. 90–7.

[64] Gaer, 'Never the Twain Shall Meet?', p. 10, quoting Eleanor Roosevelt, 'Making Human Rights Come Alive', Speech to the Second National Conference on UNESCO, Cleveland, Ohio, 1 April 1949.

[65] Morsink, 'Women's Rights', p. 235. [66] *Ibid.*, pp. 235–6.

gendered language was, however, only partial, and the masculine pronoun remained in fourteen of the UDHR's thirty articles.[67] The stubbornness (or was it optimism?) of the members of the CHR on this matter, most of whom were deeply committed to the idea of human rights, attests to the continuing power of the discourse of gender naturalization.

The CHR's refusal to specify that masculine pronouns were inclusive of the feminine, which the CSW had also suggested,[68] left the CSW with the task of negotiating the wording of every article in their attempts to ensure that the rights of women were included. Despite their efforts, there is only one direct reference to the equal rights of women which, significantly, appears in the context of the family.[69] Article 16 recognizes the 'equal rights' of men and women 'as to marriage, during marriage, and at its dissolution'. The 3rd Committee of the General Assembly, not the CHR, was responsible for the ultimate formulation, which survived by a very close vote despite resistance from Christian groups to the reference to divorce.[70] The recognition of equality between women and men in family relations was unprecedented. Although John Stuart Mill had famously argued for equality within marriage in 1869,[71] his lead had generally not been followed,[72] and liberalism's continued treatment of the domestic sphere as a private and unregulated space presented a major conceptual barrier to women's enjoyment of human rights.[73] Communitarian traditions have been even less likely to be concerned with equality within families, tending to exemplify the most oppressive features of family relations rather than opening them to scrutiny.[74] Therefore, the wording of Article 16 was a significant achievement, moving, as it does, against the grain of the major traditions that informed the drafting of the UDHR and challenging the purported innateness of gender hierarchies.

[67] UDHR, Arts. 8, 10, 11(1), 12, 13(2), 15(2), 17(2), 18, 21(1), 22, 23(3), 25(1), 27(2) and 29(1) and (2).

[68] Morsink, 'Women's Rights', pp. 231–2.

[69] There is also a reference to the equal rights of men and women in the preamble to the UDHR, but even this was only included after a struggle, despite merely repeating the wording in the UN Charter: see Morsink, 'Women's Rights', p. 232.

[70] *Ibid.*, p. 248.

[71] John Stuart Mill, *The Subjection of Women* (ed. Pamela Frankau, London, 1970), pp. 219–317 at p. 259.

[72] Martha C. Nussbaum, *Sex and Social Justice* (New York, 1999), p. 65.

[73] Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia, 1994), pp. 85–115.

[74] Frazer and Lacey, *Politics of Community*, pp. 139–40.

Unfortunately, however, the trope of the wife and mother, in need of male protection, also survived in the text of the UDHR. The description of the family as 'the natural and fundamental group unit of society'[75] reintroduces the suspect language of nature, masking the political character of the family and suggesting that it is exempted (still) from human rights scrutiny. Further, the CSW recommendation that any special provisions relating to motherhood be framed as 'rights' or 'benefits', as an alternative to treating maternity as a disability requiring 'protection', was not adopted.[76] The protected subject also makes her appearance in Article 25, which recognizes that everyone [sic] has the right to an adequate standard of living for 'himself and his family'.[77] Conflicting with the Article 16 guarantee of equal marriage rights, these provisions give renewed life to the protected female subject and the masculine figure of the household head and breadwinner who still needs a family wage in the era of universal human rights.

The CSW's acceptance of these provisions suggests some continuing ambivalence in the feminist imagination about protective (affirmative?) conceptions of women, especially when it comes to motherhood. This ambivalence is also apparent in the CSW's failure to promote rights associated with women's physical integrity and sexual autonomy, which left the UDHR silent on gendered violence and reproductive rights. At least in hindsight, these omissions are hard to understand, presuming the drafters had knowledge of the sexual violence directed at women during the Second World War, including the Japanese system of 'comfort women' and the Nazi practices of forcing abortions on non-Aryan women. The Nazis' targeting of homosexual women and men for extermination also makes the failure to protect rights associated with sexuality, in retrospect, unfathomable. The drafters left these matters, if they thought about them at all, in the uncertain custody of privacy rights.[78] These 'blind spots' attest to the powerful way that protective gender narratives work to prevent the abuses perpetrated by putative protectors – husbands, doctors and religious leaders – being classified as human rights violations.

In seeking to ensure that women's rights were explicitly recognized in the UDHR, the CSW delegates were confronted with the difficult,

[75] UDHR, Art. 16(3). [76] Lake, 'From Self-Determination', pp. 266–7.

[77] Morsink, *Universal Declaration of Human Rights*, p. 120, notes that the CSW did not object to the masculine language of the phrase 'himself and his family' which is used in both Arts. 23 and 25 because the concept of the family wage was so widely supported.

[78] Article 12 protects against 'arbitrary interference with his [sic] privacy, family, home or correspondence'.

perhaps impossible, task of conceptualizing women's different experience in a framework of equality; pressing against the established discourses of protection, salvation and formal equality. To this end, they made a number of proposals for explicit references to women's equality in the the public sphere context.[79] While their efforts resulted in several important references to equality in the UDHR's substantive provisions,[80] they do not achieve the CSW's goal of including rights that are specific to women's gendered experience. Making matters worse, there is no indication in the UDHR that equality is to be understood substantively, and there is no provision for affirmative action measures. While there is an emerging consensus today that equality and non-discrimination in human rights law are substantive concepts,[81] the gendered subjects produced by the UDHR in 1948 were formally equal, which left women's differently gendered experience in the realm of protection.

The markings of the imperial inheritances of international law and Western feminism also survived in the UDHR. In keeping with their mandate, the CSW sought to promote the rights of women 'irrespective of nationality, race, language or religion'. They argued on several occasions for the inclusion of non-discrimination clauses that made reference to other forms of discrimination, in addition to sex discrimination.[82] Despite this clarity about what would today be described as 'intersectional' forms of discrimination,[83] the CSW's reliance on non-discrimination to do all the work of ensuring the inclusion of women's diversities (beyond gender differences) merited the same critique as the one they applied to the CHR's view that prohibiting sex discrimination was enough to ensure women's equal enjoyment of human rights. That is, without specific acknowledgment that women's human rights abuses may have *intersectional* dimensions, the purportedly universal subject is not only reflective of the privileged gender group, but also bears the characteristics of

[79] Morsink, *Universal Declaration of Human Rights*, p. 243 (legal personality), pp. 250–2 (political participation) and pp. 252–5 (conditions of work and remuneration).

[80] See for example Arts. 21(3), 23(2) and 26(1).

[81] Dianne Otto, '"Gender Comment": Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) 14 *Canadian Journal of Women and the Law* 1; Titia Loenen, 'Rethinking Sex Equality as a Human Right' (1994) 3 *Netherlands Quarterly on Human Rights* 253.

[82] Morsink, 'Women's Rights', pp. 244, 251–2.

[83] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

privileged race, class and sexuality groups.[84] While this oversight may be partly attributable to the experience of the CSW women, the problem goes much deeper, to the heart of the idea of universality: whether it is possible to conceive of a universal subject that is fully inclusive.

The privileging of European experience is amply evident in the architecture of the UDHR. Although economic and social rights are recognized as universal, the UDHR gives priority to civil and political rights, in their numerical majority and their placement before economic and social rights. Its focus on individual human rights, despite the communitarian character of most, if not all, non-European traditions, raises a number of problems for feminists as well as for communitarian traditions. For feminists, the paradigm of individual rights obfuscates the structural dimensions of hierarchal arrangements of power, misrepresenting institutionalized and systemic disadvantage as a problem that can be solved by individual rights claims.[85] Further, the essentially competitive nature of individual rights makes them 'anti-socialistic',[86] leading to winners and losers rather than to collective solutions more in keeping with many communitarian and feminist ideals. While the experiences of fascism and the rising totalitarianism of communist states gave the protection of individual rights a particular urgency in the Europe of 1948, it did not justify almost totally ignoring collective conceptions of rights and obligations. In marking the autonomous individual as the highest ideal of 'civilization', the UDHR doubly reinstated the colonial paradigm of masculinity; of European superiority and of the feminized 'victim' subject in need of rescue from her own communal culture. The 'spirit' of rights that is present in every cultural tradition[87] was thus erased from the text and, along with it, women's histories of resistance to patriarchal arrangements in non-European and colonial societies.[88]

The marginalized female subjects produced by the UDHR – in need of protection, or imperial salvation, or relegated to a position of formal equality with men – were repeated, with little change, in the

[84] *Ibid.*

[85] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford, 1998), p. 27.

[86] *Ibid.*

[87] Leslye Amede Obiora, 'Panel Discussion: How Does the Universal Declaration of Human Rights Protect African Women?' (1999) 26 *Syracuse Journal of International Law and Commerce* 195 at 208.

[88] Marjorie Mbilinyi, 'Runaway Wives in Colonial Tanganyika: Forced Labour and Forced Marriage in Rungwe District 1919–1961' (1988) 16 *International Journal of the Sociology of Law* 1 at 3.

translation of its provisions into legally binding instruments: the International Covenant on Economic, Social and Cultural Rights (ICESCR)[89] and the International Covenant on Civil and Political Rights (ICCPR).[90] Both Covenants, like the UDHR, explicitly gender the universal subject and rely primarily on a general prohibition of sex discrimination as the means to ensure women's equal enjoyment of the rights they enumerate.[91] However, the continued efforts of the CSW[92] did result in a stronger emphasis on equality between women and men with the inclusion of common Article 3, which requires States Parties to ensure 'the equal right of men and women to the enjoyment of all . . . [rights] set forth in the present Covenant'. This article repeats the UN Charter's reference to the 'equal rights of men and women', which had been relegated to the preamble to the UDHR, and the choice of the word 'enjoyment' suggests substantive rather than formal equality.[93] The CSW also succeeded in having the UDHR's affirmation of equal marriage rights guaranteed by Article 23 of the ICCPR.[94] However, during the drafting of the Covenants, the energies of the CSW and women's NGOs were primarily focused elsewhere in the programme of work of the CSW,[95] which was moving towards the formulation of separate conventions promoting women's equality with respect to political and nationality rights[96] and the preparation of what would become the General Assembly Declaration on the Elimination of Discrimination against Women.[97] Paradoxically, the establishment of a separate institutional focus for women was having the effect of weakening the advocacy for women in general human rights forums.

[89] New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3.
[90] New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.
[91] *Ibid.*, Art 2(1); ICESCR, Art. 2(2).
[92] Connors, 'NGOs and the Human Rights of Women'.
[93] The ICCPR also takes two further steps: it makes clear that the prohibition of sex discrimination is among the norms that are non-derogable in times of public emergency (Art. 4(1)) and extends the norm of sex non-discrimination to children (Art. 24(1)).
[94] Connors, 'NGOs and the Human Rights of Women', p. 154.
[95] *Ibid.*, p. 153.
[96] Convention on the Political Rights of Women, New York, 31 March 1953, in force 7 July 1954, 193 UNTS 135; Convention on the Nationality of Married Women, New York, 20 February 1957, in force 11 August 1958, 309 UNTS 65. Despite the formal affirmation of equality in the convention on women's political rights, a memorandum of the Secretary General still treated the granting of political rights to women as a grant of privilege or protection: see Carrie DeBehnke in Carol Elizabeth Lockwood, Daniel Barstow Magraw, Margaret Faith Spring and S. I. Strong (eds.), *The International Human Rights of Women: Instruments of Change* (Washington DC, 1998), pp. 181–2.
[97] GA Res. 2263 (XXII), 7 November 1967.

Outside the substantive equality approach of common Article 3, both Covenants make few specific references to women. When such references are made, they either compromise women's equality by taking a protective or imperial approach, or introduce narratives that restrict equality to its formal sense. For example, while equality in marriage is recognized, it is contradicted by protective conceptions of women in association with pregnancy and childbirth[98] and the continued framing of the right to an adequate standard of living as a right that is due to a man, as the household head.[99] Further, the weaker enforcement obligations of the ICESCR magnify the qualified approach of the UDHR to this category of rights, revealing an underlying commitment to the market economies of capitalism and reducing social responsibility for the enjoyment of economic, social and cultural rights, an approach that impacts disproportionately on women, especially poor women.

In sum, the approach taken by the CSW – to ensure women's inclusion in the universal coverage of human rights by seeking explicit reference to women's rights within an overarching framework of equality – did not prevent the reinvigoration of all three of the marginalized female subjectivities produced by the earlier instruments. The main subject of human rights law, the generic bearer of universal rights, remained tenaciously masculine. Nevertheless, there were also some important changes, including the opening up of the private sphere to human rights scrutiny, and formal equality replacing protectionism as the dominant approach. But it must be asked whether the persistence of marginalizing representations of women suggests that the discourse of human rights is itself built on histories and structures of domination and therefore, ironically, reliant on the reproduction of hierarchical gender subjectivities? Or could the development of more substantive conceptions of gender equality still provide an opening for the inclusion of women's rights? These are questions that the next strategy of women's rights advocates tried to address.

The strategy of substantive equality by means of a specialized women's human rights instrument

The masculinity of the generic subject of human rights law produced by the Universal Bill of Rights – the UDHR, ICCPR and ICESCR – had serious practical consequences. It meant that women's enjoyment of human rights was seldom addressed by UN human rights bodies despite the growing

[98] ICESCR, Art. 10(2). [99] *Ibid.*, Art. 11(1).

number of formal commitments to women's equality,[100] while it was clear that women's disadvantage was persisting, and in some cases worsening.[101] This dismal state of affairs led to the second major attempt by feminists to achieve women's inclusion as full subjects of human rights law: the promulgation of a convention that would promote women's substantive equality with men. While this idea had its antecedents in the conventions drafted earlier by the CSW encouraging women's equal enjoyment of political and nationality rights, and in the General Assembly's 1967 Declaration, it was the first time that the achievement of women's substantive equality was a clear, albeit still contested, goal. In the hopeful context of the UN's International Decade for Women (1976–85), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly and opened for ratification in 1979.[102] Its preamble expressed concern that 'extensive discrimination against women' continues to exist, despite states' obligations under the human rights covenants to ensure the equal rights of men and women and despite the adoption of other international conventions, resolutions, declarations and recommendations promoting equality between women and men.

In examining the approach that CEDAW takes to the issues of gender representation and hierarchy that I have raised, it must first be observed that the formal equality approach of the general human rights instruments remains prominent. In urging the prohibition of all forms of discrimination against women, the CEDAW adopts a template of comparison with men that continues to tie women's rights to comparisons with a universal standard that is cast in masculine terms.[103] At the same time, the project of treating women differently within the framework of equality is also advanced, which requires some reconceptualization of the universal subject. The drafters of CEDAW tackled this project in two ways: by challenging the conceptual boundaries of human rights law, and by explicitly reconstituting the universal subject as a woman. The task of reconceptualizing boundaries is commenced by expanding the definition of discrimination against women by ensuring that both direct and indirect

[100] Margaret E. Galey, 'International Enforcement of Women's Rights' (1984) 6 *Human Rights Quarterly* 463.

[101] See for example Ester Boserup, *Women's Role in Economic Development* (New York, 1970).

[102] New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

[103] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 631, 'the underlying assumption of its [CEDAW's] definition of discrimination is that women and men are the same'.

forms of discrimination are included and defining the goal substantively, as directed towards women's 'enjoyment' and 'exercise' of human rights and fundamental freedoms.[104] Other CEDAW provisions also make reference to 'the practical realization' of equality between women and men[105] and 'effective protection' against discrimination.[106] A strong endorsement of affirmative action further underlines the goal of substantive equality,[107] although the 'temporary' character of such measures must be questioned in light of women's entrenched disadvantage and the long-term nature of the project of dismantling gender hierarchies.[108] Different treatment for the purposes of affirmative action is distinguished from protectionism in its extreme form by cautioning against 'the maintenance of unequal or separate standards'.[109] While the argument that equality can result from separate-but-equal treatment was supported by a coalition of conservative religious states at the Fourth World Conference on Women,[110] advocates of women's equality would agree that this approach is unacceptable. As Martha Nussbaum observes, it 'usually ends up endorsing a division of duties that is associated with traditional forms of hierarchy'.[111] Finally, CEDAW is emphatic in its prohibition of discrimination in the private sphere,[112] rejecting the boundary between public and private spheres that has served to perpetuate protective ideas about women.

The CEDAW also (re)interprets human rights in order to reconstitute its subject as a woman. For example, in the sphere of work, unfair dismissal is (re)defined to include dismissal on the grounds of pregnancy, maternity leave and marital status,[113] and providing social service supports for workers is (re)defined to include the provision of child-care

[104] CEDAW, Art. 1. [105] *Ibid.*, Art. 2(a). [106] *Ibid.*, Art. 2(c).

[107] *Ibid.*, Art. 4(1), declares 'temporary special measures aimed at accelerating de facto equality between men and women' not to be discriminatory under the Convention, so long as they do not entail 'the maintenance of unequal or separate standards'.

[108] Committee on the Elimination of Violence against Women ('CEDAW Committee'), General Recommendation No. 25 (30 January 2004), UN Doc. CEDAW/C/2004/I/WP.1/Rev.1, resolves this problem in two ways. First, it distinguishes between temporary special measures and other 'general social policies' to improve the status of women which cannot be considered temporary special measures (para. 19). Secondly, it acknowledges that 'temporary' may mean 'a long period of time', as long as the measures are functionally necessary (para. 20).

[109] CEDAW, Art. 4(1).

[110] Dianne Otto, 'Holding Up Half the Sky, But For Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7 at 14–15.

[111] Nussbaum, *Sex and Social Justice*, p. 51.

[112] CEDAW, Art. 1, does not limit its prohibition of discrimination to the public sphere.

[113] *Ibid.*, Art. 11(2)(a).

facilities.[114] Similarly, with respect to ensuring women's equal enjoyment of the right to education, gender-specific issues must be addressed, like eliminating stereotypical gender representations from educational materials[115] and implementing school retention strategies that are directed specifically at women and girls.[116] Nicola Lacey describes the approach in CEDAW as 'subtly positioned . . . between a universal conception of human rights and a woman-centred political focus'.[117] However, in some cases CEDAW goes beyond this balancing act and dispenses altogether with the model of comparison with men, as when addressing the issues of pregnancy and motherhood. For example, 'maternity leave with pay or comparable benefits' must be available 'without loss of employment, seniority or social allowances',[118] and women's health-related rights include autonomous access to appropriate reproductive health care services, not conditioned on equality with men.[119] These provisions grant women claim rights, rather than special benefits or privileges and, in so doing, reimagine the universal subject by recognizing universal rights that may not be relevant to men.

Building on these and other textual opportunities, the CEDAW Committee has strengthened CEDAW's substantive equality framework by adopting General Recommendations that advance the project of reimagination by further releasing CEDAW's subject from comparisons with men. For example, General Recommendation 16 urges States Parties to recognize and value women's unpaid economic contributions and makes it clear that the Committee considers unpaid work in family enterprises to be a form of exploitation of women that is contrary to CEDAW.[120] In the same vein, General Recommendation 24 insists that States Parties must implement health measures that address the 'distinctive features and factors that differ for women in comparison to men', breaking out of the paradigm that has recognized women's different health needs only in connection with pregnancy and motherhood.[121] The CEDAW Committee

[114] *Ibid.*, Art. 11(2)(c). [115] *Ibid.*, Art. 10(c). [116] *Ibid.*, Art. 10(f).

