

LAW, SUBJECT AND SUBJECTIVITY IN INTERNATIONAL RELATIONS: INTERNATIONAL LAW AND THE POSTCOLONY

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[This article takes current moves towards an international criminal regime as the departure point for an analysis of the implications of positing a world ordered by law. I argue that much of contemporary international relations — and virtually all of international law — is contingent on conceptions of subjectivity that are historically and culturally located in the European intellectual tradition. This in itself is hardly a novel proposition. However, by approaching this question through the problematic subjectivity of the alleged war criminal at international law, it will be demonstrated that the Eurocentrism inherent in the body of law called international is not to be understood merely as the inscription of a European truth on the blank slate of the world; rather, it is into the relationship between law and subject that this inquiry into the subject of international relations must lead — a symbiotic relation of space (with)in which both law and subject are co-defining. This insight has implications for the analysis of 'order' and the normative mechanisms that are said to protect it (of which law is but one), and for the practice of international law.]

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INTRODUCTION

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

Justice Robert Jackson, US Chief of
Counsel at the Nuremberg Trials¹

What the representatives of nations talk about are moral principles and legal claims, what their talk refers to are conflicts of power.

Hans Morgenthau, *Politics Among Nations*²

Today, when the promise of a New World Order is said to have been broken, perhaps by the old world *disorder*, in which the same rages of old manifest in different places under different names — the concentration camp doubly sanitised by the appellation ‘ethnic cleansing’ — the violences of nationalist, ethnicist and racist politics are said to be countered by (the violence of) a globalising culture.

In the search for order amid this disorder (as one strategy among many), *law* has been invoked as a criterion of peace and security. *Criminal law*, in particular, has been raised as the means of addressing crimes that are seen as an affront to human dignity and global order. For the first time since the victorious Allies brought German and Japanese war criminals to trial at Nuremberg and Tokyo, International Criminal Tribunals have been established by the Security Council of the United Nations to try those suspected of war crimes³ in the former Yugosla-

¹ (1949) 2 *Trial of the Major War Criminals Before the International Military Tribunal* 99.

² Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (2nd ed, 1954) 344.

³ The Secretary-General’s report stated that the application of the principle *nullum crimen sine lege* required the International Tribunal to ‘apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problems of adherence by some but not all States to specific conventions does not arise’: *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, UN Doc S/25704 (1993), reprinted in 32 ILM 1159, para 34. (This is consistent with para 29, which points out that the Security Council is not purporting to ‘legislate’, but merely apply existing international humanitarian law.) Such law was said to be embodied in four documents, corresponding to the categories of subject matter jurisdiction conferred upon the Tribunal:

- *Grave Breaches of the Geneva Conventions of 1949*: see Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 1950) (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 1950) (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, open for signature 12 August 1949, 75 UNTS 135 (entered into force 1950) (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, open for signature 12 August 1949, 75 UNTS 287 (entered into force 1950) (Fourth Geneva Convention).
- *Violations of the Laws or Customs of War*: see the Hague Conventions, in particular the Convention Concerning the Laws and Customs of War on Land (Second Hague, IV), signed at the Hague, 18 October 1907, UKTS 1910 No. 9; 3 *Martens Nouveau Recueil* (3d) 461 (entered into force 1910).

via⁴ and in Rwanda.⁵ As a backdrop and in contrast to these quasi-judicial executive tribunals, the International Law Commission (ILC) has been continuing its work on the possibility of establishing a permanent International Criminal Court, adopting a Draft Statute for such a court at its forty-sixth session in 1994. Such an institution, it is said, would be one of the United Nations' 'most ambitious institutional and theoretical leaps since the creation of the human rights system.'⁶

James Crawford, Chair of the ILC Working Group for an International Criminal Court, has argued that these more recent moves towards an international criminal regime are the product of three crucial factors: the large-scale breakdown of State order in particular societies that has led to massive violations of human rights; the detailed and intensive media coverage of these recent atrocities that has played an important role in stimulating public demand that 'something' be done; and the unprecedented support for action within the Security Council, associated with an unwillingness on the part of permanent members to veto that action.⁷

Nevertheless, this does not substantively address the question of why it is that 'something' requires the robes and rhetoric of law; why the local effects of global reordering after the Cold War legitimise reliance on a normative regime said to be 'universal'.

This article takes current moves towards an international criminal regime — and, by extension, an international *penal* regime — as the departure point for an analysis of the implications of positing a world ordered by law. Recent moves to

• *Genocide*: see Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 1951).

• *Crimes Against Humanity*: see below n 103 and accompanying text.

⁴ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (*'the International Tribunal'*) was established by the Security Council acting under Chapter VII of the Charter of the United Nations: SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993), reprinted in 32 ILM 1203.

⁵ The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States was established with 13 in favour, 1 against (Rwanda) and 1 abstention (China): SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/Res/955 (1994), reprinted in 33 ILM 1600. Rwanda voted against the resolution, expressing dissatisfaction on the grounds that (i) its competence was limited; (ii) its composition and structure were inappropriate and ineffective, and 'would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people'; (iii) it proposed to try not only genocide, but crimes that come under the jurisdiction of internal tribunals; (iv) certain countries which 'took a very active part in the civil war in Rwanda' were able to propose candidates for judges and participate in their election; (v) some of the accused could be imprisoned outside Rwanda; (vi) capital punishment had been ruled out, though it was provided for in the Rwandan penal code; (vii) the Tribunal should have sat in Rwanda rather than Tanzania: 49 UN SCOR (3453rd mtg), UN Doc S/PV.3453 (1994) (Mr Bakuramutsa of Rwanda speaking), cited in Adam Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts' (1995) 6 *Duke Journal of Comparative and International Law* 11, 66.