[117] Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed.), *Gender and Human Rights* (Oxford, 2004), pp. 13–55 at p. 22.

[118] CEDAW, Art. 11(2)(b).

[119] *Ibid.*, Arts. 11(2)(b) and 12(2); see further Arts. 10(h), 11(1)(f) and 11(2)(d).

[120] CEDAW Committee, General Recommendation 16 (2 January 1991), as contained in UN Doc. A/46/38; see also CEDAW Committee, General Recommendation 17 (3 January 1991), as contained in UN Doc. A/46/38.

[121] CEDAW Committee, General Recommendation 24 (2 February 1999), as contained in UN Doc. A/54/38/Rev.1, para. 12; see further, CEDAW Committee, General Recommendation 14 (2 February 1990), as contained in UN Doc. A/45/38 (on female circumcision).

has also declared its intention to treat violence against women as a form of discrimination against women that is prohibited by CEDAW,[122] and found violations of CEDAW in a case of domestic violence,[123] submitted under the new Optional Protocol that allows individual complaints.[124] These interpretations directly counter the production of marginalized subject positions as an acceptable response to women's specificities and give life to a more gender-inclusive universal subject.

Nevertheless, despite the innovative and detailed elaboration of substantive equality by CEDAW, all three of the marginalized subjectivities remain. I have already made reference to the subject who is formally equal with men, evident in many of CEDAW's provisions, despite the commitments to equality in a substantive sense. The ultimate goal of CEDAW still appears to be formally equal treatment, which, as Frances Olsen has usefully explained in another context, disrupts the rigid 'sexualizations' of the dualisms of gender by imagining that women can assume the roles and characteristics that have traditionally been thought of as men's, but does nothing to challenge the 'hierarchization' of sexed activities.[125] The movement imagined by formal equality is only one-way, contending that women should enjoy the same rights as men if they choose to enter the public sphere. It is instructive that there is not a parallel concern to ensure that men's choice to be 'like women' in domestic matters leads to the enjoyment of rights equal to those that women enjoy.

Protective representations of women also survive through a number of techniques. The first is the requirement of the 'suppress[ion] . . . of the exploitation of prostitution of women'.[126] This provision does not recognize the rights of women, either as victims of forced prostitution or as workers in the sex industry. Instead, it casts all prostitution as 'exploitation' and all 'prostitutes' as always already needing protection. Such over-simplification of the complexity of women's economic decision-making not only denies women agency, but also reflects the same gendered anxieties about women's sexuality as the earlier anti-trafficking

[122] CEDAW Committee, General Recommendation 12 (6 March 1989), as contained in UN Doc. A/44/38, para. 1; updated and extended by CEDAW Committee, General Recommendation 19 (29 January 1992), as contained in UN Doc. A/47/38, para. 23.

[123] CEDAW Committee, Communication No. 2/2003, *Ms A. T.* v. *Hungary*, as contained in UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005).

[124] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 15 October 1999, in force 22 December 2000.

[125] Frances Olsen, 'Feminism and Critical Legal Theory: An American Perspective' (1990) 18 *International Journal of the Sociology of Law* 199 at 202–3.

[126] CEDAW, Art. 6.

instruments.[127] The article is placed with the general provisions in Part I of CEDAW, which gives this protective representation a troubling prominence. The CEDAW also condones protective labour legislation, a position that is not improved by the stipulation that States Parties periodically review its continuation 'in the light of scientific and technological knowledge'.[128] By predicating change on the advice of technical and scientific experts, the provision doubly removes women from making their own decisions about where and when they will work. Protective approaches are also indirectly kept alive by many of the sweeping reservations that States Parties have entered in order to limit their obligations under CEDAW.[129] Article 16, which promotes equality in the context of marriage and the family, is the most highly reserved of the substantive provisions, evidencing strong resistance to equality in the domestic sphere and an enduring resolve to continue treating women as objects of masculine protection.

The 'victim' subject of the discourse of (neo)colonialism is also evident in CEDAW. She overlaps, to some extent, with the protected figure of the prostitute in that the problem driving the adoption of Article 6 in 1979 was no longer the 'white' slave trade but the movement of women from developing countries to the West.[130] The motivation to rescue these new 'victims' was fuelled by depictions of them as backward, naïve, helpless, tradition-bound and lacking the sophistication to make a rational decision to work in the sex industry.[131] Such images have continued to have powerful effects, keeping alive a distinction between Western women and those native 'others' who still need the West to speak for them and arrange for their escape from 'foreign' criminals and, in some narratives, also from their own conniving (uncivilized) families.[132] Thus, the woman bifurcated by colonialism continues in the 'postcolonial' era, embedded in the assumptions of the premier instrument of women's human rights.

Perhaps the most important article in CEDAW is Article 5, which recognizes that women's equality will not be achieved without changes in the social and cultural production of gender stereotypes 'based on the idea of

[127] Doezema, 'Loose Women or Lost Women?', pp. 40–1.
[128] CEDAW, Art. 11(3).
[129] See for example reservations by states that condition their compliance on CEDAW's consistency with Islamic Shariah law, like Egypt and Libya.
[130] Doezema, 'Loose Women or Lost Women?', p. 37.
[131] *Ibid.*; Kapur, 'Tragedy of Victimization Rhetoric', p. 19.
[132] For a telling example of the perpetuation of the imperial 'victim' subject in this context, see the material of the Coalition against Trafficking in Women, http://www.catwinternational.org (accessed 1 November 2005); *contra* Global Alliance against Traffic in Women, http://www.gaatw.org (accessed 1 November 2005).

the inferiority or the superiority of either of the sexes'. This provision is extremely useful in its recognition that gender is a social category and that the problem is one of gender hierarchies, rather than gender differences per se. However, the references to 'culture' as the source of stereotyped gender attitudes and 'custom' as the basis for discriminatory practices,[133] have also worked to silence women's histories of engaging culture and tradition resistively as a source of empowerment.[134] While the use of culture can be profoundly conservatizing, it can also help change to occur. The provision is often read by Western feminists to justify efforts to 'abolish' non-Western cultural practices, as if that were possible, rather than, as Celestine Nyamu suggests, seeking to 'engage with the specific politics of culture'.[135] This demonizing of non-Western cultures gives sustenance to neo-colonial narratives of women as the powerless 'victims' of their own tradition.

The continued marginalization of women from the universal frame of human rights, despite the adoption of a treaty specifically to promote women's equality and the innovative efforts of the CEDAW Committee to promote the understanding of that equality in substantive terms, prompted another re-evaluation by feminists in the late 1980s. This led to the emergence of the third feminist inclusion strategy – the claim that women's-rights-are-human-rights.[136] The dual goals of the new strategy were to have gender-specific rights abuses explicitly recognized as human rights violations, and to refocus attention on ensuring the application of the general human rights instruments to women by promoting the 'mainstreaming' of women's human rights.[137] This brought the struggle for women's inclusion in the discourse of universal human rights back to

[133] CEDAW, Art. 5(a).

[134] L. Amede Obiora, 'Reconsidering African Customary Law' (1993) 17 *Legal Studies Forum* 217; J. Oloka-Onyango and Sylvia Tamale, '"The Personal is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 691.

[135] Celestine I. Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381 at 417. See further Leti Volpp, 'Feminism versus Multiculturalism' (2001) 101 *Columbia Law Review* 1181.

[136] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486 at 496, notes the use of the phrase 'women's rights are human rights' by the GABRIELA women's coalition in the Philippines in 1989, and by a panel stating that 'Violence Against Women is a Human Rights Issue' at a conference organized by International Women's Rights Action Watch in 1990.

[137] Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community* (Cambridge, MA, 1997), p. 9.

where it began, to the strategy that the CSW adopted in 1946, which sought to ensure that explicit reference was made to rights that were specific to women's experience within the general framework of equality and universality. Could a renewed focus on constituting women's specific rights as human rights dislodge the masculine form of the universal subject, when earlier efforts to do this had failed?

The strategy of women's-rights-are-human-rights

The claim, women's-rights-are-human-rights, had widespread resonance. It became a new rallying point for women's human rights advocates in the late 1980s[138] and, in the years leading up to the 1993 World Conference on Human Rights, hundreds of thousands of women were mobilized in over one hundred countries to claim women's rights as human rights.[139] The language itself was formally adopted by states, first in 1993,[140] and then at the 1995 Fourth World Conference on Women ('Beijing Conference').[141] The claim, also expressed in the assertion of the 'indivisibility' of women's human rights,[142] insists that women's rights are universal. This new feminist strategy can be situated within a broader movement in the post-Cold War era to utilize human rights discourse to defend against new threats to human dignity and survival posed by the hegemony of global capital[143] and the erosion of the discourse itself.[144] These

[138] Gaer, 'Never the Twain Shall Meet?', p. 19.

[139] Elisabeth Friedman, 'Women's Human Rights: The Emergence of a Movement' in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (New York, 1995), pp. 18–35.

[140] Vienna Declaration and Program of Action, World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993), Part I, para. 18 ('Vienna POA').

[141] Beijing Declaration and Platform for Action, as contained in Report of the Fourth World Conference on Women, UN Doc. A/CONF.177/20/Rev.1 (1996), para. 14 ('Beijing PFA').

[142] Susana Fried, *The Indivisibility of Women's Human Rights: A Continuing Dialogue* (Rutgers, NJ, 1994); Ursula A. O'Hare, 'Realizing Human Rights for Women' (1999) 21 *Human Rights Quarterly* 364 at 365. For examples of official endorsement of this use of the term see Vienna POA, Part I, para. 18; Beijing PFA, paras. 213, 216. See further Dianne Otto, 'Defending Women's Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality' in Isfahan Merali and Valerie Oosterveld (eds.), *Giving Meaning To Economic, Social and Cultural Rights* (Philadelphia, 2001), pp. 52–67 at p. 51.

[143] Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalisation* (New York, 1996), pp. 20–3; Cynthia Enloe, 'Silicon Tricks and the Two Dollar Woman' (1992) 227 *New Internationalist* 12; Zillah Eisenstein, 'Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe' (1996) 4 *Indiana Journal of Global Legal Studies* 59 at 68.

[144] Brenda Cossman, 'Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era' (1991) 32 *Harvard Journal of International Law* 339; Anne Orford,

developments prompted and, in turn, were sustained by a growing literature of feminist scholarship in the field of international human rights law.[145] The strategy was informed largely by radical feminist perspectives, which understand 'gender' as a social category that is underpinned by 'sex' as a natural category, as in the UN definition. Drawing again on Olsen's typology, radical feminism, particularly in its cultural strands, accepts the 'sexualization' of gender dualities but seeks to challenge, even reverse, their 'hierarchization' by revaluing the 'feminine'.[146]

The first of the two main goals of the women's-rights-are-human-rights strategy, to have gender-specific forms of rights violations recognized as violations of universal human rights, illustrates how the strategy embraces the sexualized dichotomies of dominant gendered dualisms, seeking their revaluation rather than their disruption. The focus has been on rights connected to a particular set of 'sexed' issues, notably gendered violence, reproduction and, to a lesser extent, sexuality. Women and gender tend to be conflated so that men's analogous gendered injuries are excluded, for example, if men or boys were specifically targeted for rape in war. The narrow focus tends to emphasize women's vulnerability, rather than their agency, (re)fostering protective and imperial responses. Giving priority to 'sex' as a category of oppression also risks reproducing essentialist ideas about women, which are consistent with oppressive gender dualities.[147] Not surprisingly, this essentialism has been roundly criticized by many feminists of colour from inside and outside the West.[148] A further problem

'Contesting Globalization: A Feminist Perspective on the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 172.

[145] See for example Dorinda G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (Washington DC, 1993); Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia, 1994); Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (New York, 1995); Kelly D. Askin and Dorean M. Koenig (eds.), *Women and International Human Rights Law* (3 vols., New York, vol. I 1999, vol. II 2000, vol. III 2001).

[146] Olsen, 'Feminism and Critical Legal Theory', pp. 203–4. See for example Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA,1982); Nell Noddings, *Caring: A Feminist Approach to Ethics and Moral Education* (Berkeley, 1984); Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Boston, 1989).

[147] Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 *Signs* 515; Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635.

[148] Harris, 'Race and Essentialism'; Marlee Kline, 'Race, Racism, and Feminist Legal Theory' (1989) 12 *Harvard Women's Law Journal* 115; Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds.), *Cartographies of Struggle: Third World Women and the Politics of Feminism* (Bloomington, IN, 1991), pp. 51–80.

with the narrow set of 'sexed' issues is that women's economic and political disadvantage gets left off the agenda.

Attempts to promote women's reproductive and sexuality rights, as a result of the new strategy, have met considerable resistance,[149] especially from many religious groups who have taken up the cudgel in their efforts to keep sex/gender restricted to a biological category.[150] This backlash was evident at the Beijing Conference and has continued since then, preventing further advances towards women's equality in family relations and threatening regressions. By comparison, the anti-violence agenda has achieved extraordinary successes,[151] which have spilled over into other areas of international law.[152] One early demonstration of its success was the adoption of the Declaration on the Elimination of Violence against Women (DEVAW) by the UN General Assembly.[153] Yet the DEVAW does not recognize violence against women as a violation of human rights because of states' concerns that to do so would water down their universality.[154] This position – that women's specific rights are not universal – directly echoes the views of members of the CHR in the 1940s when CSW representatives argued for the explicit inclusion of women's rights in the UDHR. Instead, violence-against-women is understood as a 'barrier' to women's enjoyment of human rights. This leaves DEVAW's subjects still marginalized in the discourse of universality, needing special measures for their protection rather than human rights. Nepal's new restrictions on the ability of women to travel overseas, for example, were defended as a measure to protect them from trafficking,[155] illustrating the ease with which protective narratives can justify the denial of women's enjoyment of

[149] Sarah Y. Lai and Regan E. Ralph, 'Female Sexual Autonomy and Human Rights' (1995) 8 *Harvard Human Rights Journal* 201; Alice M. Miller, AnnJanette Rosga and Meg Satterthwaite, 'Health, Human Rights and Lesbian Existence' (1994) 1 *Health and Human Rights* 428.

[150] Doris E. Buss, 'Robes, Relics and Rights: The Vatican and the Beijing Conference on Women' (1998) 7 *Social and Legal Studies* 339; see further Center for Reproductive Law and Policy, 'The Holy See at the United Nations: An Obstacle to Women's Reproductive Health and Rights' (August 2000), http://www.reproductiverights.org/pub_bp.html#un (accessed 1 November 2005).

[151] O'Hare, 'Realizing Human Rights for Women'.

[152] Judith G. Gardam, 'Women, Human Rights and International Humanitarian Law' (1998) 324 *International Review of the Red Cross* 421; Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, 1997); Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Human Rights Quarterly* 213.

[153] GA Res. 48/104, UN Doc. A/RES/48/104, 20 December 1993.

[154] Dianne Otto, 'Violence against Women: Something Other than a Human Rights Violation?' (1993) 1 *Australian Feminist Law Journal* 159 at 161–2.

[155] Kapur, 'Tragedy of Victimization Rhetoric', pp. 6–7.

human rights, and revealing a disturbing resonance between the feminist anti-violence agenda and conservative ideas about gender. This resonance is one way to account for the successes of the strategy.

The focus on women's gendered 'injuries' has had the effect of giving new life to imperial as well as protective subjectivities. As Ratna Kapur explains, the violence-against-women model establishes a 'thoroughly disempowered and helpless' female subject whose diversities are represented as aggravating circumstances of oppression, rather than as a positive mark of the rich multiplicity of women's histories and struggles.[156] Although violence against women has been identified as a universal phenomenon, the focus has been to condemn certain 'uncivilized' practices in developing countries, such as genital surgeries[157] and dowry murders,[158] which produces anew the 'native victim' of her 'uncivilized' culture, whom Western feminists can speak for, rescue and rehabilitate, this time through extending the civilizing reach of human rights law.

The second goal of the women's-rights-are-human-rights strategy was to refocus feminist attention back on the general human rights instruments by promoting the 'mainstreaming' of women's human rights. Mainstreaming in the UN is understood as consciously considering and taking into account women's, as well as men's, concerns and experiences 'so that women and men benefit equally and inequality is not perpetuated'.[159] The ultimate goal is identified as achieving women's equality, but this critical element is often lost in bureaucratic translation, reducing the process to a technocratic efficiency exercise.[160] Gender mainstreaming has been widely endorsed,[161] and has led to a flurry of activity across the UN system, despite strong resistance from many quarters.[162] For their part, the chairpersons of the human rights treaty committees affirmed 'that all

[156] *Ibid.*, p. 10.

[157] See for example Isabelle R. Gunning, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1991–2) 23 *Columbia Human Rights Law Review* 189.

[158] Kapur, 'Tragedy of Victimization Rhetoric', pp. 13–18.

[159] Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System: Mainstreaming the Gender Perspective into all Policies and Programmes in the United Nations System (adopted by Economic and Social Council 18 July 1997), UN Doc. E/1997/66, as quoted in Office of the Special Adviser on Gender Issues and Advancement of Women, 'Gender Mainstreaming: An Overview' (2002), http://www.un.org/womenwatch/osagi/pdf/e65237.pdf (accessed 1 November 2005).

[160] Sandra Whitworth, *Men, Militarism, and UN Peacekeeping: A Gendered Analysis* (Boulder, CO, 2004), p. 126; Jacqui True, 'Mainstreaming Gender in Global Public Policy' (2003) 5 *International Feminist Journal of Politics* 368.

[161] Vienna POA, Part II, paras. 37, 42; Beijing PFA, paras. 221, 325.

[162] Anne Gallagher, 'Ending Marginalisation: Strategies for Incorporating Women into the UN Human Rights System' (1997) 19 *Human Rights Quarterly* 283; Felice D. Gaer,

human rights contained in the international human rights instruments apply fully to women and that the equal enjoyment of those rights should be closely monitored',[163] acknowledging indirectly that women had in fact been excluded, just as the CSW members had feared in 1948. Later, the chairpersons endorsed a set of six recommendations which sought to fully integrate gender perspectives into their working methods.[164] In effect, they were belatedly agreeing to incorporate the pioneering work of the CEDAW Committee, aimed at developing the concept of substantive equality and feminizing the subject of human rights law, into the work of the other treaty committees. This was a step pregnant with possibilities.

One outcome of the treaty bodies chairpersons' recommendations has been the development of General Comments that promote more effective coverage of women's rights. The Human Rights Committee (HRC), which monitors the ICCPR, adopted General Comment 28 on equality between men and women in 2000,[165] while the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the ICESCR, adopted General Comment 16 in 2005 after a long process that revealed deep disagreement about the nature of sex inequality.[166] The Committee on the Elimination of Racial Discrimination, which monitors the International Covenant on the Elimination of Racial Discrimination (ICERD), also adopted General Recommendation XXV on the gender-related dimensions of racial discrimination in 2000.[167] While the General Recommendation takes a bold lead in grappling with intersectional gender discrimination and employing the language of 'gender',[168] for present purposes I will confine my discussion to the General Comments interpreting the covenants.

The HRC's General Comment 28 borrows something from all of the feminist inclusion strategies I have discussed, adopting a substantive approach to women's equality and ensuring women's specific rights are

'Mainstreaming a Concern for the Human Rights of Women: Beyond Theory' in Marjorie Agosín (ed.), *Women, Gender, and Human Rights: A Global Perspective* (New Brunswick, NJ 2001), pp. 98–122.

[163] Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies, UN Doc. A/49/537 (19 October 1994), para. 19.

[164] Effective Implementation of International Instruments on Human Rights, UN Doc. A/50/505 (4 October 1995), paras. 34(a)–(f).