⁶ Timothy McCormack and Gerry Simpson, 'A New International Criminal Law Regime?' (1995) 42 *Netherlands International Law Review* 177, 178.

⁷ James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *American Journal of International Law* 404, 407.

insert individuals as subjects of international law, and to extend the operation of that body of law to the punishment of war crimes, sit uneasily with the axiomatic principle that this law is legitimised by the consent of *States*. The antinomies to which this gives rise will be explored, with the focus being on the conceptions of subjectivity that underpin that law, and the significance this holds for the understanding of international relations that informs it.

The theoretical project being undertaken here is, therefore, the opening up of the discourses of world order, but it also goes further. For the assertions of order, the violences of coherence that are undermined have a real practical effect on conceptions of *who* may act, and *for whom* the international order 'works'. In this way, the trajectory followed here undertakes the two-fold task of opening up both discourse and order (in so far as the two are distinguishable) to the possibility of their alternative — an alternative that must be read as encompassing both the possibilities of *an other* order, and the potentiality of *the other of* the order.⁸

I begin this inquiry with a consideration of the historical and jurisprudential foundations of international law. Its commonalities with and indebtedness to the realist school of international relations will be considered, leading to a discussion of critiques of the State as the unitary actor of both discourses and contemporary claims that the State is 'in transition'. This will provide an historical and conceptual background to the current moves toward an international criminal regime, while adumbrating the issues of the subject and subjectivity taken up more fully in the latter part of the article.

In Part II, I turn squarely to the question of war crimes as a political and legal issue. Traditional arguments for and against the prosecution of war criminals will be briefly considered, before focusing on the questions of subjectivity that are implicated in moves to do so. The antinomies arising from the insertion of a human subject into the State-centric legal order will form the basis of an inquiry into the extent to which international law and international relations disclose their European heritage, not merely in their adoption of the State as the constitutive member and individuated subject of discourse, but in their very conception of what constitutes a subject of discourse.

Finally, Part III takes up the theoretical and practical implications of this critique of subjectivity. Here, the parallels between the State-subject of international law and the putative subject of global law will be reconsidered for their capacity to illuminate previously disparate discourses (notably the lack of communication between international law and debates going on within international relations on this question). Feminist and postcolonial critiques of subjectivity will be drawn upon, with feminist analyses of subjectivity, as constituted in and through power relations, providing a bridging link to the more substantive discussion of post-colonialism. Of crucial importance here is postcolonialism's capacity to shed a self-reflective light on the theoretical and practical effects that discursive hegemony — epitomised in the colonial project — can have on the subjects of the hegemon, *even as they are defined by and in relation to it*.

⁸ Cf Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (1992) 29.

The question, then, is no longer 'what is the State' or 'what is law', but what is at stake in positing the State as subject of law? And what is involved in the inversion of that act of anthropomorphism, when the individual is (re)inserted as a subject of such a body of law? The resolution of these questions will take this article to the heart of the subject and, in turn, to the heart of subjectivity.

I LAW

That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will ... The subject of a power is either common or special. Just as the body is a common, the eye a special subject of the power of sight, so the state, which we have defined above as a perfect association, is the common subject of sovereignty.

We exclude from consideration, therefore, the peoples who have passed under the sway of another people, such as the people of the Roman provinces. For such peoples are not in themselves a state, in the sense in which we are now using the term, but the inferior members of a great state, just as slaves are members of a household.

Hugo Grotius, *De Jure Belli ac Pacis*⁹

Grotius denies that all human government is established for the benefit of the governed, and he cites the example of slavery. His characteristic method of reasoning is always to offer fact as a proof of right. It is possible to imagine a more logical method, but not one more favourable to tyrants.

Jean-Jacques Rousseau, *The Social Contract*¹⁰

As a system of law, modern international law exists in the uneasy tension of a series of contradictions as to its content and legitimacy. Through premising its status as 'law' on the consent of States, it does not merely privilege 'the State' as both creator and subject of the law of nations, but also reifies this construct by attaching the existence of law to the continued existence of its essentialised subject form. In this way, international law is dominated by bodies whose clear interests lie in maintaining the status quo, and is restricted in its global vision to the interactions of monolithic, territory-specific sites of power.¹¹ The effect of this is to render international law necessarily conservative in its content and application, but moreover it limits its capacity to conceive an alternative order. Within this regime, theoretical conflict arises primarily where notions of 'soft' law (ie customary or general international law) appear to contradict the presumed voluntarism of the legal 'system'¹² — in the language of international relations

⁹ Hugo Grotius, *De Jure Belli ac Pacis* (1625) cited in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 230.

¹⁰ Jean-Jacques Rousseau, *The Social Contract* (1762) cited in Bull *et al*, above n 9, 62.

¹¹ Exceptions to this rule exist solely by virtue of the consent of States to the legal personality of other forms of human organisation (notably the UN): see below n 27.

¹² See, eg, Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 420.

theory, where, notwithstanding the realist¹³ legitimation of the consent of States, international law pursues an idealist agenda.¹⁴

The central problematique of international law (usually articulated in the 'standard sherry party question': *is international law really 'law'?*¹⁵), therefore, concerns the dual position of the State as both constitutive member and individuated subject. Disregarding the linguistic games that often subvert this issue,¹⁶ there is a definite need to ground it in some kind of theoretical framework that can conceive of 'law' as other than that of unreconstructed Austinian positivism — that there is no law in the absence of a sovereign with power to command sanctions.¹⁷ Equally, however, the normative significance of the rules of international law needs to be explained in terms that can conceive of the complexities that make its reliance on the consent of States more than a 'passive mirror', reflecting nothing more than their (occasionally enlightened) self-interest.¹⁸

The first issue relates specifically to the jurisprudential underpinnings of international law and the role of 'civilised' (read 'Western') legal systems in informing its construction and application. The second issue more squarely raises the problematique of the dual role of the State within international society.