[165] HRC, 'General Comment 28' (29 March 2000), UN Doc. CCPR/C/21/Rev.1/Add.10.

[166] Letter to CESCR, from Women's Economic Equality Project and Women's Working Group ESCR-Net, 28 April 2004 (copy on file with author). See 'Montréal Principles on Women's Economic, Social and Cultural Rights' (2004) 26 *Human Rights Quarterly* 760.

[167] CERD, 'General Recommendation XXV' (20 March 2000), as contained in UN Doc. HRI/GEN/1/Rev.5.

[168] Otto, '"Gender Comment"', pp. 30–3.

explicitly recognized as universal. The Comment works its way through each of the ICCPR rights, reimagining the subject as a woman and, in the process, feminizing civil and political rights. For example, with respect to the right to life (Article 6), the General Comment states that:

> States parties should provide data on birth rates and on pregnancy – and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions. States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings. The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.[169]

This interpretation is ground-breaking. It includes the 'sexed' issues that the women's-rights-are-human-rights strategy has been concerned with, for example in identifying backyard abortions as a threat to the right to life, but it does not confine itself to these issues, recognizing that 'poverty and deprivation' may also pose a threat to women's right to life. Each other ICCPR article is interpreted in a similarly woman-centred manner. For example, domestic violence is recognized as a form of torture (Article 7),[170] a husband's marital powers to restrict women's freedom of movement constitutes a violation of the right to freedom of movement (Article 12),[171] and conditioning the exercise of reproductive rights on a husband's authorization is a violation of the right to privacy (Article 17).[172] The HRC has followed up the adoption of General Comment 28 by consistently questioning States Parties about issues such as unsafe abortions, domestic violence, stereotyped gender attitudes and gender discrimination in the enjoyment of rights, in its examination of States Parties' periodic reports.[173] The questioning has promoted women's equality as a substantive concept.

However, the Comment's focus on women's difference from men means that the challenge to the sexualization of gender dualisms that formal equality presents has entirely disappeared. Indeed, all the dangers that attend the inclusion of women by reference to their specificities remain.

[169] HRC, General Comment 28, para. 10. [170] *Ibid.*, para. 11.
[171] *Ibid.*, para. 16. [172] *Ibid.*, para. 20.
[173] See generally the Concluding Observations of the Human Rights Committee since April 2000.

The extensive cataloguing of women's injuries and disadvantages, while clearly necessary for making women's human rights abuses legally cognizable, emphasizes women's helplessness rather than their agency. This has the effect of reaffirming the masculinity of the universal subject who needs no special enumeration of his gender-specific injuries. The catalogue reifies the differences between women and men, reproducing not only the familiar dualistic gender sexualizations, but also the same gender hierarchies. Some of the examples of women's specific violations also serve to resurrect protective and imperial subjectivities. The central place given to non-Western practices that violate women's right to life, for example, revitalizes the imperial victim subject. The unresolved feminist conundrum is well illustrated: in reflecting women's present gendered experience of human rights violations, human rights law repeats the marginalizing gender tropes that entrench and naturalize women's inequality.

The efforts of the CESCR to elaborate a General Comment on equality between women and men in the enjoyment of economic, social and cultural rights raises a different set of problems. The Committee's drafts approached sex inequality as a problem without a hierarchy; treating men as if they were as disadvantaged by gender inequality as women.[174] While this approach could be very interesting if men's gender disadvantage was understood to arise from their dominant gender position, this is hard to conjure up and is not, in any event, what the CESCR has in mind. Rather, the drafts were an example of gender mainstreaming 'with a vengeance',[175] by which I mean that women's gender disadvantage and the end goal of realizing women's equality have been lost in translation. Despite being an improvement on the earlier drafts, the final Comment still fails to fully recognize women as the disadvantaged group vis-à-vis men,[176] illustrating one of the concerns that many feminists have with the shift to the terminology of 'gender'. While the discourse of gender has the advantage of acknowledging the relational quality of the gender tropes that privilege men and disadvantage women, the concern is that this creates an opportunity for men's interests to dominate once they have been discursively admitted into the hard-won spaces carved out for women to address their exclusion.[177] This illustrates how easily the misuse of the language of 'gender' can lead to a denial of the systemic nature of women's disadvantage.

[174] CESCR, Draft General Comment 16, April 2004 (copy on file with author).

[175] See MacKinnon, 'Agenda for Theory'; 'Toward Feminist Jurisprudence'.

[176] CESCR, 'General Comment 16' (13 May 2005), UN Doc. E/C.12/2005/3, paras. 5, 8.

[177] Sally Baden and Anne Marie Goetz, 'Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing' in Cecile Jackson and Ruth Pearson (eds.), *Feminist Visions of Development: Gender Analysis and Policy* (London, 1998), pp. 19–38 at p. 21.

While General Comment 28's account of gender reveals how strongly intact the sexualizations and hierarchies of gender have remained, despite over fifty years of feminist engagement with human rights law, the CESCR's Comment reveals the disastrous consequences for women if they are papered over. The HRC's reinvigoration of marginalized women's subjectivities highlights the question that has haunted my entire discussion – whether a focus on women's specificities, in the framework of universality, will ever achieve women's full inclusion in universal representations of humanity, because it is those very specificities against which the privileged figure of the masculine universal is defined. Yet to ignore women's specificities, as in the CESCR's Comment, is to misrepresent the reality of women's gendered disadvantage. This dynamic suggests that, paradoxically, the cost of women's 'inclusion' may be their continuing marginalization; that the project of disrupting gender hierarchies through human rights law may be impossible. That is, unless the new moves towards the language of gender can be utilized in the spirit of its emancipatory origins. Could the recognition that sex/gender are entirely social categories open new possibilities for challenging not only the rigid sexualizations of gender dualities, but also their hierarchies? It is to this possibility that I now turn.

A new strategy proposal: re-scripting sex as shifting and multiplicitous

As I have shown, the history of the engagement of women's rights advocates with human rights law highlights a conundrum; feminist inclusion strategies have reproduced unequal relations of gender power in their efforts to make women's gender-specific human rights violations legally cognizable and achieve women's full inclusion in a universal discourse. The method of making the 'gendered human rights facts' of women's lives legally actionable repeats the hierarchical gender scripts that produce the gendered violations in the first place. Unless feminist strategies can be re-scripted to disrupt the circular restaging of women's marginalization, the most that will be achieved will be some uncertain improvements in the conditions of that marginalization, which will always be vulnerable to reversal because the underpinnings of women's inequality will not have been disrupted. It could be argued that such incremental improvements will multiply and constitute eventually a significant challenge to the persistence of male privilege because the 'gendered human rights facts' will have changed, and this may be right. However, feminists have been engaged in this project for at least the past century and the

progress to date is not encouraging. Gender hierarchies have not only remained strongly naturalized, but the tropes that they rely upon seem barely to have shifted, despite the recent history of determined contestation by feminist human rights advocates. Karen Engle's conclusion from her survey of the impact of women's human rights strategies in 1992 is still apt; while the masculinist core may have been shaken, it remains, and '[w]omen are still on the periphery'.[178] In fact, backlashes from fundamentalist forces are threatening many of the incremental gains that have been made.[179]

So, how could the re-scripting of gender in human rights law be done? By what means could emancipatory gender subjectivities be produced? What alternatives are there to the abstract universal subject and his female 'others'? We might begin by thinking about existing feminist strategies and whether they could be extended or reoriented. For example, what would be the effect of building on the women's-rights-are-human-rights-strategy and fully reflecting the idea that there are two sexes in human rights law, instead of trying to force the masculine universal to be more gender inclusive? This would involve creating the universal as a 'double subjectivity', as Luce Irigaray has suggested, with two sets of sexually specific rights.[180] Irigaray's argument is that the feminine will retain its object status unless relations between men and women are changed so that they have access to genuinely intersubjective relations, and that this will only occur if women are fully subjectivized. Her proposal, then, is that the law be 'sexed dualistically';[181] that a distinctive and socially valued women's culture be recognized by according women rights of 'being' that are sexually specific, like rights to guardianship of the home, to motherhood and virginity, to equal institutional representation and to economic resources.[182] Only as full bearers of rights will women achieve the status of full subjects, and only then will equality be possible. However, this approach would

[178] Engle, 'International Human Rights and Feminism', p. 610.

[179] On 4 April 2004, the Special Rapporteur on Violence against Women warned the CSW of 'alarming trends towards political conservatism and backlash which threatened the gains made thus far in the global women's human rights agenda': as reported in Women's International League for Peace and Freedom, *1325 Peacewomen E-News*, Issue 39, 11 April 2004, http://www.peacewomen.org/news/1325News/1325ENewsindex.html (accessed 1 November 2005).

[180] Luce Irigaray, *Thinking the Difference: For a Peaceful Revolution* (trans. Karin Montin, New York, 1994), chapter 3.

[181] Discussed in Davies, 'Taking the Inside Out', p. 27.

[182] Luce Irigaray, *Je, Tu, Nous: Towards a Culture of Difference* (trans. Alison Martin, London, 1993), chapters 9 and 10.

exacerbate the problems of essentialism and the lack of attention to other hierarchies of power which attend the women's-rights-are-human-rights strategy. It would also fix gendered subjects firmly within the existing sexualized dichotomies, strengthening the idea of gender as a natural category, rather than rejecting it.

A second option would be to seek to particularize the masculine in much the same way as the feminine has been made specific. The CESCR's problematic General Comment is suggestive of this approach, although this was not its intention. What I have in mind is reimagining men as injured by the hierarchies of gender; casting them as the victims of dominating forms of masculinity that give rise to human rights claims. Conscription into the armed services is one example of the enforcement of a particular militarized form of masculinity, which many men find coercive and oppressive. While human rights law currently provides a remedy for conscientious objectors, this does not extend to those who object to compulsory service as a form of gender injury. In fact, the masculinist discourses that support war construct such objecting men as suffering a different kind of gender injury; as being too feminized to be 'real men'.[183] If human rights law could produce, instead, the militarized man as the injured subject and valorize the objector as an expression of emancipated masculinity, the discourses that legitimate war, which resemble the scripts that repeat women's marginalization in human rights law, would be seriously disrupted.

More generally, outside the example of military conscription, it seems incorrect to describe men as 'injured' by their gender privilege. While men's experience of gender power may involve pain and alienation,[184] this kind of injury cannot be equated with the injury that comes from lack of gender privilege, especially because women do not benefit from men's gender injuries. In fact, if the injuries associated with masculinity were to be enumerated – like those that result from exercise of the 'masculine' attributes of competitiveness and aggression – the list would bear a superficial resemblance to the UDHR, while differing in the important sense of identifying the *cause* of the injuries as dominating and imperial forms of masculinity. So, although there are many disruptive possibilities in the idea that men's injuries resulting from their male privilege could be

[183] Carol Cohn, 'War, Wimps, and Women: Talking Gender and Thinking War' in Miriam Cooke and Angela Woollacott (eds.), *Gendering War Talk* (Princeton, 1993), pp. 227–48.

[184] Michael Kaufman, 'Men, Feminism, and Men's Contradictory Experiences of Power' in Harry Brod and Michael Kaufman (eds.), *Theorizing Masculinities* (London, 1994), pp.142–63.

made legally cognizable, turning the gaze back on men in this way runs the risk of leaving women on the periphery all over again by shifting the focus away from the oppressive effects of gender hierarchies on women. Particularizing men's injuries could also serve to reinforce rather than dismantle male privilege. At the same time, feminist campaigns will never succeed unless they take account of the relational quality of gender; the need to change both male and female subjectivities. The recent efforts of the CSW to promote discussion about the role of men and boys in achieving gender equality is a useful initiative in this regard.[185] For as long as masculinity is conceptualized as a dominant form of power in human rights law, the female subject will remain trapped in the gender-subordinate position. This is the reverse side of the feminist conundrum I have already outlined.

A further option that emerges from thinking about building on existing strategies is to work towards inverting the existing gender scripts so that, for example, men are produced as nurturers and carers and women as breadwinners. This idea extends the formal equality framework, which disrupts the dualistic sexualization of gender by granting women the same rights as men if they undertake activities that have traditionally been classified as 'masculine'. If these disruptions can be made to work both ways, by granting men who engage in domestic work the same human rights as women, the hierarchy of gender will also be challenged. Such reversals have important symbolic effects in that they immediately complicate gender identities and upset the naturalness of the dominant gender scripts. However, where such reversals have had some effect on social practices, all too often the privilege associated with masculinity has remained attached to male bodies. Therefore, the strategy of reversals presents only a limited challenge to the arrangement of gender as hierarchy because gendered power, or the lack of it, follows gendered bodies. Nevertheless, gender reversals are helpful in revealing the fluidity of sex and showing how gendered bodies as well as occupations are fully social productions.

However, building on existing strategies still avoids the recognition that sex/gender is entirely socially produced. Indeed, if the persistent hierarchies produced by dualistic gendered subjectivities – protective and vulnerable, rescuing and injured, autonomous and dependent – are to be displaced, gender must be re-scripted as something other than a dichotomy;

[185] See Division for the Advancement of Women, The Role of Men and Boys in Achieving Gender Equality: Report of the Expert Group Meeting (12 January 2004), UN Doc. EGM/MEN-BOYS-GE/2003/REPORT.

as multiplicitous rather than as dualistic. The feminist project of denaturalizing sex needs to be taken to its logical conclusion, which is to detach sex/gender entirely from bodily parts. The notion of gender 'hybridities' is a useful way to develop this idea; that human beings need to be understood as constituted by a multiplicity of ideas and practices that are culturally associated with masculinity and femininity, rather than predetermined by biology as either 'male' or 'female'. Gender identity, then, becomes the hybrid result of choices and desires that are not tied to male, female, transgendered, butch, femme, queer, eunuch or any other body types, which are, in any event, also social constructions. Such a diversity of gendered subject positions would make it impossible for the present dualistic sexualizations and hierarchies of gender to survive. If hybrid gender subjectivities could be admitted into the legal lexicon, the full range of sex/gender possibilities would be opened to all human beings as never before and the dualistic models of gender equality would be superseded.

But I am jumping too far ahead. The rejection of gender as dichotomy and hierarchy would also mean the loss of conceptual tools that are necessary to make legal sense of the 'gendered human rights facts' of the present. Fully embracing sex/gender as a social category would threaten erasure of the female subject produced by conditions of gender inequality and make nonsense of gender-specific human rights. It may also still reassert the masculine as the universal in the image of the hybrid. Finally, it would erase the categories that are presently essential for feminist political action and leave subjugated gender subjectivities without language to express their human rights claims.

Pulling back from, but not abandoning, the idea of gender hybrids, a possible point of departure is suggested by Ratna Kapur's 'resistive subjects'.[186] She proposes that legal strategies be built on the idea of law as a site of discursive struggle and 'normative challenge', instead of looking to law to promote gender equality by producing more rights.[187] Her strategy, or at least my application of it to the problems I am considering here, suggests foregrounding those subjects who disrupt the presently sexed and imperial order of human rights law; those chaotic, disorderly and demonized 'others' who exist on the fringe of human rights law and 'civilized' society. Kapur's peripheral subjects include transnational migrants (legal and illegal), Muslims, homosexuals and sex workers,[188] and there are many more such candidates. They present normative

[186] Kapur, 'Tragedy of Victimization Rhetoric', pp. 29–34.
[187] *Ibid.*, p. 29.
[188] *Ibid.*, pp. 31–3.

disruptions, as in the case of the migrant woman who chooses to move, which belie marginalizing assumptions about women as tied to the home and family by oppressive cultural traditions.[189] If feminist human rights strategies were constructed on the normative challenges presented by such disruptive subjects, they would pose a serious challenge to the biologism of sex and the dichotomies and hierarchies that have been built on the myth of naturalness.

Therefore, it is premature to conclude that women's full inclusion in humanity is impossible. If feminist engagement with human rights law is translated into a project committed to completely denaturalizing sex/gender and reimagining gender as hybrid and diverse rather than dualistic, then it has barely begun and it is hard to predict what new opportunities and insights will emerge. Re-scripting sex as shifting and multiplicitous needs to be an interdisciplinary endeavour that has the courage to draw on new theoretical paradigms, as well as old histories. At a time when many states are dogmatically embracing naturalisms in defence of traditional family formations and fundamentalist religious precepts, human rights law offers an increasingly embattled secular space for discursive contestation of unequal relations of gender power as well as new understandings of power. Hope is not lost, despite old and new challenges to critical and emancipatory thinking. While feminist human rights advocates need to be wary of legal constructions that cast women as victims, as vulnerable and in need of protection, and as only needing to enjoy the same rights as men, a new language of human rights must be created that does not allow such injurious slippages.

[189] *Ibid.*, p. 32.

13

Flesh made law: the economics of female genital mutilation legislation

JULIET ROGERS*

> Every man child among you shall be circumcised. And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.[1]

Legislation to prohibit the practices described as 'female genital mutilation' has become an international franchise. Laws which mark the needs, desires and demands of the subject of 'mutilation', together with the subject who is apparently 'non-mutilated', have been enacted with unprecedented enthusiasm over the last two decades, in countries we might now call the 'coalition of the willing'. The laws are strikingly similar and most of them include the phrase 'female genital mutilation' to describe the many practices that are said to occur in these countries and beyond. Indeed, in Australia, this term is called upon 'to embrace all types of the practice'.[2] The laws, and the research and consultations which preceded their enactment, also describe the sexual, psychological, hygiene and aesthetic needs and desires of the subject. In short, the process of making the laws and the laws themselves combine to provide a manual for Being. Not just any being, of course, for the laws are based upon empirical and theoretical research, public response and popular fiction produced largely in, and

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[1] Genesis 17:10–11 (biblical citations are to the King James Version).

[2] Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General* (Barton, ACT, 1994), p. 5.

for, Western consumption. The laws are a manual for the franchising[3] of a Western subjectivity whose sexual, psychological, aesthetic and hygiene requirements are based upon those of what Gayatri Spivak has termed the capital S Subject,[4] what the Family Law Council in Australia has termed the 'non-mutilated' woman[5] and what I will argue in this paper is the international subject.

The laws function as a manual for Being insofar as they incorporate a range of liberal discourses of subjectivity and offer this being as Being internationally. The practice known as female genital mutilation is imagined through anthropological research, biomedical explanations of corporeality and sexuality, Western feminist 'isolationist admiration'[6] literature and fictional narrative. The subject, described as the 'mutilated' woman in the Family Law Council's research,[7] is a collection of symptoms of the Western individual. She represents – in the psychoanalytic language of Jacques Lacan – the 'I' (the Western subject) 'takes [it]self to be'[8] a priori mutilation. The mutilated woman is reflected and refracted as 'mutilated' through a Western gaze. This representation is a narcissistic production or, as Leela Gandhi has discussed, an 'epistemic violence'[9] which is productive of a subjectivity – whether mutilated or not – with isomorphic properties akin to those of the Western individual. Indeed, it is of a Western individual, with a piece missing. Thus, the language and imagery of female genital mutilation, utilized in the making of female genital mutilation legislation internationally, enables the production, in fantasy, of an ideal subjectivity of the 'non-mutilated' subject. The Western 'I' is comparatively a non-mutilated subject able to retain all its bits.

[3] I am specifically employing the term 'franchise' to indicate the licensing of 'trade marks', which, held by one party, facilitate the merchandising of a product through an agreement with the other.

[4] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA, 1999), p. 265.

[5] Family Law Council, *Report to the Attorney-General*, p. 23.

[6] This is a term employed by Spivak to describe the western feminist approach to a universal liberationist discourse for women: see Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1990) 12 *Critical Inquiry* 243 at 243.

[7] Family Law Council, *Report to the Attorney-General*, p. 23.

[8] Jacques Lacan, *The Seminar of Jacques Lacan: Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis 1954–1955* (ed. Jacques-Alain Miller, trans. Sylvana Tomaselli, London, 1988), pp. 3–12. While Lacan does not directly use this phrase his saying of this phrase has been attributed to this seminar.

[9] Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (St Leonards, NSW, 1998), p. 87.

The 'I the Western subject takes itself to be' is a being which 'takes itself' to retain a sense of wholeness. The Western subject, in the (omni)presence of law and language which demands the recognition of an anterior presence to the subject, is in a constant state of anxiety about what is outside its sovereignty. As Jacques Lacan states: 'The subject is no one. It is decomposed, in pieces.'[10] It is law and language, indicating the presence of another, which effects this decomposition. The subject, and, I would argue, specifically the Western subject represented as a wholly present individual in contemporary democracy, is far from being comfortable with its decomposition. It is distressed and anxious when faced with this effect. The pieces come to be represented in the symbolic of language but the fragmentation of those pieces, the edge that shows them to be pieces, is the location of 'lack'. The 'mutilated woman' of female genital mutilation imaginings has come to be interpreted in the female genital mutilation discourse which informs legal initiative, as the precise representation of this lack. Indeed, she, as a genitally mutilated subject, is the evidence of what can happen to one before law and within language. She is evidence of the reality and effect of castration.

In contemporary Western discourses of freedom and choice the necessity of presenting as a subject beyond the reach of castrating law and language is urgent for the subject of neo-liberal democracy. The liberal subject of democracy must be as a Being who is wholly present. A non-mutilated Being. The tension for the Western subject before the law is his[11] capacity to be a subject of the law rather than subject to the law. As Costas Douzinas has discussed, the former is the position of subjectum – a subject inaugurated through rights discourse. The latter is subjectus – one who is subject to law, a subject who must submit to law's demands.[12] The tension for the subject is to be wholly present when the latter position heralds his castration. This tension is often resolved, or at least tolerated, with reference to an economy of circumcision. In this economy one loses only a small piece of the whole and this piece offers a return to enable the imagination of an intersubjective wholeness with God, law or biomedicine. It is an economy of return rather than a narrative of castration as mutilation.

The subject who imagines himself in the position of circumcised before the God of Abraham or before Western biomedical doctrines of hygiene

[10] Lacan, *Book II*, p. 54.

[11] Lacan uses the pronoun 'it' to denote the subject; I will standardly use 'he' to avoid confusion and to illustrate a point I make later.

[12] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000), pp. 203–5, 216.

and aesthetics, enters into a covenant with the Other as he perceives it. This perception as the performance of the subject's imaginary position before the law is crucial. The 'circumcised subject', as I am reading it through the discourses of female genital mutilation, does not experience himself as 'castrated'. Indeed, the other is castrated – like the circumcised Jewish child in the representation of the gentile, his circumcision stands in for castration.[13]

The discourses of female genital mutilation offer an 'acceptability' of circumcision that stands beyond 'castration'. When the British Parliament accepted a name change of the Female Circumcision Prohibition Act 1984 to the Female Genital Mutilation Act 2003 to ensure the presentation of a lack of 'acceptability' to the practices I am suggesting that they were precisely offering an acceptance of circumcision as a practice, and an acceptance of the flesh offered through this practice.[14] They were, one could argue, playing God. And circumcision becomes the new economic autonomy where the subject offers a bit to get a bit back from the state. Indeed, circumcision in these discourses is a metaphor for a contractual agreement; which, in contemporary times, suggests the subject's 'free' agreement. This is an agreement which both must be perceived as 'free' and must be imagined as performed as 'free' by the free subject. From this position the law, as a law which protects the subject's freedom and enables the free subjectivity of the Western democratic subject, particularly in these times of terror, can function as the Other. And the God of Abraham and the authorizing power of Western medicine stand in metaphorically for this Other; thus they are the law, *mutatis mutandis*. The covenant with the Other, as one imagined by the subject of law *qua* Other, inaugurates the subject before the law as a being who is made Being through the relationship. God and Western biomedicine sanction the being of the subject, just as the circumcised subject in an 'economic' relationship with

[13] Freud has discussed the hatred of the Jew emanating from the gentile's awareness of the circumcised penis and its configuration for the gentile as the possibility of castration or indeed as castration itself: see Sigmund Freud, 'Analysis of a Phobia in a Five-Year-Old Boy' in Freud, *Standard Edition of the Complete Psychological Works of Sigmund Freud* (24 vols., ed. and trans. James Strachey, London, 1953–75), vol. X, p. 198. Daniel Boyarin has precisely pointed to the 'circumcised' as 'castrated' status of the Jewish man and the role of this in anti-Semitism inflicted by the state: see Daniel Boyarin, 'What Does a Jew Want?' in Christopher Lane (ed.), *The Psychoanalysis of Race* (New York, 1998), pp. 211–40.

[14] Ann Clwyd MP, as cited in Alex Sleator, 'House of Commons Library Research Paper 03/24: The Female Genital Mutilation Bill, Bill 21 of 2002–2003' (19 March 2003), p. 9.

the Other imagines that the law becomes his law,[15] as if it were a voluntary contract authorized by the subject prior to the event. This contract, as an a priori 'free' agreement, is in tension of course. The subject, on some level, knows he is made whole only through this agreement; hence it is no 'free contract' at all. This is glossed, however, through an apparent agreement with what the law says, as if it always already said it for the subject. His subjectivity articulates with that of the law of the land, state law, and he can explain the law as a law of himself and thus retain his *autos nomos* (self law). The practices known as female genital mutilation both problematize this position and placate the Western subject's anxiety as to whether he truly did enter into the contract as an autonomous party.

The presence of practices which are described as 'cultural', that is, in dialogue with another Other, in the nations of the 'coalition of the willing', are both disturbing and reassuring to the Western subject. They point to the presence of an-Other's law which is not the law of the autonomous Western subject, or of the nation. And the practices point to the impossibility of the subject's autonomous relationship to the Other. The Other, as the Lacanian big O Other, represents the law as state law insofar as the subject's – what we might call – 'truth' is acquired through the instantiation of statute, decisions and everyday legal discourse.[16] The law as state law thus functions as the Other to inform the subject of the 'true' and 'correct' symbolic interpretation of language. Female genital mutilation suggests a limit to the sovereignty of the subject and thus calls into question his capacity for Being before the law and for articulating the symbolic as 'truth'. Female genital mutilation points to the Real.[17] The practices and

[15] The lack of capacity for Jewish people to articulate with state law, beyond Israel perhaps, is well documented in the stories of persecution discussed and documented by authors such as Sander L. Gilman, *Jewish Self-Hatred: Anti-Semitism and the Hidden Language of the Jews* (Baltimore, 1986) and Marsha L. Rozenblit, *The Jews of Vienna, 1967–1914: Assimilation and Community* (Albany, NY, 1983).

[16] This became frighteningly apparent to me in relation to students' engagement with ideas about 'terrorism'. Their capacity to engage with the confusion about what a terrorist was/is, was markedly reduced after the introduction and dispersal of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth).

[17] I am assuming some fluency with the Lacanian concept of the Real; however, my discussion here will focus on a consideration of the Real as the traumatic space which cannot be filled by the presence of the subject in the symbolic. In this sense, the Real is precisely what is pointed to by the 'radical alterity' of the other. For Lacan's descriptions of the Real see Lacan, *Book II*, pp. 31–2; Jacques Lacan, *Four Fundamental Concepts of Psycho-Analysis: Seminar XI* (ed. Jacques-Alain Miller, trans. Alan Sheridan, London, 1977), pp. 49–60, 167.

their products are therefore swiftly and violently consigned to the status of 'known' by the Western subject through the iteration of an archival (or arche)-violence.[18] This is repeated and repeated through the articulation of the laws as if they 'accurately' name the castrated condition of the other.[19] And as if repeating the name in itself will assure its accuracy and therefore the capacity of the Western subject to articulate the law. The arche, as Douzinas has described, maps a 'primacy of value' and origin to being.[20] It reaches across the Real of radical alterity[21] and narcissistically recognizes the other in the nation as the sublimated other to the non-mutilated subject, to the being performing the recognition. Indeed, the other is fantasized as subject of the law; both the law of the non-mutilated subject and the law of the Father.[22] Female genital mutilation becomes the new name for castration, and the mutilated woman is the one subject to the non-mutilated subject's law, while the Western subject is represented as one who possesses his own law with such magnanimity that he has law to give her.

This chapter will discuss the situation of the Western subject before the law and explain the aggressive and excited fantasies of female genital mutilation as a symptom of the anxiety of the Western subject in its status as subject before the law. The fantasies of female genital mutilation I will discuss as productive of the legislation together with a need to give something to the 'mutilated woman' who is both a product of the fantasies and an imagined product of castration. This arrangement is economic insofar as it first violently produces the other as 'mutilated' through the aggression of repetition perpetuated by the Freudian 'death drive',[23] and it is economic insofar as it engages a system of exchange where the western subject can fantasize himself made whole in the exchange. The western subject gets a piece back from making a gift of legislation. The franchising of the legislation assists in this fantasy in that the dispersal of a trademarked subjectivity enables an internationality *qua* universality to

[18] Jacques Derrida, *Archive Fever: A Freudian Impression* (trans. Eric Prenowitz, Chicago, 1996), p. 7.

[19] A concern for 'accuracy' was specifically referred to in research for the change in the UK legislation from the Prohibition of Female Circumcision Act 1985 to the Female Genital Mutilation Act 2003: Ann Clwyd MP, as cited in Sleator, 'Research Paper 03/24', p. 9.

[20] Douzinas, *End of Human Rights*, p. 203.

[21] My use of 'radical alterity' comes largely from Spivak's explanation of Derrida's employment of this term in his work: see Spivak, *Critique of Postcolonial Reason*, Appendix.

[22] Jacques Lacan, *Ecrits: A Selection* (ed. Bruce Fink, New York, 2002), pp. 61–7.

[23] Translated as 'death instinct' by Strachey: Sigmund Freud, 'Beyond the Pleasure Principle' in Freud, *Standard Edition*, vol. XVIII, pp. 38–41.

the subjective status of the supposed non-mutilated subject. The 'I' the western subject takes itself to be can be imagined as the 'I' the universal subject should – through the augmentation of law internationally and human rights discourse – take itself to be. The gift status of law also enables the crisis of international law's authority, as discussed by Hilary Charlesworth[24] and Anne Orford,[25] to be placated. The reference in female genital mutilation legislation to the authority of international law, with its diet of human rights and moral imperatives, gives a presence of Being to international law, and the franchising of the legislation ensures the repetition of the gift.

Being and castration

The fantasizing of female genital mutilation as a performance of castration articulates the western subject's concern with the protection of its being, and the question of what is or is not present for the subject prior to 'mutilation'. Being, prior to castration, has always been a question for the subject, and, indeed, for philosophy. Since Descartes, the fundamental question of who the subject who thinks (*cogito*), thinks it is (*sum*), has remained an aporia. For Lacan, the I who thinks – the subject – is the fragmented subject who is represented as present to themselves through the 'I [the subject] takes himself to be'. But what he 'takes himself to be' can no more be separate from how he takes himself to be, than he can be without the prior presence of an-other. As Lacan describes the subject it[26] is 'jammed, sucked in by the image, the deceiving and realised image, of the other, or equally by its own specular image [the 'I' as it 'takes itself']. That is where it finds its unity'.[27] As Sartre argued, the recognition of the self in the *cogito* presupposes the recognition of an other.[28] The (im)possibility of being without the presence of an other poses an anxiety-provoking question for the subject who imagines himself autonomous before the law.

Derrida's meditations on Martin Heidegger's *Being and Time* illuminate the problem of autonomy, *mutatis mutandis*, if we consider the presence of time to be representative of the presence of the subject and presence

[24] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

[25] Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden Journal of International Law* 441 at 443.

[26] See above n. 11.

[27] Lacan, *Book II*, p. 54.

[28] Jean-Paul Sartre, *Existentialism and Humanism* (trans. Philip Mairet, London, 1980).

itself to represent autonomy.[29] Time, Derrida muses, only exists within the context of time itself, therefore there is no present to time. Similarly, we can say that autonomy before the law only exists within the context of recognition by the law; there is no presence to autonomy beyond its instantiation from an-other's law. Autonomy, in this sense, can be understood as a euphemism for presence, or arguably Being itself, in a consideration of the condition of the subject before the law. For Heidegger, 'Beings are grasped in their Being as "presence" (*Anwesenheit*); this means that they are understood with regard to a definite mode of time – the "Present" (*Gegenwart*)'.[30] The present of time and the present of the subject are thus homologous in terms of their understanding: they must be 'understood' as present in order to be understood as Being. However, the development by Derrida of Heidegger's point suggests that, like time, the subject exists within or through an outside, and that outside is 'informative' of its presence. The subject does not exist without the outside of itself; just as the subject of the law does not exist prior to the law. Law inaugurates the subject. Thus, there is no essential (legal) subject. There is always an other to the subject, and the lack of essence for the subject is the experience of the Real of castration in Lacanian psychoanalytic theory; this is the condition of 'decomposition' for the subject.

For Lacan 'I is [precisely] an other',[31] the other being a function of the 'I'. The other, therefore, exists as 'anterior' to the subject. And this anteriority is located in the other as Other; a being who represents the impossibility of autonomy. In the context of castration the subject does not exist beyond the recognition of the Other. A recognition that demands a piece, indeed the piece, from the subject. Castration thus inaugurates the subject into being through subjecting the subject to the law of the Other, and, using Douzinas' explanation of subjectum and subjectus, this can be said to be true of the law as state law. The anteriority of the subject is present in the Other insofar as the subject is inaugurated by the recognition of law *qua* law of the Other. This inauguration is both an experience of subjection and an experience of Being before the law. The subject imagines himself – in Lacanian speak, 'takes [him]self'[32] – to be a subject through the

[29] Jacques Derrida, '*Ousia* and *Grammē*: Note on a Note from *Being and Time*' in *Margins of Philosophy* (trans. Alan Bass, Brighton (UK), 1982), pp. 29–68.

[30] Martin Heidegger, *Being and Time* (trans. John Macquarie and Edward Robinson, New York, 1962), p. 47.

[31] Lacan's famous phrase was taken from the poet Rimbaud's '*Je est un autre*': see Lacan, *Book II*, p. 7.

[32] Specifically for Lacan it is the '"I" I take myself to be', discussed in Lacan, *Book II*, pp. 3–24.

recognition of the Other. In so doing, the subject loses what we tend to call 'autonomy'. The subject must recognize that the law it 'experiences'[33] is anterior, thus not its law at all. This is a dialogue, however, and there are no fixed positions. In a material sense the law can precisely be seen to be that of the self, if the 'self law' articulates with that of the state; that is, if the subject can 'take himself' in this way. The self that is both able to name, in terms of an enactment of power, and the self that articulates with already existing names enacted through law, can be said to have an economic relationship with law. The self circulates in an economy with law; and this is a circumcision; a circular economy.

The position of circumcised before the law can be viewed as a particular rendition of economics as the *oikos nomos*;[34] a law which is named and allocated to the properties of the master of the house. The master, in an economic sense, allocates belonging to that which comes before the law: his law. Thus the subject, in his capacity to exercise mastery – as master of his house – through state law, that is, through the law of the state functioning as the big O Other, can retain a sense of autonomy in relation to castration. There is a tension for the western subject before the law, however, when things fall beyond its economic reign. While we might hope that the economics of sovereignty can accommodate that which falls beyond the house of the master, the presence of female genital mutilation, in countries where state law is supposed to articulate with the needs of the liberal subject, threatens the idea of state law as articulating with self law. This is a question of universality that I will return to later in the chapter. Female genital mutilation states the presence of another's law and thereby calls into question the subject's singular relationship to the Other. The economy breaks down. It is as if the presence of female genital mutilation aggravates the very anxiety that castration, in psychoanalytic theories, represents for the subject. In a reversal of Lacanian developmental understanding, the Other becomes other.[35] In the presence of female genital mutilation the subject recognizes a beyond to its jurisdiction. The

[33] 'Experience' is an inadequate definition here, but I am utilizing it for the same reasons Derrida employed it in regard to language. It neither pronounces the subject as subject of or subject to language/law, but suggests both: see Derrida, *Grammatology*, chapter 2.

[34] See Jacques Derrida, *Given Time: 1. Counterfeit Money* (trans. Peggy Kamuf, Chicago, 1992), p. 6.

[35] Of course, there is much debate about whether one can describe Lacan's theories as 'developmental'. I am specifically ascribing a developmental status to his discussion of 'the mirror stage' due to his reference to a specific age of approach, although one can see these as scenes or 'times' which occur with 'logical rather than chronological priority': Dylan Evans, *An Introductory Dictionary of Lacanian Psychoanalysis* (London, 1996), p. 128.

presence of female genital mutilation regenerates the anxiety of the possibility of a lack *qua* lack of autonomy for the western subject. Female genital mutilation hails from the outside of the subject, and, in so doing, demands the recognition of an outside, of an anteriority and thereby of the Real. In doing so, it thereby generates the necessity for an aggressive, indeed repetitive, economic mastery to manage the anxiety of the western subject.

Female genital mutilation rendered a crime removes the possibility of another Other who authorizes the freedom of the subject in another context. It affirms the status of the 'mutilated woman' as a victim of a crime and thereby not a 'free' other before her law. The consignment of female genital mutilation to the status of crime is enabled through the production of the mutilated woman as 'mutilated', as unable to authorize her own law. Her castration is complete in the narratives. Her fleshly covenant with God or the law removed and narcissistically ingested by the western subject and the clitoris, fantasized as removed from her, stands in for the *objet petit a*, the vehicle for an interface between the subject as subjectus, the mutilated woman, and the subject as subjectum, the non-mutilated western subject. The subjectivity of the 'mutilated woman' is announced, indeed repeated, through the fictional literature and research acquired by those who advocate for female genital mutilation legislation. The 'mutilated woman' is produced through texts such as Fran Hosken's widely cited anthropological meditations,[36] Alice Walker's fictional narrative of a woman circumcised in *Possessing the Secret of Joy*,[37] Nahid Toubia's biomedical research in *Female Genital Mutilation: A Call for Global Action*,[38] television documentaries such as 'Act of Love',[39] and Kim Manresa's photographical account of a 'mutilation' in the form of *The Day Kadi Lost Part of Her Life*.[40] The mutilated woman is collected through a series of stories and selectively reproduced in the research which affirms the legislation. She, like so many 'Third World women'[41] utilized

[36] Fran Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females* (3rd ed., Lexington, MA, 1992).

[37] Alice Walker, *Possessing the Secret of Joy* (New York, 1992).

[38] Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* (New York, 1993).

[39] SBS Television (Australia), 'Act of Love', *The Cutting Edge*, 29 June 1993.

[40] Kim Manresa and Isabel Ramos Rioja, *The Day Kadi Lost Part of Her Life* (Melbourne, 1998).

[41] The use of what has been described by Spivak and Talpade Mohanty as 'Third World women' or 'Third World looking women' to enhance western feminist causes or images of 'success' of western feminist movements has been well documented by Spivak, Chandra Talpade Mohanty, Trinh T. Minh Ha and Leela Gandhi. For an excellent discussion of

to promote a western feminist cause, is, as Leela Gandhi has described, 'grist to the mill of Western theory'.[42] These texts are either cited in the legislation directly or referred to by anti-'fgm' activists who campaign for legislation. The mutilated woman is a product of these texts and a product of the legislation, no more fact than fiction but a collection of symbolic references isomorphically related to the fantasized subjectivity of the 'non-mutilated' liberal subject. The mutilated woman remains in the texts as a relic of her own castration, her name and her experience repeated and repeated to defend off the Real of castration inaugurated through radical alterity. And the clitoris of this representation functions as *objet petit a*, a product that the western subject extracts from the economic gesture of giving law and the arche-violence enacted to produce the fantasy of his own articulation with the law.