1. It is not the purpose of this article to defend or destroy international law's claim to the status of 'law'. Indeed, it is arguable that the posing of this question as the central dilemma of the modern law of nations in fact serves to cloak far

¹³ In part a reaction against the utopianism of Woodrow Wilson (crushed by the failure of the League of Nations and the outbreak of the Second World War), 'Realism' represented a return to power politics in the study of international relations. Premised on an international system populated by unitary, rational, power-seeking States, it represents a theory of *realpolitik*. As a structural theory of world politics, 'Neo-Realism' describes the international system through two constants and one variable. The constants are the existence of an anarchical system of horizontally distributed power (as opposed to vertical distribution within a State), and the population of that system by similarly functioning units (States) whose behaviour is determined according to that system (much the way that diverse corporations function similarly within an economic market). The variable is the distribution of power capabilities across the system, and much has been written concerning the inevitability (and, indeed, desirability) of a bipolar system epitomised by the Cold War. See generally, Kenneth Waltz, *Theory of International Politics* (1979).

¹⁴ Cf Martti Koskenniemi's brief discussion of *philosophical* idealism (seeing the world as constituted by ideas) and realism (adopting the 'common-sense' view that the world is composed of separate facts): Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 460-4.

¹⁵ David Harris, *Cases and Materials on International Law* (4th ed, 1991) 6.

¹⁶ See, eg, Glanville Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) 22 *British Yearbook of International Law* 146; cf Thomas Franck, *The Power of Legitimacy Among Nations* (1990) 27-40 (discussing the 'irrelevance of law and non-law').

¹⁷ See John Austin, *The Province of Jurisprudence Determined* (1st published 1832, 1954 ed) 175, 201; Frederic Maitland, *The Constitutional History of England* (1908) 529; cf H L A Hart, *The Concept of Law* (1961) 208-31. According to a 'realist' understanding of the international system, the ability to impose order represents the major difference between power relations within a nation-State and within the international system: the former can be regulated by a government that has a monopoly on the legitimate use of force; the latter cannot be regulated and so necessarily becomes a system of self-help: Kenneth Waltz, 'Anarchic Orders and Balances of Power' in Robert Keohane (ed), *Neorealism and its Critics* (1986) 99-100. Cf Ingrid Detter de Lupis, 'The Relationship between International Relations and International Law' in Hugh Dyer and Leon Mangasarian (eds), *The Study of International Relations: The State of the Art* (1989) 386.

¹⁸ Avigdor Levontin, *The Myth of International Security* (1957) 154

deeper concerns as to the universalising presumptions implicit in that debate.¹⁹ Here, then, it is approached not for the purpose of reaching a definitive resolution to the question, but for a consideration of what is left out of this conversation.

The most basic level of argument proceeds from a standpoint of power politics, where instances are paraded in which the 'law' was not followed or enforced in order to demonstrate that international law is ultimately powerless,²⁰ or in which 'law' merely followed the interests of the powerful — at best being selectively implemented.²¹ Against this, the defenders of international law enumerate the number of persons working in the area for State Departments and the occasions on which State leaders use the language of international law to justify their actions (though often subsequent to the event).²² By presenting alternative *descriptions* of the international system, the truth-claim of each relies on a war of empirical evidence, the ultimate effect of which is to impoverish our understanding of the power dynamics behind these observations.²³

A slightly more sophisticated approach looks more to the reasons *why* it might be in States' interests to recognise international law. Anthony D'Amato adopts the notion of 'reciprocal entitlements' to argue that the enlightened self-interest of States introduces and subsequently binds them to the rights and obligations of a form of international citizenship.²⁴ On closer inspection, however, his argument approximates the power politics analysis in uncritically positing a decentralised regime where order is enforced by the capacity of States to retaliate against violations of their entitlements.²⁵ Similar concerns arise in variations of this that

¹⁹ For a discussion of the conflict between the 'naturalists' (law as normative teleology) and 'positivists' (law as normative deontology), see Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard International Law Journal* 81, 81-8.

²⁰ See, eg, Waltz, above n 17, 126-7. Cf Niccolò Machiavelli, *The Prince* (1st published 1513, 1935 ed) 94: '[I]n the actions of men, and especially of princes, from which there is no appeal, the end justifies the means.'

²¹ Witness the different responses of the international community to the invasions of Kuwait and East Timor, and the United States' withdrawal of its acceptance of the compulsory jurisdiction of the International Court of Justice in the face of an adverse preliminary finding. See the discussion in Thomas Franck, 'Icy day at the ICJ' (1985) 79 *American Journal of International Law* 379 (arguing that the interest of the United States is not served by reliance on its own power, but on an international system governed by 'neutral reciprocal principles').

²² See Anthony D'Amato, *International Law: Process and Prospect* (1987) 10-13; cf Franck, above n 16, 3: 'In the international system, rules usually are not enforced yet they are mostly obeyed.' See further Louis Henkin, *How Nations Behave* (1968). Alternative formulations of this second approach draw on psychological and sociological studies to describe the normative impact of the *idea* of law: the more States are compelled to use the rhetoric of law to justify their actions, the more they will 'feel' bound by its content: see Purvis, above n 19, 111-13; cf Max Weber, *Max Weber on Law in Economy and Society* (1954) 6-7.

²³ Cf Koskeniemi, above n 14, 485 (discussing a similar outcome from a war of unsituated legal principles).

²⁴ D'Amato, above n 22, 13-25.