The remainder

Lacan suggests 'I love you, but, because inexplicably I love in you something more than you – the *objet petit a* – I mutilate you'.[43] The act of mutilation for Lacan is the production of the other through the fantastical register of the imaginary as s/he who has what the subject requires to make it whole. Indeed, this is why the subject loves, for Lacan. In this sense, female genital mutilation, as the name chosen by the Family Law Council in Australia, represents an act of love. As the Council states: 'when the term "female genital mutilation" is used it is meant to embrace all types of the practice'.[44] The 'embrace' performed in the making of the female genital mutilation legislation produces both the other as 'mutilated' and the western subject as 'non-mutilated'. The embrace, like the archive, takes in what it wants and renders the rest external, it cuts off the outside. What is embraced in the name is what the subject as Council wants to name; in this capacity, it can be seen as an act of love. And the consummation of that love – the interface between the mutilated and not – is represented in the body of the mutilated woman who comes to present the remainder of castration for the western subject who loves.

how Edward Said's ideas of 'orientalism' have been employed in the interests of western feminist advancement and a summation of contemporary arguments see Gandhi, *Postcolonial Theory*, chapter 5, and for a discussion of this practice in 'human rights' and 'leftist intellectual' causes see Spivak, *Critique of Postcolonial Reason*, chapter 3.

[42] Gandhi, *Postcolonial Theory*, p. 87.

[43] Lacan, *Four Fundamental Concepts*, p. 263.

[44] Family Law Council, *Report to the Attorney-General*, p. 5.

The representation of the mutilated woman through western fantasies of who and what she is and who and what she needs, enables her production as the Other for whom a little piece is required to make the subject whole. The Other is not only required as whole, however, but s/he is able to produce the subject as whole through her recognition. Her recognition comes in the form of fantasized gifts that are products of her attention. The little gifts that emanate from the Other can be – for Lacan – voice, gaze, semen, faeces etc. They can be anything which falls from an orifice in the other, what Lacan describes as 'the cut'.[45] The fantasy of the cutting of the mutilated woman and the journey of the flesh that falls from her can be understood as having a similar quality to Lacan's 'cut' and the objet petit a, respectively.[46] It is the western subject, as the 'I' who loves, who is waiting for the flesh to fall from the mutilated Other, the beloved – but the western subject is doing more than waiting. The aggressive allocation of the subjectivity of the mutilated woman in western fantasies and the repetition of this representation in legislation internationally, are a gesture of love *qua* violence. This is a gesture which positions the authors of the discourses – the lovers – as mutilators, indeed as perpetrators. The name, its repetition, and the narcissistic production effect the psychoanalytic structure which displays the death drive.

The death drive points to a 'crack' in the Ego,[47] a crack that must be fortified by the gesture of repetition. The crack is smoothed when the subject is able to perceive his speech as true. The 'truth' of the speech of the subject, authorized by the Other as 'true' and thus emanating from a being *qua* Being, is the gesture of arche-writing. A signifier which emanates from the arche of the subject; but the arche, indeed the arche-Being of the subject, is always in contest through castration. What is said must be said and re-said with a violence that destroys the trace of the origin of its presence, with a violence that attempts to make the statement wholly present. The discourses of female genital mutilation that inform the making of the legislation internationally are a restatement of the name female genital mutilation and of the subjectivity of the mutilated woman. The trace is what is cut off in this act of violence and it is what returns to the western subject as enjoyment, a piece that both affords the subject jouissance and points to the desire, as lack, in the subject. The mutilated woman and

[45] Lacan, *Ecrits* (ed. Fink), p. 303.

[46] The *objet petit a* for Lacan can be best thought of as what falls from the Other; as he describes it, it is 'the split between the eye and the gaze': Lacan, *Four Fundamental Concepts*, p. 67.

[47] Lacan, *Book II*, p. 37.

the clitoris are there as products of the female genital mutilation legislation. The legislation and the accompanying fantasies are the metaphoric display of the cutting.

I mean to make two points at once about this. The making of the mutilated woman through the legislation is both an act of naming, a naming that consigns the namer to the position of peer with the Other, to the position of he who articulates state law as self law. The second point is that this very act produces a remainder. Indeed, two remainders. The first is the mutilated woman, thus consigned to the name, the second is the flesh which falls from her. It is a symbolic meaning, but the literature explains this flesh as an object which can be materially 'lost', 'taken',[48] indeed 'gobbled'.[49] The flesh is fantasized as evidence in the crime. It both shows the crime to be 'crime' and is the very reason for the legislation. Because of this piece, the legislation is given to the mutilated woman; because of this piece the western subject achieves the status of giver of law, and, as I will explain, is given himself as autonomous in return.

The name

The mutilated woman can be understood, like time, to be produced in the repeating and repeating of the name female genital mutilation. She is made present through the gesture of repetition. Female genital mutilation is the name used in all statutes in the US, Australia and Britain. Indeed, Britain's Female Circumcision Prohibition Act 1985 was amended in recent times to become the Female Genital Mutilation Act 2003. The term female genital mutilation was employed in the revised Act to 'describe more accurately the prohibited acts'.[50] For Lacan, however, accuracy is the fantasy of the liar who thinks it knows the truth,[51] in this case the truth of the mutilated woman. The names 'female circumcision' and 'female genital mutilation' alike display the fantasy of 'accuracy'; the fantasy of the possibility of a 'true' description of the practices the legislation is meant to embrace. The 'accuracy' of the term 'female genital mutilation' suggests that a presence can be referred to in the name; that the term reflects nothing beyond, or outside the name. As accurate, the name would point directly to the 'thing in itself'.[52] The term female genital mutilation, however, describes neither

[48] Manresa and Rioja, *Kadi* (no page references in text).
[49] Walker, *Possessing the Secret*, p. 73.
[50] Sleator, 'Research Paper 03/24', p. 9.
[51] Lacan, *Four Fundamental Concepts*, pp. 136–48.
[52] Jacques Derrida, *Of Grammatology* (trans. Gayatri Chakravorty Spivak, Baltimore, 1974), pp. 35–7. Derrida also states: 'ah, the things themselves!' to refer comically to the very

accurately nor inaccurately the practices the term means to 'embrace'. Female genital mutilation can better be thought of, using Derrida, as an archive, or as an instance of arche-writing.[53] But an instance of arche-writing which refers back to the arche of the subject. As a name it does not succeed in (in)accurately describing the 'thing in itself', but instead 'consigns' or 'gathers together';[54] a kind of embrace. In this case, the very 'embrace' the Family Law Council means to exercise.

The partitioning of signification through the signifiers 'female', 'genital' and 'mutilation' authorizes the accuracy of the term and suggests a 'natural' attachment to the thing in itself. Further, the gendered signifier, 'female', allocates a decisive being of the address; a being as the 'biologically scientific' being of the address; a being that in common parlance is recognized indisputably as having arrived 'female'. The signifier 'female' demands a feminist attention and gendered presence to the name; the scientificity of the name 'genital' reaffirms the sexed status of the being and heralds the place of being in contemporary western discourse. The signifier 'mutilation' demands alterity from the acceptability of circumcision and 'mutilation', as a signifier, authorizes the law and retroactively signifies the practices embraced in the name as criminal. The traces of either the collected phrase, or respective signifiers, are effaced in this embrace. The archive which augments the collection of the phrase and deploys what appears to be 'natural' meaning, exercises an economic repetition which defends against the anxiety of the western subject encountering this alterity. As Derrida explains the deathly violence that is an aspect of archiving the name: 'It works *to destroy the archive: on the condition of effacing* but also *with a view to effacing* its own "proper" traces.'[55] There is an attempt at killing off the outside or the trace of female genital mutilation and thereby producing the mutilated woman in a narcissistic fantasy of the western subject. Indeed, 'accuracy' itself is archiviolithic in Derrida's terms; it is an archival violence, a violence that works to destroy the trace. Accuracy is an invalidation of the heteronomy of signification and enables an economy of the practices as violently archived through the legislation; archived as the name 'female genital mutilation'.

The practice of 'embracing' in law involves economics as *oikos nomos*, where the name means to partition all that is owned by the master of the house. The rest is destroyed in an effort to render the master 'accurate', that

possibility of naming things at all: Jacques Derrida, 'For the Love of Lacan' (trans. Brent Edwards and Anne Lecercle) (1995) 16 *Cardozo Law Review* 699 at 699.

[53] Derrida, *Grammatology*, chapters 1 and 2.

[54] Derrida, *Archive Fever*, p. 5.

[55] *Ibid*., p. 10 (emphasis in original).

is, in possession of the knowledge of the Other. This is economic insofar as it names the identity of the mutilated woman and the non-mutilated in a circular exchange; a gift exchange, whereby the author of the name is recognized as 'master' of the knowledge and thus a peer to the (big O) Other, if not the Other himself. As Lacan explains:

> Truth is nothing other than that which knowledge can apprehend as knowledge only by setting its ignorance to work. A real crisis in which the imaginary is resolved, thus engendering a new symbolic form . . . This dialectic is convergent and attains the conjuncture defined as absolute knowledge. As such it is deduced, it can only be the conjunction of the symbolic with a real of which there is nothing more to be expected. What is this real, if not a subject fulfilled in his identity to himself? . . . this subject is already perfect in this regard . . . He is named . . . he is called the *Selbstbewusstsein*, the being conscious of self, the fully conscious self.[56]

This being, this *Selbstbewusstsein*, is the Being of non-castration, subjectum. The production of the namer of the discourse – the author who 'engender[s the] symbolic form' – as subjectum is the effect of authorizing the truth of female genital mutilation as a truth through propagating a knowing which apparently references the 'thing in itself'. This can be seen in the language employed by those who advocated the change to the name of the British legislation when they stated:

> the practice of female circumcision . . . [is] now commonly known internationally as female genital mutilation.[57]

This is a statement which asserts both the capacity to know and the universality, as internationality, of this knowing; an internationality which affirms its repetition in the franchised legislation.

The flesh as objet petit a

In a repetition of the name, the clitoris is similarly economized as a known referent of female genital mutilation. Signified in the discourses as the flesh that is 'cut off' from the body of the 'mutilated woman', the clitoris could metaphorically represent the possibility of an outside to the experiences fantasized by western readers/viewers/legislators, as that which cannot be

[56] Jacques Lacan, *Ecrits: A Selection* (trans. Alan Sheridan, New York, 1977), p. 296. I am referring here to the Sheridan translation, rather than Fink's, because it represents, at least in quotation form, a better expression of the concepts I am discussing.

[57] Sleator, 'Research Paper 03/24', 'Summary of Main Points'.

'embraced'. It could be a reference to what cannot be known; what cannot be assimilated; what cannot be utilized in an economy. However, like the trace, the flesh is 'economized' through its consignment to the fantastical production, in western legal discourse, of what female genital mutilation is and what her flesh signifies. The flesh is animated, Hosken describes, as 'the essence of the female personality'.[58] Like the phallus which falls under the whole of the symbolic, the clitoris is animated as the piece – the piece which must be exchanged rather than grieved; the piece which comes to signify the allocation of western women under the gaze of the Other. It is the production of the clitoris, animated as the economic, which renders it essential as the objet petit a.

Alice Walker's account of a woman's experience of 'mutilation', although fictional, is referred to in the Family Law Council's report,[59] and her description of the journey of flesh of the 'mutilated' protagonist, Tashi/Olivia and her sister, illustrates graphically the clitoris acquired as *objet petit a*. Tashi's memory, as articulated by Walker, is of a moment when she experiences 'mutilation'. The flesh, instead of being grieved as lost, is represented as having its own journey. As Walker describes:

> it was so insignificant and unclean that she carried it not in her fingers but between her toes. A chicken – a hen, not a cock – was scratching futilely in the dirt . . . M'Lissa lifted her foot and flung this small object in the direction of the hen, and she, as if waiting for this moment, rushed toward M'Lissa's upturned foot, located the flung object in the air and then on the ground, and in one quick movement of beak and neck, gobbled it down.[60]

The hen ingests the flesh, making it her own. The clitoris is no longer of the body of the young woman but becomes a part of the body of another. The body of the hen performs its carnivoric identification in the novel and receives its status in return. The powerful figure of the hen, in Walker's novel, is first thought to be a 'rooster' or 'cock' by Tashi. It looms large in the book as the omnipresent perpetrator. The presence of this figure, waiting for the remainder of the crime, is a metonym for the presence of the western subject gleaning its bits from the fantasized mutilated woman.

[58] Hosken, *The Hosken Report*, p. 14.

[59] Although there is no direct reference to Walker's novel, *Possessing the Secret of Joy*, it is cited in the 'Selected Bibliography' of Family Law Council, *Report to the Attorney-General*. Another account by Walker of seeing a 'circumcision' is referenced at p. 5.

[60] Walker, *Possessing the Secret*, p. 73.

Similarly, in Manresa's account of Kadi's mutilation, there is an Other as other here to make meaning of the flesh, to ingest the flesh. The photographic representation of the 'ritual' is finalized with a gesture from an 'old woman'. A directive hand points from the margin to tell the girls to stop crying. This hand appears to come from nowhere. It could be any figure in the story, indeed it could be Manresa. Like the hen/cock of Walker's fantasies the presence of the other awaiting the flesh is aggressively maintained in the story. Indeed, the western authors demand a perpetrator. But who is it – the daya, the old woman, the hen, the western author? Indeed, in the legal discourses of female genital mutilation the perpetrator is not easily profiled, it is sometimes women and often men who are suggested as perpetrators. The Family Law Council offers the Ecumenical Migration Centre's perspective that the practices are a product of 'patriarchal social relations'.[61] Even Walker's protagonist (and Walker herself) is confused about the gender of the perpetrator, as she states earlier in the novel:

> It was for this small thing that the giant cock waited, crowing impatiently, extending its neck, ruffling its feathers, and strutting about.[62]

Is the perpetrator 'cock' or 'hen', as it appears elsewhere? The fantasized perpetrator of this crime is not clear. Indeed, it is conspicuously confusing. The mutilated woman is certainly fantasized as 'cut up' in a Lacanian and legal act of 'mutilation' and a Derridean performance of arche-violence, and the clitoris is then animated by a perpetrator – the perpetrator? – as the object of desire that informs the 'enjoyment' as Being for the western subject. The 'giant cock' waits 'crowing impatiently', 'strutting about', and all this for the 'small thing'; only it is no small thing, this piece. The animation of the clitoris as *objet petit a* renders this object relevant to the subject in the extreme, and this animation can be thought of as a gesture of perpetration. It gives something to the perpetrator in an economic exchange which enables jouissance for the perpetrator. It returns the 'giant cock' to itself, whole, strutting, satiated; or is it the 'hen' that is satiated, if indeed she is? It is a question of the subject's imagination. Not the subject as supposed 'victim' of female genital mutilation but the subject as subject of the law. The identification is confused and the identification of a perpetrator is confused. Something was done here, an arche-violence and an imaginary narcissistic violence that places the western subject of law in the place of the child/subject of the practice. In Kadi's story the 'old

[61] Family Law Council, *Report to the Attorney-General*, p. 9.
[62] Walker, *Possessing the Secret*, p. 71.

woman' tells her to stop crying 'for the sake of tradition',[63] or we might say, for the sake of law; for she has been initiated as subject to law. The clitoris has become the phallus and the child/subject is imagined in a state of lack.

Clitoris as phallus

The confusion of the profile of the child/subject and indeed the perpetrator is soothed by the presentation of the clitoris as *objet petit a*. The animation of the clitoris in its economic relation as *objet petit a* is a process which must first reference the privilege or primacy of the piece. Nahid Toubia is cited to explain its primacy in the Family Law Council's report:

> The clitoris is the primary female sexual organ . . . The vagina has minimal capacity for sexual response. Consequently, female genital mutilation aims to remove the woman's sexual organ.[64]

The subject who enters into the economics of circumcision cannot just exchange any piece with the Other. Indeed, it must come from a cut in the other, a location which signifies the crime of castration. The clitoris, however, cannot be simply assigned a status as *objet petit a* through its representation as the 'primary sexual organ'. This does not make the clitoris a phallus – as women have known for years. The clitoris in female genital mutilation literature is constantly referenced as the equivalent to the phallus, however, and its loss is akin to – not simply a piece of the phallus – but the entire phallus itself. As if the clitoris could position the subject wholly in the symbolic.

The falling flesh of the mutilated woman is fantasized in the literature of female genital mutilation as the 'essence' of woman. It is that which makes the (female) subject wholly in the symbolic. The flesh of the mutilated woman, once severed, renders her incomplete, lifeless, soulless, without her 'personality'. The representation of the mutilated woman is of a woman who could be completely whole if not for her mutilation, indeed, she is represented as a woman without (Lacanian) lack prior to mutilation. The 'mutilated woman' in the anti-female genital mutilation texts reproduced in the pre-legislative consultations, is represented as a subject who is made 'less whole' through her 'mutilation'. In the Family

[63] Manresa and Rioja, *Kadi*.
[64] Family Law Council, *Report to the Attorney-General*, p. 22, drawing on Toubia, *Female Genital Mutilation*, p. 17.

Law Council's *Report to the Attorney-General*, a woman is cited from the SBS programme 'Act of Love' as saying she is not 'a complete woman'.[65] She is missing the essential piece which would make her whole. In Alice Walker's *Possessing the Secret of Joy*, the protagonist, Tashi/Olivia, is represented as consistently not being the Being she could have been, if not for her infibulation. As Walker describes: 'That her soul had been dealt a mortal blow was plain to anyone who dared look into her eyes'.[66] Similarly, in *The Day Kadi Lost Part of Her Life*, 'life' stands in as a metonym for the Being of Kadi. Kadi, like Tashi, could have Been, if the 'part' of the whole had not been 'lost'. The flesh thus stands in for the very piece that produces whole symbolization. It produces Being. In Lacanian psychoanalysis this is the phallus that must return whole to the subject to make the subject whole.

The representation of the clitoris as positioning the subject as wholly before the symbolic, as Being through the recognition of the Other, is articulated specifically in relation to presence, indeed, even presence in time, in the story of Kadi's experience. Articulated through photographs and captions by Manresa herself,[67] Kadi's voice is never present, the final caption in the book reads: '[S]he will never be the same again, she has lost part of her life.' This is the part which might render her 'the same'; the part that would return her to the Being that could always Be. The subject is constantly 'never the same' in encounter, and is unable to maintain a whole presence in the presence of the Other. This is the condition of the subject before the law. This is the condition of subjectus. In *The Day Kadi Lost a Part of Her Life* the author and the photographer are never in the picture; like the western subject, they sit (un)comfortably outside the frame in this story. They can remove themselves from the implication of castration in the last caption: '[S]he will never be the same again, she has lost part of her life.' While Kadi is never the same – she is aggressively castrated by the experience – the western authors can retain their position as, at least partially, whole, and the western reader who advocates legislation can imagine that something has been exchanged in this dialogue. They can imagine that, while Kadi is castrated, the offering of the products of her mutilated body to law is like the flesh offered God from Abraham's children.

The flesh of the circumcised male child symbolically referenced in biblical and biomedical texts is imagined by the modern individual of

[65] Family Law Council, *Report to the Attorney-General*, p. 23.
[66] Walker, *Possessing the Secret*, p. 65. [67] Manresa and Rioja, *Kadi*.

liberal democracy as performing an economic return to the child.[68] This is a return that inaugurates the subject as, at least in part, economically subjectum. Kadi's flesh, like Tashi's and like so many products of western fantasies of female genital mutilation, does not create a covenant with God or biomedicine; not for them at least. Indeed, the notion of any religious or cultural significance of the practices is powerfully absent from legal texts. Despite community claims to the contrary, the Family Law Council goes so far as to equate these beliefs to 'myths'.[69] Simply left with a cut, the mutilated woman is lack par excellence, an intolerable position that denies the possibility of *jouissance* imagined for the subject of castration. She is only, and extremely, subject to law. She is the castrated remainder. But like the rooster/hen, somebody or something did receive a piece in this story.

The use of stories such as Walker's, hyperbole such as Hosken's, biomedical facts such as Toubia's and graphic images such as Manresa's, ensure that western subjects respond swiftly and often hysterically to the presence of female genital mutilation in their nations. The response, far from being a conversation with the communities,[70] is the consignment of the bodies of others to the status of 'mutilated' and a call to the law to come forth. The representation in western discourses of female genital mutilation ensures that castration is not the case for the authors. Their lack is filled with (the representation of) her flesh. The authors, as those who authorize the subjectivity of the mutilated woman before law, can fantasize that they have entered into an economic relationship with the law as Other. The mutilated woman's presentation, and international affirmation as 'mutilated', suggest that the authors are articulating the 'thing in itself' and thereby escaping the Real of the symbolic. This escape is of course only partial, hence the offer of flesh to the Other must be repeated in legislation and in document after document which supports their position. The trace of the signifier's female genital mutilation must be effaced in this process

[68] This is by no means a 'real' interpretation of Biblical or Toranic discussions of 'circumcision', indeed it is precisely a misinterpretation that I am arguing has become the economic interpretation of the contemporary liberal legal subject in an 'individual' relationship with the Other, here read as God. For a complex discussion of a similar dynamic in relation to the 'nation' see Julia Reinhard Lupton, '*Ethnos* and Circumcision in the Pauline Tradition: A Psychoanalytic Exegesis' in Christopher Lane (ed.), *The Psychoanalysis of Race* (New York, 1998), pp. 193–210.

[69] Family Law Council, *Report to the Attorney-General*, p. 9.

[70] See Juliet Rogers, 'Managing Cultural Diversity in Australia: Legislating Female Circumcision, Legislating Communities' in B. Shell-Duncan and Y. Hernlund (eds.), *Transcultural Bodies: Female Genital Cutting in Global Context* (forthcoming), for further discussion of the violent processes of exclusion towards 'relevant communities' exercised in Victoria during the making of the Crimes (Female Genital Mutilation) Act 1996 (Vic).

to produce the flesh as gift and the authors as economically instantiated as masters of this discourse. This is the kind of 'frenetic legislative activity' that Douzinas has discussed; not, I suggest, with the aim of creating a 'Father or law-maker',[71] but to produce the subject whose subjectivity articulates with the law as the father, or at least the uncle. A moment of psychosis which suggests that the language of the law is fathered by the subject in agreement with the law.[72] In this economy, those who affirm the presentations by the authors of female genital mutilation discourse are able to take up a position of 'circumcised' before the law, instantiated as whole in an economy with law as Other. But this position is always tenuous, especially for those who materially have little capacity to exercise any 'real' autonomy before the law.

Woman as castrated

> Every man child among you shall be circumcised. And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.[73]

The metaphor of circumcision points to the status of the male child before God, biomedicine and, *mutatis mutandis*, the law. The male child is offered a covenant with the Other which authorizes him as subjectum in economic arrangement with his subjectus status. He may not be able to call the law his own, but the economic gesture of circumcision – the performing of his assent to state law[74] – assures that he is in dialogue with the Other and that sometimes the flesh will return to him and confirm that the law *qua* Other articulates his needs.[75] The production of the female genital mutilation legislation affirms this through the production of the 'mutilated woman' in a narcissistic violence, that is, in his image – except that she's not quite

[71] Douzinas, *End of Human Rights*, pp. 328–9.

[72] For further discussions of the structure of psychosis in relation to law and freedom see Juliet Rogers, 'Unquestionable Freedom in a Psychotic West' (2005) 2 *Journal of Law, Culture and the Humanities* 1.

[73] Genesis 17:10–11.

[74] This can be in terms of both an agreement with the parameters of a particular legislation, such as the Crimes (Female Genital Mutilation) Act 1996 (Vic) in Victoria, the Female Genital Mutilation Act 2003 (UK) and US equivalents, or even perhaps an agreement with the existence of law as a means of social necessity.

[75] For a parallel of this argument in relation to 'national belonging' see Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Australia* (Sydney, 1998). The antithesis to this position I discuss later considering Hage's argument.

in his image. The woman of female genital mutilation literature is always 'female'.

The use of the signifier 'female' in female genital mutilation legislation, and indeed in female circumcision and female genital cutting discourses, announces the gendered problematics of law's confusion as to the acceptability of the flesh; the flesh which establishes the economics of circumcision. 'Female' points to the problematic as to the status of the circumcised subject before the law (and before God).[76] As I mentioned earlier, in a research paper prepared before the changing of the British legislation from the Female Circumcision Prohibition Act 1985 to the Female Genital Mutilation Act 2003, the author asserted that the change in name would remove any implication of acceptability of the practice.[77] Indeed, the retention of 'female' and the removal of 'circumcision' reaffirmed, with some urgency, the status of male circumcision as not a crime. Or we might say it reaffirmed the acceptability of male circumcision as a practice of his law. It reaffirmed that the Other as law would accept the piece removed from the male child. Crucially, this is not the 'true' status of the Jewish subject before God, indeed, it is a misreading of the economic relationship one may have to the God of Abraham and of Abraham's children, that I am suggesting is performed by the liberal democratic subject in relation to state law. It is precisely the misreading of the autonomous individual *qua* Being, and it is a misreading made evident by the omissions and articulations of the discourses of female genital mutilation legislation. As a gesture of affirmation, the pronunciation of a law – such as the female genital mutilation legislation enacted in western countries – that is for others, and enabled by those who may or may not be circumcised, renders the removal of flesh from the circumcised male merely the practice of relationship. It renders the law a 'buddy' of the subject and the articulation of state law upon the subject is fantasized as the condition of two autonomous Beings in dialogue – in contract we

[76] Boyarin has discussed the state as having 'twin others', 'women and Jews', both of whom point to the position of the subject as castrated, and indicated that the position of the circumcised Jewish male is metaphorically akin to the castrated subject before the law, and may be experienced as such. As Boyarin has pointed out, this is not simply the representation from the perspective of the gentile, but of the Jew who may see his own 'damaged penis' as a representation of castration, as was the case for 'Little Hans': Boyarin, 'What Does a Jew Want?', pp. 213–15. Hence the relationship with God articulated in the Torah does not exempt the Jew from a fear of castration, but the role of the state, particularly since the 'holocaust', may enhance this fear in the configuration I am offering.

[77] Sleator, 'Research Paper 03/24', p. 9.

might say – as if the law (as Other) were a peer to the subject. Thus the law is his law.

The presence of 'female' points to the status of the subject as subjectus; the subject that is always already castrated through law and to whom there is no economic return.[78] The body of woman is an embarrassing metaphor for the whole Being of the enlightenment. Woman is the always already castrated subject who stands before law with no hope of becoming whole. This leaves a problem for the woman of liberal democracy who should (eventually) be able to come to Being through acquiring (more and more) rights. She, in a post-feminist, liberated landscape, should be able to be autonomous too. The positioning of the mutilated woman as other helps sidestep the problematic of women being always already not whole, by proclaiming mutilation through crime, rather than through the very existence of a system of justice; of a system that subjects.[79]

But the question of woman's access to justice, and access to the status of autonomy before the law, still exists. The 'mutilated woman' as the quintessentially castrated subject, pure subjectus, relieves some of the anxiety of the western subject struggling to maintain his sense of liberal autonomy before the law. He can imagine her as lacking, while his law becomes the law. The position of being as Being before the law for the western subject is not simply divided into the mutilated and non-mutilated, however – despite the Family Law Council's insistence when they ignore the protests from the Eritrean Community of Australia and insist that they know 'the Australian community's view *as a whole*'.[80] The law does not belong to every western subject equally. There are textures to this 'whole'. This is a material point, of course, for the western subject of state law and the global subject of international law. There is a texture to the Being before the law that is announced in the reality of the law's capacity to articulate the needs and desires of the heterogeneity of (western) subjects. Law simply does not speak the wishes and wants of everybody. There is a Real to the signification performed by the law as Other; a real which is articulated in the difference that is the cultural practice known as female genital mutilation and a Real which is articulated in

[78] Indeed, this may be similar to the disenfranchised position of the Jewish citizen as other before state law in nation-states (other than Israel), contrary to the liberal subject's fantasized position of 'circumcised' that I have argued can be read through the texts of female genital mutilation legislation.

[79] For a discussion of subjection in relation to 'justice', see Rogers, 'Unquestionable Freedom'.

[80] Family Law Council, *Report to the Attorney-General*, p. 3 (emphasis in original).

the signifiers 'Man' and 'Woman'. This is a problem in a liberal nation-state where democracy advocates the assurance of equality before the law. While female genital mutilation can describe the subjectivity of the victim of the crime of castration before the law, and the western subject's capacity to name her experience enables the belief in the autonomy – through the reassurance of economy – of the western subject before the law, this is not the capacity for everyone. Indeed, the very existence of woman, as the always already castrated subject of psychoanalysis, announces the texture of these positions.

In a material sense one can argue that the law does not articulate with the needs and desires of western women. Ongoing feminist battles around sexual assault law,[81] underpolicing of domestic violence,[82] the over-representation of women on minor fraud charges in prison,[83] the masculine assumptions about self-defence requirements and proportionate force in spousal killings,[84] and significant pay parity issues,[85] are testimony to the less than autonomous situation of women before 'state law'. Similar disentitlement has been discussed in relation to people from cultures, and/or with identities, regarded as marginal before state law. Ghassan Hage has summarized this position in his discussion of spatial belonging and cultural capital which describes the situation of those who feel that they belong to the nation rather than the nation belonging to them.[86] The latter group, holding a large portion of cultural capital – that is certainly, but not only, financial – believes the nation belongs to them. Indeed, the latter group has well been described, by Hage using

[81] See Liz Olle and Peter Rush, 'A Community Debate on Law and Sexual Assault' (1997) 9 *Australian Feminist Law Journal* 67; Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code' (1997) 9 *Australian Feminist Journal* 100; Alison Young, 'The Waste Land of the Law, the Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442.

[82] See Women's Domestic Violence Crisis Centre, *What's Love Got to Do With It? Victorian Women Speak Out about Domestic Violence, Annual Report 2001–2* (Melbourne, 2002), pp. 4–41; Jenny Morgan and Regina Graycar, *The Hidden Gender of Law* (Leichhardt, NSW, 1990), pp. 277–307.

[83] Catherine Gow, 'No Women in Men's Prisons! No Private Prisons!' (1994) 2 *Australian Feminist Law Journal* 174; Amanda George, 'Commemoration of Women Who Have Died in and after Custody', Presentation at Melbourne Town Hall, 23 March 1993.

[84] Danielle Tyson, '"Asking For It": An Anatomy of Provocation' (1999) 13 *Australian Feminist Law Journal* 66; Adrian Howe, 'Provocation in Crisis – Law's Passion at the Crossroads? New Directions for Feminist Strategists' (2004) 21 *Australian Feminist Law Journal* 55.

[85] Morgan and Graycar, *Hidden Gender of Law*, pp. 83–94.

[86] Hage, *White Nation*, pp. 45–6, 53.

Badieu, as 'aristocratic';[87] hardly the democratic 'everyone' in countries such as Australia.

The position of believing that one is owned, or belongs to the nation, can be extrapolated as the experience of non-Being before the law; or non-autonomy. The resurrection of the 'mutilated woman' as absolutely castrated relieves some of the anxiety this produces, but the relief demands an economizing of her subjectivity and an economic dialogue with the Other as law. This position is the circumcised position that we can argue the 'aristocrats', as masters of the discourse, always already inhabit. Indeed, they are usually born to it. Their mastery ensures an articulation of state law with their subjectivity and hence assures their sense of autonomy.

If we understand state law, for the subject who imagines itself economically circumcised as an individual before the law, to assert the metadiscourse of the Other, then we can understand symbolization, at least as it is perceived by this subject, as exercised through the law. Hence, we can say, as Lacan does, that, for the circumcised man, '[t]here's no such thing as Woman'.[88] A priori the symbolic recognition of the big O Other 'Woman' is a name for Man, that is, the name Woman can only be considered legitimated before the symbolic, as recognition from the Other. As Lacan describes, the Other is 'the beyond in which the recognition of desire is tied to the desire for recognition'.[89] The law, as Other, and the state law as the articulation of the Other, does not recognize the whole of women however, insofar as she cannot be wholly symbolized. This leaves her in a position of ongoing signification, but before state law, this just leaves her lacking autonomy.

Renata Salecl has discussed the benefits of utilizing this idea to imagine the subject of human rights, the subject who is only ever partially symbolized and must constantly be re-symbolized as the 'human' of human rights discourse. She suggests that Woman as a symptom of human rights is like the Kantian subject:

> The Kantian subject, as an empty form of apperception, is always in need of another subject to ground its identity: as long as I am an empty, split subject, what I am is always linked to what the Other (in the sense of another human being, as well as the symbolic order) thinks I am.[90]

[87] *Ibid.*, pp. 53–4, 57.

[88] Jacques Lacan, *On Feminine Sexuality: The Limits of Love and Knowledge, 1972–1973* (trans. Bruce Fink, New York, 1975), p. 72.

[89] Lacan, *Ecrits* (ed. Fink), p. 163.

[90] Renata Salecl, *The Spoils of Freedom: Psychoanalysis and Feminism after the Fall of Socialism* (London, 1994), p. 117.

This is the castrated subject, but the avenue for recognition from the Other is a question of economics; a position of castration *qua* circumcision. The economics of *oikos nomos*, as I have discussed, demands a mastery over signification to delineate the name, it demands that the arche-writing as law emanate from the arche of the Being before the law; from the subject as master. And this requires a dialogue with the Other, that is, the subject who is recognized in the presence of the Other *qua* state law must be able to assert an economic mastery which articulates with state law. This mastery I have earlier discussed as a by-product of the arche-violence perpetrated against, or as, the 'mutilated woman'. The master's relationship with the Other as economic, involves the gift of the flesh of the mutilated woman, but what makes the master whole, is his recognition by the Other through the gift made as legislation. This gift enables the production of all subjects of the law, in their capacity as 'women', whose presence in the symbolic articulates with the values of female genital mutilation legislation, to be autonomous subjects before the law; that is, to be Man. The female genital mutilation legislation seals the pact for the subject who gives the gift.

The legislation, as I have discussed, describes the subjectivity of the western subject. It is a manual for Being for the western subject made up of a collection of fantasies; fantasies which resemble, isomorphically, the condition of the western subject before the law, minus a piece. This production becomes the symbolic structure through which 'women' as the castrated subject before the law, can be recognized by the Other. The legislations present the body of women *qua* 'Woman' to the law as a gift to the Other. Derrida's description of 'giving' illuminates precisely this condition. As he states:

> Let us suppose that someone wants or desires to give to someone. In our logic and our language we say it thus: someone wants or desires, someone intends-to-give something to someone . . . a subject identical to itself and conscious of its identity, indeed seeking through the gesture of the gift to constitute its own unity and, precisely, to get its own identity recognized so that that identity comes back to it, so that it can reappropriate its identity: as its property.[91]

The giving of law to the mutilated woman enables 'women' as authors of law, as participants in the *oikos nomos*. As subjects who can dialogue with the Other as law; as beings who can be autonomous before the law.

[91] Derrida, *Given Time*, p. 10.

The giving of the gift of legislation in its capacity as economic presentation of and for women pulls 'women' into the light of enlightenment. Women, as produced through the giving of the gift, can be imagined as subjects equally subjectum as 'Man'; subjects equally symbolized in the gaze of law. This 'equality' is as fictional or factual as the presentation of the 'mutilated woman' in the discourse itself. It is the fantasy of a western democracy that gives law to others in a gesture of benevolence. It is the fantasy of democratic subjects who can believe they are all circumcised rather than castrated before the law. And it is a fantasy produced through the making of female genital mutilation legislation in the west as a gesture of repetition.

Law made international

The activity of giving law to the mutilated woman is not simply an act of handing over and moving on, however. The gift never seems to be acquitted. The legislation, which has appeared in the UK, Australia and the US, states and restates the name female genital mutilation. In this sense, it states and restates the archival violence that is exercised in the name, it states and restates who and what the subject is and it offers the possibility of an economic relationship to the Other internationally.

The economic relationship to the Other is displaced, however, by the presence of female genital mutilation. The practices, in their many forms, suggest an adherence to the law of another Other. The practices evoke the anxiety of the western subject in its relationship to a liberal, largely Christian and certainly capitalist Other who sanctions individuality, choice and free sexuality. The absoluteness and essentialness of this Other is thrown into question by the presence of bodies which circulate their flesh in a different economy. Their gift to another Other exposes the Real for the western subject. The rupture in their economy that may suggest a loophole in the economic pact. The fantasizing of the trajectory of that flesh in western discourse can relieve, in part, this anxiety, but the western subject is left with a nagging feeling, in the presence of female genital mutilation, that there is more out there. The radical alterity embodied in the practices violently named as female genital mutilation brings the western subject closer to the Real; closer to the possibility that their own flesh offered in an economic exchange is simply being offered to the abyss. The answer to the problem of the abyss is to give the Other a name that can be deferred to; a name which suggests a universal all-encompassing Other. That name, in female genital mutilation discourse, is international law.

The presence of international law in female genital mutilation legislation offers a universal authority to the situation of the western subject before the law. International law suggests that the mutilated, circumcised and non-mutilated subjects' relationship to law as Other is 'accurate'. Indeed, the use of the term internationally authorizes the fantastical production of these subjectivities and invalidates alternative dialogues. Equally, international law's 'knowledge' as a status of knowing the 'common' language is reaffirmed in its capacity to know the Being of the subject, through reference to human rights discourse. International law, like the Other, knows what the subject wants, needs and desires. It knows this because, through its recourse to human rights, it owns the patent *qua* Being to the 'right human'. As Douzinas has argued, human rights instantiate the being as (Heidegger's) Being. International human rights law 'promises to set all that is valuably human on paper and hold it before us in triumph'.[92] In a gesture reminiscent of making 'women' Woman, human rights law brings the castrated subject into symbolic illumination, a gesture that could only be performed through the gaze of the Other. Like Annie Sprinkle's mirror,[93] female genital mutilation legislation holds the (universal) human of human rights before us and says (with law to cover the lack): this is what we are, and this is what she should/could be. This is Being! or at least it will be once we give it some law.

The 'knowing' status of international law as Other is necessarily accompanied by a recognition of its authority. The amended Female Genital Mutilation Act 2003 (UK) utilized a research paper which specifically stated:

> International law will not act in a direct way to legislate against FGM practice, but international law contains an obligation for states to adapt, improve or establish their own legislation.[94]

International law's capacity to 'oblige' suggests a capacity to authorize the accuracy and validity of western fantasies of female genital mutilation implicit in the making of the legislation. The Other as international law

[92] Douzinas, *End of Human Rights*, p. 214.