²⁵ Cf Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984) 14-27; Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, (entered into force 1980); 9 ILM 679, art 60(1). Clearly, as in D'Amato's example of the United States' economic retaliation against the Iranian government's ratification of student occupation of its Tehran embassy, a legal order under such enforcement is entirely contingent on the capacity of individual States to apply adequate pressure: *contra* D'Amato, above n 22, 24-5. D'Amato further argues that 'the tit-for-a-different-tat patter "makes sense" in a legal system that does not have a central court of compulsory jurisdiction, a world legislature, and a world police force'.

tie international law to the explicit consent of States; a positivist line that defines international law as a contractual regime limited to the content of treaties. Such an approach fails to account for the reason why States acknowledge treaty obligations: this implicitly relies on the existence of a higher-order legal system which (at the very least) provides the norm establishing the State treaty as a law-creating material fact.²⁶

What lies in common with all these approaches is their reliance on the State as one of many unitary, rational actors, and on the concept of law as something universal — at once linked to, but somehow conceptually ‘above’, the States. It is this double presumption of equality and uniformity that provides the focus for my critical analysis not of the inconsistencies of international law, but of the ambiguities within the *idea* of it.

2. As the traditional subjects of international law, States continue to command a privileged position over other (recognised) international persons. Only States are recognised as full members of the United Nations;²⁷ only States may bring contentious claims before the International Court of Justice;²⁸ and only States are entitled to the benefits of territorial integrity and sovereign immunity.²⁹ The State is therefore the actor on the international plane, but if States are theoretically equal, then some are clearly more equal than others.³⁰

The most explicit power disparity entrenched at international law is the privileged position of the Permanent Five members of the Security Council, each holding a power of veto over the only decisions that can bind the United Na-

²⁶ See Hans Kelsen, *Introduction to the Problems of Legal Theory* (1st published 1934, 1992 ed) 122. On the standard definition of a treaty, see the Vienna Convention on the Law of Treaties, above n 25, arts 2-3, and see now the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, (not in force) 25 ILM 543. Cf the jurisprudence of the International Court of Justice on the nature of binding agreements between States outside of written treaties: *Nuclear Test Cases (Australia v France; New Zealand v France)* [1974] ICJ Rep 253, 457; *Aegean Sea Continental Shelf Case (Greece v Turkey)* [1978] ICJ Rep 3, 10-12 paras 20-5.

²⁷ International organisations (most obviously the United Nations Organisation) have been recognised as having international legal personality, but this personality is delimited by the nature of its origin in the consent of States:

Whereas a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the Organisation must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice the Court concludes that the *Members have endowed the Organisation* with capacity to bring international claims when necessitated by the discharge of its functions. (Emphasis added.)

Reparation for Injuries Suffered in the Service of the United Nations Case [1949] ICJ Rep 174, 180 (‘the *Reparations Case*). However, it was further held that fifty States, ‘representing the vast majority of the members of the international community’, could thus bring into existence an entity with ‘objective international personality’ not merely recognised by them alone: *ibid* 185.

²⁸ Statute of the International Court of Justice, art 34(1). Cf *Mavrommatis Palestine Concessions Case (Jurisdiction) (Greece v United Kingdom)* [1924] PCIJ (ser A), No 2, 12.

²⁹ UN Charter art 2(7).

³⁰ See, eg, Alain Pellet, ‘The Normative Dilemma: Will and Consent in International Law-Making’ (1992) 12 *Australian Yearbook of International Law* 22, 42-5. In what we might call ‘real’ terms, a State’s military and economic power are obviously significant in its capacity to make its voice heard on the international plane, as well as in its capacity to manufacture the ‘consent’ of States.

tions,³¹ a position intended to confer authority commensurate with these nations' responsibilities for maintaining world peace and security after the Second World War.³² With the thawing of the Cold War, a significant part of the rhetoric of the 'New World Order' turned on the hopes of a united Security Council enabling a more active United Nations.³³ Nevertheless, the short-term prospects of altering the power imbalance set in place in San Francisco in 1945 remain slim.³⁴

In addition, however, the nominal equality of States must take into account the power of United Nations Member States to set the criteria for statehood.³⁵ The significance of this was most evident in the assertion of a 'sacred trust' over those peoples less 'advanced' than Member States at the formation of the United Nations.³⁶ As a means of elevating 'their' status, the decolonisation project adopted by the United Nations in the 1960s represented the first meaningful articulation of the right of all peoples to self-determination, but this right was based on the attainment of a higher form of existence in the State.³⁷ Such an

³¹ UN Charter arts 25, 27(3).

³² Alvin Bennett, *International Organizations: Principles and Issues* (2nd ed, 1980) 44-8, 65-8. Cf Leland Goodrich and Edvard Hambro, *Charter of the United Nations* (2nd ed, 1949); Inis Claude Jr, *Swords into Plowshares — The Problems and Progress of International Organization* (4th ed, 1971) 48-9.

³³ See, eg, Lawrence Freedman, 'The Gulf War and the New World Order' (1991) 33(3) *Survival* 195, 196, 201-2; Keith L Sellen, 'The United Nations Security Council Veto in the New World Order' (1992) 138 *Military Law Review* 187. This has been acknowledged as an important factor in current moves towards international recognition and prosecution of war crimes: Crawford, above n 7.

³⁴ See, however, Sellen, above n 33, 191 (who argues that the permanent member veto should be replaced with a 'double-majority' voting method).

³⁵ See the Montevideo Convention on Rights and Duties of States 1933, 135 LNTS 19; USTS 881, open for signature 26 December 1933, art 1 (commonly accepted as reflecting customary international law in this regard).

³⁶ UN Charter, art 73; cf Covenant of the League of Nations, art 22(1), (referring to lands 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world') and art 22(2) (referring to the principle that 'the tutelage of such peoples should be entrusted to advanced nations'). Both instruments contrast interestingly with Rudyard Kipling's 1899 poem, 'The White Man's Burden':

Take up the White Man's burden—
Send forth the best ye breed—
Go bind your sons to exile
To serve your captives' need.