[93] Annie Sprinkle is an American (feminist) comedian who is famous for requiring audience members to participate in her routine by viewing her genitals reflected in a mirror she holds between her legs.

[94] All Party Parliamentary Group on Population, Development and Reproductive Health, *Report of the Parliamentary Hearings on Female Genital Mutilation Held on 23 and 24 May 2000* (November 2000), as cited in Sleator, 'Research Paper 03/24', p. 31.

is readily obliged by the subjects of states who act to offer the gift of legislation. And the economic balance is restored.

Anne Orford has suggested, however, that international law suffers from an anxiety that emanates from a 'crisis of authority'.[95] This anxiety, she suggests, is relieved through the act of 'repetition'. The act of repetition, exuded through the death drive, attempts to state and restate the known presence of the object through the signifier, a presence known to its sovereign author. It is a gesture that demands, for Lacan, 'primacy of signification' through memorization. Repetition occurs because the Master – who speaks it – who decides what it means – wants the word to be remembered in the format he intends, in this case in the format the law intends. As Lacan explains repetition:

> [the] requirement of a distinct consistency . . . signifies that the realization of the signifier will never be able to be careful enough in its memorization to succeed in designating the primacy of the significance as such.[96]

While the realization of the signifier 'will never be able to be careful enough', its repetition is a relief – a relief born of the subject's belief in its capacity to capture the Real in the symbol. Its capacity to 'be a Man', in a Lacanian sense. In so doing the subject, again, relieves itself of the terror of castration and offers its economic signifier back to the Other, who is thus authorized by the subject's belief. International law, as that Other, gratefully accepts the gesture, as the making of female genital mutilation legislation internationally, repeats the name, and asserts the primacy of the signifier and the primacy of international law to signify.

Conclusion

The making of female genital mutilation legislation is the kind of 'frenetic legislative activity'[97] described by Douzinas, which 'attests to [the] desire for a Father or law-maker'.[98] He attests, I have suggested, to the desire of the subject to be that Father or law-maker, or to be the autonomous 'buddy' of that figure, that Other. An activity born, in part, out of the anxiety of the western subject in his fear of castration, and his inability, in contemporary times, to grieve his loss as subjectus. This legislative activity provides a product to the Other that is both the 'mutilated woman' as other to the

[95] Orford, 'Destiny of International Law', p. 443.
[96] Lacan, *Four Fundamental Concepts*, p. 61.
[97] Douzinas, *End of Human Rights*, p. 329. [98] *Ibid.*, p. 328.

non-mutilated woman, and the flesh that falls from her castrated self. She is the very figure of castration and the flesh is the objet petit a for the western subject. In giving her legislation that is intended to fill her 'cut' the western subject is giving a gift to the Other, a gift that instantiates the western subject in an economic contract with the Other. The law is a gift that will allow the western subject to experience himself as master over state law and thereby believe himself to be in an autonomous position before the law. In this position he can believe himself wholly subjectum – a product of law, rather than a being subject to law. Women, as the always already castrated subjects of psychoanalysis, problematize this position and add a material question to the equation. Not everyone is equally able to assert mastery before the law. Female genital mutilation legislation, in its presentation of the being of woman to the law and in its presence as gift to the Other, assists in the production of women as Woman however. The legislation allows for the fantasy that all subjects whose values articulate with state law can be recognized before the Other in its capacity as law; all subjects who agree with the presentation of the mutilated woman as mutilated can have their flesh exchanged for hers. The presence of female genital mutilation legislation internationally, with its deference to international law and references to human rights discourse, assure that the Being of the subject is as a universal Being; one recognized by the universal Other. This placates the western subject in his anxiety about the presence of another economy and a relationship with another Other. The use of international law to affirm female genital mutilation legislation assures the western subject that the Real presented by the presence of the radically other in his nation, is merely a passing fantasy – a fantasy that can be frenetically, narcissistically, legally and violently archived through the repetition of the name female genital mutilation.

PART IV

History's other actors

14

On critique and the other

ANTONY ANGHIE

The tragic events of 9/11 have led to a number of challenges to international law and organization. Prominent among these is the Bush Administration pre-emption doctrine, articulated in the US *National Security Strategy*, that basically proposes that the US can take action, in self-defence, against any 'emerging threats'.[1] It purports, in effect, to rewrite the laws regulating the use of force: under Article 51 of the Charter of the United Nations,[2] states have an 'inherent right' to self-defence, but this is in response to an 'armed attack'. International lawyers have suggested that an imminent threat of armed attack might suffice to enable a state to respond in self-defence. It would be impractical to require states to experience an actual attack before being able to respond with force. The Bush doctrine, however, clearly goes beyond the situation of an imminent attack, suggesting rather that even an 'emerging threat' could justify the use of force in self-defence. A further dimension of the *National Security Strategy* suggests that the targets of this new doctrine are states that might be characterized as 'rogue states' – the most prominent of which are Iraq, Iran and North Korea.[3]

The articulation of this strategy has inevitably caused intense controversy because it represents a radical departure from the existing law on the use of force. Scholars have thus focused on questions such as the relationship between pre-emption and the law of the Charter; how this doctrine can be reconciled with the law of the Charter; and whether the law of the Charter should be interpreted to accommodate this departure in order to meet the new challenges confronting the international community as a consequence of terrorism. Several scholars have forcefully asserted, furthermore, that the UN, if it refuses to accept the Bush pre-emption

[1] Introduction to the *National Security Strategy of the United States of America* (September 2002), http://www.whitehouse.gov/nsc/nss.html (accessed 1 November 2005).
[2] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67.
[3] *National Security Strategy*, pp. 13–14.

doctrine and accommodate it within its system, will simply become irrelevant. Further questions arise as to the implications of the acceptance of this doctrine into international law. The *National Security Strategy* asserts, for instance, that pre-emption must be based on sound intelligence.[4] But the complete failure of intelligence regarding the existence of weapons of mass destruction in Iraq surely suggests many of the problems with pre-emption. It is difficult to forget the conviction with which Secretary of State Colin Powell attempted to persuade the world that Iraq had such weapons, and that the global community should endorse and join in what was an inherently illegal war.[5]

One of the fundamental principles of international law is that all sovereign states are equal.[6] The right of pre-emption asserted by the US, if it was to become a part of international law, would therefore be a right enjoyed by all states. Given the rivalries that exist between states, it would surely destabilize the international system to endorse a doctrine that legitimates a first strike in the name of pre-emptive self-defence. Further, universalizing the doctrine makes it possible for states such as Iran and North Korea to argue that they can attack the US in self-defence because they have been identified as members of the 'axis of evil',[7] and the first such member, Iraq, has already been attacked. But the very idea that the right may be invoked against the US makes it evident that the US has no intention of permitting such a powerful right to be invoked by states other than itself and its allies. Arguments have thus been made that only democratic states can exercise such a right. This is an extension of the idea that democratic states are more likely to adhere to international law. The theory here, going back to the writings of Kant,[8] is that democratic states are in various ways accountable and responsible. The distinction between democratic and non-democratic states, liberal and non-liberal states is becoming increasingly important in any analysis of international relations and international law.

The US is seeking in this way to expand its own right of self-defence to a point where the line between 'self-defence' and 'aggression' is very

[4] *Ibid.*, p. 14.

[5] Address by Secretary of State Colin Powell to the UN Security Council, 5 February 2003, as contained in UN Doc. S/PV.4701, pp. 2–22.

[6] This is enshrined in Art. 2(1) of the Charter.

[7] President George W. Bush, State of the Union Address, 29 January 2002, http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html (accessed 1 November 2005).

[8] Immanuel Kant, 'Toward Perpetual Peace: A Philosophical Sketch' in Hans Reiss (ed.), *Kant: Political Writings* (2nd ed., Cambridge, 1991), pp. 93–130, especially pp. 99–102.

hard to distinguish. As the *National Security Strategy* itself puts it: 'The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression'.[9] But who is to decide whether pre-emption is really aggression if, as the Bush Administration maintains, the legitimacy of pre-emptive self-defence can be determined only by the state that perceives itself as threatened? In the final analysis, it would seem, it is only the US that can decide for itself whether it has acted properly or not. The further aspect of this argument is that, in a democratic polity, it is the electorate that will decide whether or not the government has made a mistake. Even as it expands its own rights in this way, however, the US is intent on curtailing the rights of other states that it perceives as a threat. Thus even the attempt of other states to acquire nuclear weapons could be interpreted as a threat justifying the doctrine of pre-emption.[10] Starkly presented then, the question might be whether states perceived as a threat by the US can arm themselves. Nuclear weapons, weapons of mass destruction, are, of course, the key issue here. And while the US is emphatic that certain states (such as Iran) should not possess such weapons,[11] it is equally vehement in arguing, as it did before the International Court of Justice, that the use of nuclear weapons is legal,[12] and, furthermore, that it plans to develop additional weapons.

The *National Security Strategy* further propounds the view that democratic societies will pose no threat to the US and its interests. It seeks to promote 'moderate and modern government, especially in the Muslim world, to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation'.[13] The ongoing and problematic US attempt to transform Iraq into a democracy[14] is an example of this policy in action, although, as critics have pointed out, Iraq has not been convincingly linked to the 9/11 attacks, whereas several of the hijackers were Saudi Arabian. In any event, President Bush has proceeded to use the language of human rights to further justify his war on terror, proclaiming that 'Our security is not merely found in spheres of influence or some

[9] *National Security Strategy*, p. 15. [10] *Ibid.*, p. 14.

[11] See for example the statement by the US at the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that it 'supports international efforts to establish an objective guarantee that Iran permanently and verifiably abandons its nuclear weapons ambitions', in UN Doc. NPT/CONF.2005/54, 27 May 2005, p. 2.

[12] See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226.

[13] *National Security Strategy*, p. 6.

[14] A project outlined in the address by President George W. Bush to the UN General Assembly, 23 September 2004, as contained in UN Doc. A/58/PV.7, at p. 10.

balance of power. The security of our world is found in the advancing rights of mankind.'[15]

The *National Security Strategy* and the war on terrorism more generally thus challenge, if not undermine, fundamental doctrines of international law – including the laws of war, international human rights law and international humanitarian law. Although not stipulated in the *National Security Strategy*, the war on terror has also entailed denying suspected terrorists the protections of the Geneva Conventions and fundamental human rights instruments prohibiting torture and providing for basic rights. These policies were supported by various senior legal officers in the US Office of Legal Counsel, Department of Justice and Department of Defense, who provided extensive opinions that set out the legal justifications for these practices.[16]

For many scholars who have sought in one form or another to incorporate the Bush Administration policies into existing international law, the attacks of 9/11 inaugurated a new system of international relations, and international law had to adapt accordingly. A system of law that failed to respond to such atrocities by relapsing into outdated formalities would prove itself to be hopelessly invalid. International law thus had to demonstrate that it could adequately meet this challenge. But for other scholars familiar with the relationship between international law and the non-European world, these allegedly new initiatives have a very familiar and, indeed, almost primordial structure. The war on terror waged by the Bush Administration effectively calls for the return to an imperial system of order, one in which the imperial power assumes for itself the right to invade other states and transform them for its own purposes – this, ostensibly, in the name of liberating those peoples.[17] It is not difficult to see the war in Iraq as resembling a very old war of conquest. The fact that 'sovereignty' in Iraq is formally vested in the Iraqi people does not necessarily change this conclusion. Many imperial projects sought to create what might be termed a 'dependent sovereignty', that is, a situation in which formal sovereignty was benevolently bestowed on the conquered state even while real economic and political control was retained by the imperial power. Nineteenth-century protectorates also

[15] Address by President George W. Bush to the UN General Assembly, 21 September 2004, as contained in UN Doc. A/59/PV.3, pp. 7–11.

[16] See Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005).

[17] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005), pp. 302–3.

embodied the same sort of arrangement, at least formally providing that the subordinate state retained sovereignty over internal affairs while the imperial state managed the international relations of that state. When the British first acquired control over Iraq following the First World War, Sir Arthur Hirtzel of the India Office, drawing on all his experience as a colonial administrator, advised that:

> What we want to have in existence, what we ought to have been creating in this time is some administration with Arab institutions which we can safely leave while pulling the strings ourselves; something that won't cost very much, which Labour can swallow consistent with its principles, but under which our economic and political interests will be secure.[18]

It is difficult not to see the US policy in Iraq as being driven by similar ambitions, but the question remains as to whether they can be realized. Hirtzel is acute in appreciating the importance of satisfying public opinion in England at the time in much the same way that the Bush Administration is intent on promoting the war to the US and the world community as being an exercise in democracy promotion. Freedom is on the march, and surely only terrorists or liberals can be opposed to such a good.

Similarly, the claims made by the Administration that suspected terrorists are savages who may be deprived of the protections of both the Geneva Conventions and basic international human rights law because they are entirely outside the law[19] merely return us to a familiar figure in the history of American imperialism: the Native American. Writing in 1927, in the *American Journal of International Law*, Captain Elbridge Colby argued that international humanitarian law could not apply to savages such as the Native American, who were too brutal and backward to understand or adhere to the laws that obtained among civilized states.[20]

To point to the parallels between the policies animating the war on terror and a much older imperial system takes us, then, to the central theme of this volume: international law and its others. It is in the imperial encounter and the civilizing mission it embodies that, I would argue, the character of this relationship has been most clearly evident, and has

[18] As cited in Peter Sluglett, *Britain in Iraq 1914–1932* (London, 1976), p. 37.

[19] See for example John Yoo and Robert J. Delahunty, 'Memorandum for William J. Haynes II, General Counsel, Department of Defense' (9 January 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 38–79 at p. 50.

[20] Elbridge Colby, 'How to Fight Savage Tribes' (1927) 21 *American Journal of International Law* 279 at 285.

most profoundly shaped the structures and doctrines of international law. My basic argument here is that international law is fundamentally animated by the civilizing mission that is an inherent aspect of imperial expansion which, from time immemorial, has presented itself as improving the lives of conquered peoples. This mission is based on a crude distinction between the civilized and the uncivilized, and, importantly for the purposes of international law, it is the invocation of this distinction that completely transforms or, in some cases, nullifies and renders inapplicable, existing legal doctrine. Presented simply, the civilizing mission asserts that we are civilized, enlightened, universal, peaceful; they are barbaric, violent, backward, and must be therefore pacified, developed, liberated, enlightened, transformed. The barbarians usually occupy valuable territory, but any act of resistance on the part of the barbarians to the encroachments of the imperial powers is further affirmation of the fact that they are barbaric, incapable of understanding their own interests or developing their own resources. Resistance is aggression, and this calls for the use of force – a force that is both extreme and redemptive. Wars waged by the civilized are invariably 'defensive' wars. A powerfully circular logic drives the structure of the civilizing mission because the acquisition by one entity of 'civilization' ensures that whatever that entity does is inherently virtuous and legitimate even if it appears to violate existing law. This is the case because the barbarian is always outside the law, incapable of understanding or acting upon the laws applicable among the civilized. Within this scheme, then, legal doctrines play the crucial role of identifying the other – and this has the effect of expelling the other from the realm of law – and then proceeding to develop the doctrines necessary to suppress, transform, redeem the other. I have argued that all these themes and this basic structure are evident in the work of one of the first jurists of the modern discipline of international law, Francisco de Vitoria, a sixteenth-century Spanish theologian whose work was preoccupied with the question of how Spain acquired sovereignty over the Indians of the New World.[21] In Vitoria's work, the Indians are characterized in contrasting terms: tyrannized by their local rulers and yearning for freedom on the one hand, and yet overwhelmingly violent and hostile on the other. Intervention in the affairs of these societies is justified in both cases. Vitoria makes it clear that the rules of war that apply among European sovereigns are useless in a war against the Indians because they

[21] See Anghie, *Imperialism, Sovereignty and the Making of International Law*, chapter 1.

are outside the pale of civilization. He further makes it clear that, for the same reason, only Christian states can wage a 'just war'.

The structure of thinking articulated by Vitoria bears a striking resemblance to the ideology animating the war against terror.[22] And it is the concept of 'democracy' that is being deployed for the purposes of pushing towards a new system of international law. As noted above, the broad argument being made within this scheme, which draws heavily on Kant, is that liberal democracies, because of their internal constitutional order, are more likely to adhere to international law and, indeed, should play a decisive role in shaping the international order. The NATO intervention in Kosovo was clearly illegal under international law and yet the fact that a coalition of liberal democratic states was involved in that action provided it with a certain legitimacy in the eyes of many scholars.[23] Democracy promotion is so imperative that it justifies going to war in violation of the laws of war, and, that step having been taken, the ideal of democracy provides the template for the reconstruction of the defeated society. This system of ideas has now been further extended to assert that democratically elected leaders can take whatever measures they deem necessary to protect their peoples regardless of international law. These ideas represent a complete inversion of traditional international law: in the classic international law of the nineteenth century, states could – at least nominally – do as they pleased within their borders as long as they complied with their international obligations. Now, there is a reverse tendency, even among critics of the war. Democratic states can depart from the law and still be seen as acting legitimately, in the interests of cosmopolitan ideals, because they are democratic. Democratic states have these special privileges: they are not bound by international law, rather they make it. For scholars of international law, this is a familiar argument: only civilized states have proper membership of the family of nations. Only they enjoy the sovereign rights necessary to act in the international system.

The system of law established by the UN condemns imperialism, and, indeed, the whole international system appears committed to terminating whatever remains of that older system of governance. In this setting, revealing the continuation of imperial practices might have counted as a form of criticism. But that is no longer the case. The war on terror is, in

[22] See *ibid.*, chapter 6.

[23] See Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824 at 826; other similar viewpoints are noted by Martti Koskenniemi in '"The Lady Doth Protest Too Much": Kosovo and the Turn to Ethics in International Law' (2002) 65 *Modern Law Review* 159.

effect, an exercise in imperialism. And, while the US naturally denies that its policies are imperial, in the present dispensation, several eminent scholars such as Niall Ferguson have forcefully argued not only that the US is an imperial power but that imperialism may be a sound and indeed necessary policy.[24] Imperialism can serve the international community by furthering human rights, establishing the rule of law amongst less fortunate peoples, promoting the markets that will lead to economic development. Indeed, whereas human rights law and human rights principles – the right to self-determination, the right to political participation – were traditionally used to oppose imperialism, it is now argued that imperialism is the mechanism by which human rights may be made a reality.

These new arguments for imperialism compel us to rethink the point and usefulness of presenting an anti-imperial critique. But this enthusiasm for imperialism and the legal reforms that could enable it are part of a much broader and more complex crisis that confronts international lawyers. Reviewing a number of books on Islam, Clifford Geertz concludes:

> But certainly, the conception of 'Islam' being so desperately built up before our eyes by professors, politicians, journalists, polemicists, and others professionally concerned with making up our minds will be of great importance in determining what we do. Here, for once, the line between writing and the world is direct, explicit, substantial, and observable. And, we shall doubtless soon see, consequential.[25]

Similarly, the war on Iraq in particular, and the war on terror more generally, have made international law the subject of quite unprecedented public interest. In recent years, international law has ceased to become a specialized area of study for academics and legal officers. Rather, its concepts and principles have now become central to the general public's understanding of the legitimacy of actions such as the war in Iraq. The public interest in international law has rarely been so intense, but this in itself has proved disorienting to international lawyers who, it seems, have been thrust from their familiar and comfortable obscurity into playing a much larger and novel role. A number of scholars from European universities who signed a much publicized letter asserting that the impending war

[24] Niall Ferguson, *Empire: How Britain Made the Modern World* (London, 2003), especially pp. 358–70; Deepak Lal, *In Praise of Empires: Globalization and Order* (New York, 2004).

[25] Clifford Geertz, 'Which Way to Mecca? Part II', *New York Review of Books*, 3 July 2003, p. 39.

against Iraq was illegal absent authorization by the Security Council, have written an illuminating reflection on what they experienced themselves to be doing when engaged in this project: 'What is the public role of a teacher of international law? Can war be resisted through legal argument? How does an anti-war intervention in the media relate to academic debates about international law? How does activism relate to critique?'[26]

But the war on terror and the new public prominence given to international law have also, of course, created sharp divisions. The war on terror is in part a mission to bring democracy and the rule of law to bear on various 'rogue states' and must itself, therefore, be conducted according to the rule of law. Thus it is only after a thorough examination of international law, the Geneva Conventions[27] and the constitutional law of the US that the legal advisers in the Department of Defense and the Office of Legal Counsel determined, for example, that the Geneva Conventions were not applicable – at least not to the Afghanis captured in the war against Afghanistan[28] – and that only treatment that resulted in, for example, organ failure, amounted to torture.[29]

The question of what role should be played by the scholar, or, more particularly, the international law scholar and adviser, is a very old and complex one. But clearly, profound changes have occurred. The traditional divisions and debates, between 'realists' and 'pragmatists' and the 'crits', seem in retrospect to have been based on a curiously secure intellectual order, one in which, whatever the divisions, certain shared assumptions were maintained. The older verities that bound together the members of the 'invisible college of international lawyers', in Oscar Schachter's memorable phrase,[30] no longer obtain. Perhaps it is sadly ironic that the 2001 Annual Meeting of the American Society of International Law, the last

[26] Matthew Craven, Susan Marks, Gerry Simpson and Ralph Wilde, 'We Are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363 at 363.

[27] Particularly the Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135.

[28] See for example Yoo and Delahunty, 'Memorandum for William J. Haynes II'; Jay S. Bybee, 'Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense' (22 January 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 81–117.

[29] See for example Jay S. Bybee, 'Memorandum for Alberto R Gonzales, Counsel to the President' (1 August 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 172–217 at p. 176.

[30] Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217.

to be held before 9/11, was entitled 'The Visible College of International Law'. The reflections of past legal advisers[31] seem to belong to a different world from that which is inhabited by authors of the memoranda advising on the inapplicability of established human rights law and international law to suspected terrorists.[32] And the questions at stake now are no longer confined to heated debates about the 'methodologies of international law' but rather whether the lawyers who generously redefined torture, and who negated the laws of the Geneva Conventions, could be said to have behaved unethically, or even committed war crimes.[33] The upheaval of 9/11 has not only altered international law, but the whole question of what it means to be an international lawyer.

The claim is powerfully made that we are living a new reality that calls for different intellectual responses, and it appears that international lawyers are still in the process of working out what it means to be an international lawyer in these times. What are the responsibilities of international lawyers today? Perhaps it is the role that international lawyers should have always played, administering the rule of international law with expertise and integrity.

This is easy to assert, but in the present dispensation, a more disturbing possibility looms – the possibility that the fundamental concepts on which critique is based, the ground rules which make it possible for lawyers and scholars holding very different positions to engage in meaningful debate, have themselves changed. One form of anti-imperial analysis involves pointing to older imperial parallels – and many abound. This is not the first time, after all, that the West has sought to intervene massively in the affairs of Iraq to further the 'well being' and 'development' of the backward peoples of this territory. In the inter-war period, Iraq was placed under the control of the British, who administered the territory as a Mandate on behalf of the League of Nations. But history, of course, has more than one

[31] Teresa A. Bailey, 'Presidential Plenary Panel: An Exchange with Former Legal Advisors of the US Department of State' (2004) 98 *American Society of International Law Proceedings* 131.

[32] See the discussion of the memoranda authors' 'mindset' in Anthony Lewis, 'Introduction' in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. xiii–xvi. It is notable that William Howard Taft IV, Legal Advisor to the Department of State, opposed the advice that the Geneva Conventions were inapplicable to the war in Afghanistan: see Taft, 'Memorandum to Counsel to the President: Comments on Your Paper on the Geneva Convention' (2 February 2002), as reproduced in Greenberg and Dratel, pp. 129–33.

[33] Richard B. Bilder and Detlev F. Vagts, 'Speaking Law to Power' (2004) 98 *American Journal of International Law* 689.

interpretation, and very different lessons may be drawn from a study of the same materials. Douglas Feith, widely criticized for the failures of US intelligence policy in Iraq, is a devoted and knowledgeable student of the relationship between the West and the Middle East. A further technique of criticism might point to the contradictions and tensions that seem to afflict the war on terror. An older analysis, for instance, would suggest that Abu Ghraib is not so much a departure from the logic of the war on terror, as an embodiment of it. Wars against the 'uncivilized' inevitably require the use of uncivilized methods and this tends to have the effect of corrupting the self-identified civilized as well. The war, the violence of the civilizing mission, collapses into itself. Current policies are incoherent: the war on terror appears to be generating more terrorists than before; in assertively pursuing human rights, it is increasingly evident that human rights are being violated on a massive scale; and Iraq is coming perilously close to a situation where it must be destroyed in order to be saved.[34] In efforts to further democracy abroad, democracy is being undermined at home in numerous ways as domestic institutions and the populace are cowed or terrified into acquiescing to the imperatives of the war on terror. But pointing to contradictions and intellectual incoherence no longer seems a viable form of critique either. To make arguments based on history, or in the incoherence of current policy, is to adopt a certain idea of reality. And it is precisely the power of empire to change reality. A senior adviser to President Bush has asserted:

> We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.[35]

There are those who make history and those who are condemned merely to study it. Contradiction and incoherence are irrelevant in the new reality being created by the new empire. It remains to be seen, of course, whether the powers of empire are so extensive as to maintain the impregnability of this reality. And, of course, the clear distinction between actors and observers notwithstanding, all empires require ideas: they are built, furthered, justified by advisers and scholars. Ideas may be transformed

[34] For a detailed study of the incoherence of the US as a world power see Michael Mann, *Incoherent Empire* (London, 2003).

[35] As quoted in Ron Suskind, 'Without a Doubt', *New York Times Magazine*, 17 October 2004, p. 51.

into action in this way – and the temptation somehow to shape reality is surely very powerful to any international lawyer.[36] But at least one other alternative offers itself, not through a lawyer, but a novelist:

> My task which I am trying to achieve, is, by the power of the written word, to make you hear, to make you feel – it is, before all, to make you *see*. That – and no more, and it is everything.[37]

[36] See José Alvarez, 'The Closing of the American Mind' (Address to the 32nd Annual Conference of the Canadian Council on International Law, 17 October 2003).

[37] Joseph Conrad, Preface to *The Nigger of the 'Narcissus'* in Morton Dauwen Zabel (ed.), *The Portable Conrad Reader* (revised ed., New York, 1975), p. 708.

15

Afterword: and forward – there remains so much we do not know

HILARY CHARLESWORTH AND DAVID KENNEDY

This book is hard to conclude. At the conference where the papers in this book were first presented, we abandoned any attempt to wrap up proceedings. As the conference ended, the questions prompted by the substance and style of the papers and the discussion that followed seemed so broad that we struggled simply to catalogue them.

Looking back, the effort to rethink international law by focusing on its relationship to 'others' was illuminating. As in any discipline, it is easy to become preoccupied by the differences *within* the field. Focusing on differences *between* international law and things it defines as other to it helped us focus more broadly on the need to think in new ways about our discipline as a whole. Moreover, we did so at a time when conventional images of international law – as 'the law governing relations between states' – no longer seem sufficient to describe the global governance regime. The global constitutional order is a diverse, fragmented and chaotic one, in which national and international, public and private legal regimes overlap, struggle for priority and have quite diverse impacts on the ground. We do not, in fact, have a good sociological map of the global regulatory regime – it is more than, and different to, the sum of national and international, public and private law. Looking at the relationships between the international law tradition and its 'others' offered a window into how much we still do not well understand, and a set of promising intellectual paths forward.

For many years, it was conventional to think of international law as the 'other' of international 'politics'. Interestingly, this distinction was not prominent in our discussions. Over the last half century or more, international lawyers have worked to understand their field as continuous with the global political process – as the currency in which political legitimacy is counted, for example. For all of us, this struggle seems to have been

won. Something similar happened a century ago. For a long period, it had been conventional to worry about the relationship between international law and 'morality', and then, suddenly, this no longer seemed a relevant boundary by which to define the field. The boundary with politics seemed far more salient. Perhaps we are now witnessing a similar transition – from a time in which the boundary with politics defined the field, to a moment in which international law is preoccupied with another other – but which one?

For the participants in this conference, different 'others' were relevant. For some, it was the boundary between law and *culture*, particularly popular culture, that loomed largest. Was law another language for culture? Were the tropes of legal argument *like* those of contemporary movies? What should we make of these similarities? Or, was law fundamentally *other* to culture – a domain of power, decision, force? Should we worry when law came to imitate, or snuggle up to, cultural forms? Should we desire a law autonomous from culture – should we fear it? Could we have it? Perhaps predictably, these questions seemed particularly salient in discussions between those of us who specialize in law, and those who see themselves primarily as analysts of culture. As in many interdisciplinary conversations, we had as much miscommunication as new insight. But, as international lawyers, once we accept that law has become a currency for communication about the legitimacy of power, we have made law a player in the domain of culture. We are convinced work along this boundary will remain significant and fruitful.

For some included here, the most significant 'other' was the world of economic affairs – of trade, private commercial relations, corporate power. Inquiry along this boundary is, in many ways, more familiar to us as lawyers – the relationship between private ordering and informal, customary ordering and the public constitutional order has been a recurrent theme in modern legal scholarship, in the field of international law as elsewhere. But the global relationship between public order and private power seems newly significant as the capacity for public policy at the local, national and international level has seemed under threat from the largely economic process of 'globalization'. Does it make sense any longer to see public international law as the star of the legal sciences – are its structures, its sources, its procedures the sinews of our global constitution, or has it become a narrow sub-speciality, a peculiar institution and profession, left over from utopian projects of another era? Is corporate law a better map of the world's constitution – if corporations govern, is not corporate governance global governance? If the debate about international law

and culture was structured by a feeling of uncanny parallels, our discussions about international law and economic power were structured more by the implicit feeling that our discipline was losing ground to an other that really was other. Placing the two inquiries together posed a different question – should we see the global economic order as other – or might we unravel the strands of relationship between public and private power, the presence of sovereign authority in private authority, as we have the relationship between international law and politics or culture?

A number of papers investigated the relationship between international law as a hegemonic global order radiating outwards from Europe and North America towards the ex-colonial world – the colonial world as 'other' to an international law made, packaged and sold from a headquarters in Europe. This is a rich topic, and one about which international lawyers have written extensively in the years since decolonization. For all that, it remains extremely difficult to understand. Was international law, in fact, 'made in Europe' for export – or is it the reverse, made in the colonial encounter for generalization at the centre and the periphery? The legal structure of relations between the strong powers and the weaker periphery today is uncannily similar to the structure that characterized the League of Nations mandate period – and the initial seventeenth-century colonial encounter. What are we to make of these similarities? Our participants differed greatly on this – is international law 'imperial', and, if so, as a matter of logic, of language, of prejudice or of sociology? Does it just 'get used' that way – or is there a 'logic of domination' in the disciplinary imagination and materials? How persistent is this prejudice – is this a system, a structure, an imperative or simply a tendency to be watched, attended to, overcome? Again, a powerful set of questions to which we less found answers than sketched paths for further research.

The relationship between international law and warfare was on all our minds during the conference. Was international law about peace, a discipline designed to alleviate the violence and reduce the incidence of war? Was warfare really, as we had always hoped, 'other'? One might think it unfortunate that international law continued to think of culture, or economic life, or peripheral nations and peoples as its 'other'. In these fields, one might seek to bridge the gap, as we had done with politics – illuminating the connections between what we knew to be law, and what we had thought to be its 'other'. But war? Surely we should retain the project to stand outside war, limiting it, denouncing it, constraining it. It turns out that international lawyers have long since left this vision behind. The tradition of humanitarian law is all about infiltrating military

decision-making, developing rules and standards that can be slipped into the calculations of those who make war. The result has been, for better or worse, a merger of the international legal profession with the modern machinery of warfare. Several of the papers explore what was gained and lost by this merger between international law and one of its 'others', professionally and personally, as well as ethically and strategically. Thinking about international law *implicated* in warfare was also a useful heuristic, suggesting attention to law's implication in other practices that it also retained the vocabulary to denounce. Is the international law of human rights part of the problem, as well as the solution? Does international refugee law also contribute to the incarceration of the world's peoples in national boundaries?

Culture, economic power, the periphery, warfare – these were not the only counter-images to international law explored at the conference. We repeatedly discovered links and parallels between international law and domains that might have seemed alien to it: theology, mercy, sacrifice, terror, sex, gender, humanity, erotics, philosophy, justice, fetish, redemption, bodily flesh. International law has attitudes about these things, about their distance, their similarity, their potential, their peril. International law influences these things, and is influenced by them. Each of the authors took up the theme in her or his own way – but there were methodological overlaps as well. For some, the inquiry was primarily sociological – an exploration of cause and effect, of the relations in the world between international law, defined as an institution, a profession, a normative regime, and the real world of colonial resistance, private economic power, military professionalism, erotic life. For others, the inquiry was one of meaning, logic, imagery – an analysis of the common rhetorical and cultural forms present in the discourses of international law and those of colonialism, trade, war or gender. These approaches overlapped, bled into one another – but sometimes they also conflicted.

The more we looked at international law and its others, the less clear it became that the 'international law' we were talking about was the same thing. There turns out to be more than one international law – not just the international law imagined by Europeans, by Africans, by Unitedstateseans, by Australians, but also the international law preoccupied with war, with economic power, with erotic life. In a radically pluralist legal culture, the professional her or himself comes quickly into sharp view. It no longer seems so plausible to imagine the international lawyer simply speaking or applying or serving 'the law' – with legal pluralism, what had seemed legal judgments come into sharp relief as personal decisions. Indeed, the

conference raised the issue of the way in which international law can be understood as a series of professional performances rather than an edifice of ideas and doctrines.

Elaborating the relationship between international law and its others also allowed us to glimpse the *quotidian* practices of the discipline – its routine involvement in war, in poverty, in cultural life. Normally, international lawyers specialize in crises. Our sense that we are living through a momentous period in history is permanent. We will always feel as though there is something peculiarly challenging and significant about *this* moment in international law and that the core of our discipline is somehow under threat. The exceptional nature of each new situation provides a stimulating sense of danger.

One example of performance is the way academic international lawyers responded to the invasion of Iraq in 2003. This performance must be read in the context of the sense of insecurity that dogs international lawyers. In the academy we tend to be considered purveyors of a rather suspect form of legal reasoning and incapable of distinguishing between true law on the one hand and politics on the other. The role of international law in the academic curriculum is thus endlessly debated – is it central or peripheral to the core business of a law school?

The lead-up to the invasion of Iraq and the response to it made international lawyers everywhere feel as though they were at the heart of the action. We were relevant at last, because of the unusual public interest in whether or not the invasion was legal. For a time at least, the press, colleagues, students and the general public seemed interested in the views of international lawyers. Australian, Canadian and British international lawyers wrote public letters questioning the legal basis for war that attracted political attention. This thrill of attention and relevance, of talking law to power, was however tainted by a sense of deepest irrelevance. Whatever the views of most international lawyers that the invasion was illegal, the members of the 'Coalition of the Willing' proceeded to invade Iraq on the basis of what seemed to be very weak, perhaps even ironic, legal advice.

Was the invasion of Iraq good news or bad news for international law and its practitioners? The options proposed by international lawyers include vigorous restatement of the basic principles of the Charter of the United Nations[1] and retention of the moral high ground, awaiting the

[1] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67.

day when they will again attract politicians;[2] developing legal principles that are better attuned to political agendas to increase the chance that they will be observed;[3] exploring (and celebrating) the informal amendment of the cumbersome structures of the UN Charter relating to the use of force;[4] and accepting and living with the intellectual and emotional pendulum between commitment and cynicism inherent in the practice of international law.[5]

The long-term significance of the dissonance between international legal principle and political action in the case of the invasion of Iraq may well be its puncturing of the myth of the reasoned effectiveness of international lawyers. The search for a causal link between international law and political action can be seen to be unproductive and the image of speaking law to power a conceit. The invasion of Iraq may lead us to describe a more complex role for international law: it can have a powerful impact, but not in the ways we are taught to expect or acknowledge.

One way to better understand the relationship between international law and foreign policy is through the idea of 'extravernacular projects'. This requires studying the dark, non-progressive side of international law to challenge the dominant narratives of progress and development in the discipline. The standard focus of international lawyers is on humanitarian objectives – the protection of human rights or the environment, for example. It may be more useful however to ask what international law offers to people who want to violate international law and to investigate how international law is implicated in the problems we have set out to solve.

Extravernacular projects can assist us to see the way that principles of international law may work to obscure injustices. In the case of Iraq, for example, we might ask how international law was deployed to construct Iraq as an appropriate place to invade. How did the international law of sanctions, of no-fly zones, of 'oil for food' programmes contribute to the creation of 'Iraq – The Problem'? A Security Council resolution explicitly

[2] For example, Thomas M. Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607 at 620.

[3] For example, Michael J. Glennon, 'Why the Security Council Failed' (2003) 82(3) *Foreign Affairs* 16 at 30–5.

[4] For example, Carsten Stahn, 'Enforcement of the Collective Will after Iraq' (2003) 97 *American Journal of International Law* 804.

[5] For example, Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York, 1999), pp. 495–523.

authorizing the use of force against Iraq would have met the requirements of Chapter VII of the UN Charter and rendered the invasion legal in a formal sense, although the resolution may have been the product of economic coercion of some of the non-permanent members of the Security Council. The sense that action can be legal but illegitimate prompts the question of why international law pays so little attention to economic disparity between states and insists on a fiction of equality as international actors.

A related strategy would be to consider principles of international law from the perspective of their objects. For example, claims of humanitarian intervention could be studied from the viewpoint of the people on whose behalf the intervention took place. The international interventions in Kosovo, East Timor, Afghanistan and Iraq would take on a more complex hue when examined from inside the 'rescued' communities. The pattern of association of humanitarian intervention with economic subjugation of the saved group would become clearer.[6] This type of inquiry would destabilize the stock of images deployed in international law, such as the Third World as chaotic and uncivilized and the West as a scion of democracy.

International law could be productively studied as myth and ritual in the international community and within nation-states: what are its codes and its fetishes? Why is intervention typically understood as having a military form; what other forms of intervention are possible? What of the fantasy realm that lies behind international law? Should we move beyond international law's juridical model of power and investigate how its narratives affect our imaginations and emotions?[7] What professional and personal performances are involved in the practice of international law? Invocation of international law can often more effectively galvanize civil society than the makers of foreign policy, and understanding the hopes and desires woven into the fabric of international law can help explain this.

The deep sense of disquiet held by many international lawyers about the invasion of Iraq may lead to a new disciplinary self-image, a recognition of the dark sides of humanitarian impulses. Instead of seeing ourselves as wise and sometimes heroic counsellors speaking truth/law to power, hoping that one day we will be heard and that our advice will be taken,

[6] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, 2003), chapter 4.

[7] *Ibid*., p. 77.

we should accept that we will only ever have a minor direct impact on the generation of foreign policy. At the same time, we have considerable power in shaping the way problems are identified, categorized and resolved at the international level. We are active participants in intensely political and negotiable contexts and we must confront this responsibility without sheltering behind the illusion of an impartial, objective, legal order.

INDEX