Rudyard Kipling, 'The White Man's Burden' in *The Five Nations* (1904) 78.

³⁷ See, eg, *Frontier Dispute Case (Burkina Faso v Mali)* [1986] ICJ Rep 554, 567:

[T]he maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples. (Emphasis added.)

Cf Emperor Haile Selassie's declaration at the Consultative Committee of the Organisation of African Unity (OAU), formed to try to resolve the conflict between Nigeria and secessionist Biafra:

The national unity and territorial integrity of member states is not negotiable It is our firm belief that the national unity of individual African states is an essential ingredient for the realization of the larger and greater objective of African Unity.

In David Ijalaye, 'Was "Biafra" at Any Time a State in International Law?' (1971) 65 *American Journal of International Law* 551, 556.

approach to 'equality' based on criteria of development and civilisation is somewhat dubious when set against its accompanying claim of universality.

The notions of equality and uniformity underpinning arguments concerning the 'legality' of international law are problematic to say the least, but they are linked inextricably to the equality and uniformity of an essentialised State subject form. It is through the self-evidence of this form, and of international law's role in merely facilitating the *laissez-faire* order in which these 'equal' forms interact, that the dominant discourses of (Western, liberal) conservatism are privileged.³⁸ To get to the heart of this, I turn now to a closer analysis of the State as construct, looking to its historical and epistemological specificities, as a conceptual introduction to the consideration of its position as subject.

A *The State-Subject*

The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea; and an unselfish belief in the idea — something you can set up, and bow down before, and offer a sacrifice to ...

Joseph Conrad, *Heart of Darkness*³⁹

International law as originally conceived by the man sometimes labelled its founder, Hugo Grotius, was based less in legal doctrine than it was in a body of principles rooted in the laws of nature.⁴⁰ This conception, which Hedley Bull came to call the 'anarchical society'⁴¹ of States, provided an alternative world view to both the entirely chaotic state of nature as described by Machiavelli and later Hobbes;⁴² and the attempts to bring this chaos under centralised control by

³⁸ Prosper Weil identifies the aims of international law as being to 'enabl[e] orderly relations to be established among sovereign and equal states ... [and] to serve the common aims of members of the international community'. This second aim is qualified by the threefold requirement that norms evolved for this purpose must be based on voluntarism of states and that they be both 'neutral' and positivist: Weil, above n 12, 418-21. Weil grounds (and dates) himself by citing the Permanent International Court of Justice decision in *The Lotus Case (France v Turkey)* (1927) PCIJ (serA), No 10. The implicit target of his critique, however, appears to be the use of General Assembly Resolutions against the interests of Western States (which are protected by a *laissez-faire* regime of international law). Cf Franck, above n 21, 379-84 (critiquing this position); Mohammed Bedjaoui, 'Poverty of the International Order' in Cyril Black and Richard Falk (eds), *The Future of the International Order* (1967) 153-4 (discussing the perspective of third world States).

³⁹ Joseph Conrad, *Heart of Darkness* (3rd ed, 1988) 10.

⁴⁰ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625). This international society centred around the understanding that States and their rulers are bound by rules and form a society or community with one another, of however rudimentary a kind: Hedley Bull, 'The Importance of Grotius in the Study of International Relations' in Bull *et al*, above n 9, 71.

⁴¹ See generally Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977).

⁴² See, eg, Michael Walzer, 'On the Role of Symbolism in Political Thought' (1967) 82 *Political Science Quarterly* 191; and see generally Crawford Macpherson, *The Political Theory of Possessive Individualism* (1962). Hobbes' thought in particular remains the intellectual foundation of the currently dominant realist (and now 'neo-realist') school of international relations:

restoring the institutions of Latin Christendom;⁴³ or through the construction of new institutions seeking a perpetual peace through human progress as ultimately articulated by Immanuel Kant.⁴⁴ For the purposes of the discussion here, however, I shall focus on its significance in reifying the essentialised form of the State as the unitary and equal constituent member of that society,⁴⁵ and the Eurocentrism of the 'society' that accompanied it. This will provide a context within which to evaluate contemporary claims that 'the State is in transition', and the backdrop for my subsequent discussion of the insertion of the human subject (the war criminal), and the implications of the conceptions of subjectivity implied and implicated in that move.

Grotius wrote his treatise, *De Jure Belli ac Pacis*, in a period of transition. Europe was emerging from the medieval period and the vertically structured hierarchies under Pope and Emperor, and entering the modern period of horizontally organised sovereign States that was formally established in the 1648 Peace of Westphalia.⁴⁶ In the act of affirming the right of rulers to determine the confessional allegiance of their States and subject (*cujus regio, ejus religio*)⁴⁷ and the corresponding secular declaration of the supremacy of territorial rulers over their dominions (*Rex in regno suo est Imperator regni sui*),⁴⁸ the (European) world was reformulated not merely in its political structure, but in its conception of the universe on which that structure was laid. The emergence of absolute and exclusive sovereignty has elsewhere been linked to the rediscovery from Roman law of absolute and exclusive private property.⁴⁹ However, when viewed against contemporary changes in the humanities, the concept of sovereignty as a spatial organisation of politics may be seen as part of a broader transformation in the European conception of reality from the domination of thought by the truth of

Concerning the Offices of one Sovereign to another ... commonly called the *Law of Nations*, I need not say anything in this place; because the Law of Nations, and the Law of Nature, is the same thing there being no Court of Naturall Justice, but in the Conscience onely; where not Man, but God reigneth.

Thomas Hobbes, *Leviathan* (1st published 1651, 1914 ed) 189.

⁴³ One issue on which both Hobbes and Grotius agreed was the authority of the State over the church: Bull, above n 41, 27-9.

⁴⁴ See Immanuel Kant, *Perpetual Peace* (1st published 1795, 1903 ed). For a modern articulation of Kantian international legal theory, see Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

⁴⁵ Thereby establishing its position as subject of international law: Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Yearbook of International Law* 1, 26-30.

⁴⁶ See, eg, Antonio Cassese, *International Law in a Divided World* (1986) 34-8; B Röling, 'Are Grotius' Ideas Obsolete in an Expanded World?' in Bull *et al*, above n 9, 289. Cf Bull, 'The Importance of Grotius in the Study of International Relations', above n 40, 75 (discussing the existence of *States* prior to the Peace of Westphalia, but distinguishing *nation*-States which did not emerge until the eighteenth and nineteenth centuries); see also James Der Derian, 'The Boundaries of Knowledge and Power in International Relations' in James Der Derian and Michael Shapiro (eds), *International/Intertextual Relations: Postmodern Readings of World Politics* (1989) 3.

⁴⁷ Bull, 'The Importance of Grotius in the Study of International Relations', above n 40, 76-7.

⁴⁸ John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139, 157.

⁴⁹ See, eg, *ibid* 157; Perry Anderson, *Lineages of the Absolutist State* (1974) 429.

God rooted in religious ideology, to an objective scientific truth grounded in positivist empiricism.⁵⁰

The idea of the State, then, can be seen not as an inevitable progression of human society,⁵¹ or a consequence merely of changing production forces,⁵² but as a corollary of the emergent European mind: conceiving of truth and the world as conquerable and *possessible*.⁵³ The extension of this discourse to emergent States beyond Europe, presented as the 'civilising mission',⁵⁴ can therefore be seen more properly as the application of a European truth onto the (presumed) blank slate of the world.⁵⁵

The intellectual heritage that this provided for the modern 'realist' discipline of international relations is clear,⁵⁶ but assertions as to the Western specificity of international society are hardly sufficient to challenge the authority of statist conceptions of the contemporary international order. The problem identified here, however, lies not in the power of State-centric formulations to actively attack weaker States and deprive them of 'rights', but in its *legitimation of their status as disempowered*. This effect can be traced to two central characteristics of the 'anarchical society': the perception of it as populated by equal States with similar

⁵⁰ See, eg, Michel Foucault, 'The Discourse on Language' in *The Archaeology of Knowledge* (1972) 216-19. Cf Ruggie, above n 48, 159 (comparing the concept of sovereignty with the emergence of the single-point perspectival form in the visual arts); and cf Hugo Grotius, *De Jure Belli Ac Pacis* (1625) Book 1, Ch 1, Part X, para 11 (natural law would exist even on the assumption that God did not). See also Ramashray Roy, R Walker and Richard Ashley, 'Dialogue: Towards a Critical Social Theory of International Politics' (1988) 13 *Alternatives* 77, 84.

⁵¹ See, eg, Michael Oakeshott, *On Human Conduct* (1975) 289 (describing a State as 'circumstantially distinguished territory whose inhabitants, incorporated in the relentless exploitation of its resources, have a common interest in the continuous success of the enterprise').

⁵² See, eg, Eric Jones, *The European Miracle: Environments, Economies and Geopolitics in the History of Europe and Asia* (1981) 147; Fred Block, 'The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State' (1977) 33 *Socialist Revolution* 6.

⁵³ Cf Jean Bethke Elshtain, 'Sovereignty, Identity, Sacrifice' (1991) 58 *Social Research* 545, 557 (arguing that sovereignty is a concept constitutive of, as well as derived from, nation-State formation and identity: a Western historical form that has been, and continues to be, universalised). Michel de Certeau makes a similar point in his discussion of the city, 'a *universal and anonymous* subject' which made it possible to 'attribute to it, as to its political model, Hobbes' State, all the functions and predicates that were previously scattered and assigned to many different real subjects': Michel de Certeau, *The Practice of Everyday Life* (1984) 94.

⁵⁴ See, eg, David Livingstone, *Missionary Travels and Researches in South Africa* (1857) 28:

The promotion of commerce ought to be specially attended to [I wish] to promote the preparation of the raw materials of European manufactures in Africa, for by that means we may not only put a stop to the slave-trade, but introduce the negro family into the body corporate of nations, no one member of which can suffer without the others suffering with it. Success in this ... would lead, in the course of time, to a much larger diffusion of the blessings of civilization than efforts exclusively spiritual and educational confined to any one small tribe. These, however, it would of course be extremely desirable to carry on at the same time ... for neither civilization nor Christianity can be promoted alone. In fact, they are inseparable. (Emphasis added.)

⁵⁵ This idea found its most literal manifestation in the doctrine of *terra nullius*: see especially the concurring opinion of Vice-President Ammoun in *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 86-7. It is possible to go one step further and argue that this appropriation of the Other is not merely symptomatic of the excesses of Eurocentrism, but essential to and, indeed, *constitutive of* Western knowledge: cf Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* (1986) 17.

⁵⁶ See generally Bull *et al*, above n 9. Cf Phillip Darby and Albert Paolini, 'Bridging International Relations and Postcolonialism' (1994) 19 *Alternatives* 371, 390.

but competing interests, and the conception of power, within that society, as power over an other.

The idea that the international society is essentially conflictual, comprised of Hobbesian States held in check only by their self-interest⁵⁷ and Grotius' bare minimum of agreed rules,⁵⁸ is intimately connected with the idea that those States are autonomous, monolithic and rational. In the context of the international society, that self-interest is therefore served only in achieving the one aim common to all States: ensuring their future survival.⁵⁹ As such, the primary goal of Grotius' international law is not the advancement of humanity, or even the prevention of war, but the maintenance of the State system and all its iniquities.⁶⁰

Moreover, the perception of the international society as the bastion of peace and security is also contingent on the idea of power in international relations. Fundamental to the historical concept of the State is its position as the consolidation of all legitimate power; the possessor of absolute authority within the bounded territorial realm. Internally, the monopoly established in the Peace of Westphalia found a name in the 'king's peace';⁶¹ externally, it was expressed in the sovereign right to make war.⁶² Current international law eschews (at least nominally) the use of force in international relations, but the idea of power within the mainstream remains largely rooted in an oppositional framework, defined as control over others.⁶³ As a result, cooperative regimes (increasingly associated with feminism) and theories premised on a conception of power as relational⁶⁴

⁵⁷ See Hobbes, above n 42, 66-74, 87-90; cf Charles Beitz, *Political Theory and International Relations* (1979) 27-34.

⁵⁸ See Bull, 'The Importance of Grotius in the Study of International Relations', above n 40, 72.

⁵⁹ Cf Weil, above n 12, 418-21.

⁶⁰ See, eg, UN Charter arts 1(1), 2(1), 2(4). Article 2(4) refers specifically to the obligation on Members to 'refrain from the threat or use of force against the territorial integrity or political independence of any state'. The principle of non-intervention has been interpreted to establish that 'respect for territorial sovereignty is an essential foundation of international relations': *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4; cf *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, 96. On the history of this precept, see Martin Wight, *Systems of States* (1977) 135: 'it would be impossible to have a society of sovereign states unless each state, while claiming sovereignty for itself, recognized that every other state had the right to claim and enjoy its own sovereignty as well.' Cf Levontin's discussion of international law as an 'ally of the past', rendering it

the only intellectual discipline to which appeal can be made by a decayed nation [*sic*] which continues to cling to its ancient glories, in the form of a colonial empire or otherwise, and which can show no ethical justification for its continued denial of freedom to others. Under international law its position is 'legitimate'. Nothing can be done without its consent.

Levontin, above n 18, 148-9.

⁶¹ Cf Weber's oft-cited definition of the State as that which can claim a 'monopoly of the legitimate use of physical force within a given territory': Max Weber, 'Politics as a Vocation' in Hans Gerth and Charles Wright Mills (eds), *From Max Weber: Essays in Sociology* (1948) 77, 78.

⁶² See, eg, Ruggie, above n 48, 151.

⁶³ Hedley Bull has described the power realities behind international law as both its greatest strength and weakness, in that it serves to balance interests while simultaneously providing the potential to impose unjust changes or prevent just ones: Bull, above n 41, 92. Cf J Ann Tickner, 'Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation' (1988) 17 *Millennium: Journal of International Studies* 429, 434.

⁶⁴ See, eg, Isabelle Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 *Virginia Journal of International Law* 211, 217-21 (considering the links between feminist and Afrocentric ideas of power as the ability to 'act in concert'). Gunning

are written out of the narrative because they do not conform to the broadly accepted truth that international relations must be a zero-sum game.⁶⁵ Power as the instrument of gunboat diplomacy may have fallen from favour in the international order, but by its connection with the State as international actor (defined by its oppositions), and its typical formulation as unilateral, military power, it contributes to the perception that international peace and security equates with the prevention of war, achieved by keeping the Hobbesian States at bay.⁶⁶

The adoption of the State as the currency of international relations, therefore, exercises a series of unstated moves, the apparent self-evidence of which precludes their contestation. The definition of the State as order, of order, and in turn, as the opposition of disorder, roots the State deeply in Western political and epistemological sacred ground:

Only in the state does man [*sic*] have a rational existence ... Man [*sic*] owes his entire existence to the state, and his being within it alone. Whatever worth and spiritual reality he possesses are solely by virtue of the state.⁶⁷

It would be idle to suggest that the State is no more than a culturally specific icon thrust upon the non-West. However; many States whose voices it could be said are silenced or marginalised by this structure nevertheless recognise the benefits of a world premised on sovereign States, be it as a legal shield against colonialism,⁶⁸ or as the positive foundation for building a nation.⁶⁹ The dilemma for many non-Western States, then, is whether to accept the Eurocentrism of the existing regime and try to work within it,⁷⁰ or to opt out of the international

draws on Hannah Arendt's formulation of power as 'never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together': Hannah Arendt, *On Violence* (1970) 44. Cf 'The Discourse on Power' in Michel Foucault, *Remarks on Marx: Conversations with Duccio Trombadori* (1991) 147-72.

⁶⁵ See, eg, Anne Sisson Runyan and V Spike Peterson, 'The Radical Future of Realism: Feminist Subversions of IR Theory' (1991) 16 *Alternatives* 67, 96-7.

⁶⁶ Cf John Thompson, *Studies in the Theory of Ideology* (1984) 63: 'The reproduction of the social order may depend less upon a consensus with regard to dominant values or norms than upon a *lack of consensus* at the very point where oppositional attitudes could be translated into political action.'

⁶⁷ G W F Hegel, *Lectures on the Philosophy of World History: Introduction* (1st published 1830, 1975) 94.

⁶⁸ Felix Okoye, *International Law and the New African States* (1972) 184. Okoye argues that the acceptance of new African States that were 'small, underdeveloped, and frequently lacking in effective central government', and the granting to those States of the full rights and privileges of sovereignty, 'has diluted the concept of statehood as understood in traditional law'. The argument presented here suggests that the importance of 'State' and 'sovereignty' in international law have less to do with their physical manifestation than with their construction as ideas: *ibid* 175.

⁶⁹ Cf Ranajit Guha, 'On Some Aspects of the Historiography of Colonial India' in Ranajit Guha and Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (1988) 37, 37-43 (discussing the central problematic within Subaltern Studies as being restricted to the 'historic failure of the nation to come to its own', thus premising its historiographical legitimacy on a reaffirmation of the nation-State construct).

⁷⁰ In recent times this has clearly been the path taken in the context of the United Nations, in particular using the forum of the General Assembly and the ambiguous legal form of the Resolution: see Harris, above n 15, 59-64.

society entirely — hardly an option, given the economic shackles still binding many States of the South.⁷¹ Kwame Anthony Appiah captures the dilemma well:

The apparent ease of colonial administration generated in the inheritors of the post-colonial nation the illusion that control of the state would allow them to pursue as easily their much more ambitious objectives. 'Seek ye first the political kingdom,' Nkrumah famously urged. But that kingdom was designed to manage limited goals. Once it was turned to the tasks of massive developments in infrastructure ... it proved unequal to the task. When the post-colonial rulers inherited the apparatus of the colonial state, they inherited the reins of power; few noticed, at first, that they were not attached to a bit.⁷²

It is within this political and genealogical schema that I evaluate contemporary claims that the State is in transition.

B *A State of Change?*

In an analysis of claims that the State is in transition, it is necessary to distinguish between the State as the location of *the political* as territorially bounded, and sovereignty as the exercise of supreme power (*politics*) over that realm.

Utopian theorists have long raised the possibility of a world in which States might cede sovereignty to a central body — world government.⁷³ A variant on this theme is the idea of limited sovereignty, much as exists within the modern European Community, where States devolve aspects of sovereignty in a federal-type structure.⁷⁴ Despite the obvious political difficulties in either task, however, the end result would be of questionable significance in addressing the deeper problems of subjectivity discussed in this article, if only because they appear to replace the State with an equally universalising (if higher-order) structural form. Other formulations not grounded in the devolution of sovereignty rest on notions of an international *civil* society,⁷⁵ or conceptions of 'the moral State'.⁷⁶ Again, the foundation lies in essentialised forms of States as equal individuals, without meaningful analysis of the fundamental relationship between these forms as subject and the normative order in which they exist.

⁷¹ See, eg, Noam Chomsky, *Year 501: The Conquest Continues* (1993) 33-64.

⁷² Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (1992) 266.

⁷³ See, eg, Richard Falk, *A Study of Future Worlds* (1975) 178-84. Cf Levontin, above n 18, 282-4.

⁷⁴ On sovereignty in the European Community, see Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1. Cf Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law & Contemporary Problems* 293, 341-3; Jean Bethke Elshtain, 'Sovereign God, Sovereign State, Sovereign Self' (1991) 66 *Notre Dame Law Review* 1355, 1377 (arguing for a reformulated vision of sovereignty as the 'co-existence of overlapping, porous sovereignties').

⁷⁵ See generally Joseph Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992) 199-232; Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in James Crawford (ed), *The Rights of Peoples* (1988) 27, 27-31. Cf Craig Calhoun, 'Civil Society and the Public Sphere' (1993) 5 *Public Culture* 267; Charles Taylor, 'Modes of Civil Society' (1991) 3(1) *Public Culture* 95 (noting that civil society is understood as referring to a condition existent in the West, and that this condition is realised in the distinction of civil society from the State).

⁷⁶ See, eg, Tesón, above n 44, 69-72.

Two challenges to sovereignty that have attracted particular attention within international law are that of the emergent human rights discourse in the latter half of this century, and the growing corpus of international environmental law. These developments may well represent an unprecedented permeability of the previously inviolable borders of the State, but may be more properly construed as changes in the *exercise* of sovereignty — not least because these changes have largely taken place under the aegis of the United Nations.⁷⁷ Within international law, at least, there is yet to be a serious challenge to the State as such.⁷⁸

Here, however, I briefly consider these discourses for the distinct ways in which each reveals a developing conception of sovereignty as *relational* rather than absolute. This adumbrates issues to be developed in the subsequent Parts of this article.

1. Immediately when one adopts the position of articulating ‘universal’ human rights, questions of cultural and political specificity arise. The most basic danger lies in presumptions of the ‘self-evidence’ of rights and their ability to be abstracted entirely from their economic and social contexts.⁷⁹ Here the liberal conceptions of rights *as against the State*⁸⁰ — intimately linked as it is to the European (male) vision of the world as bounded and discrete — may be contrasted with its ideological antithesis of economic and social rights emanating *from the State*.⁸¹ At present, however, I shall concern myself only with the liberal rights that dominate current human rights debates, and the insertion point that they provide into the State-centric discourse of international law. (The conceptions of subjectivity implicated in this discussion are taken up in Parts II and III.)

⁷⁷ The legitimacy of the United Nations (which is in essence a standing diplomatic conference) is contingent on the consent of its member *States*: see the *Reparations Case* [1949] ICJ Rep 174, above n 27. This guiding principle is echoed in the rhetoric of the new world order:

The new world order does not mean surrendering our national sovereignty or forfeiting our interests. It really describes a responsibility imposed by our successes. It refers to new ways of working with other nations to deter aggression and to achieve stability, to achieve prosperity and, above all, to achieve peace.

George Bush, ‘The Possibility of a New World Order’, Speech at Maxwell Air Force Base, Montgomery, Alabama, 13 April 1991, in Freedman, above n 33, 195. Cf Freedman, above n 33, 207 (arguing the realist position that in the wake of the Cold War, the lack of a regional power base in the Middle East leaves the West ‘no alternative but to take an active part’).

⁷⁸ Challenges to the State within international relations are, of course, numerous. One of the projects of this article is to bring such debates within international relations into the international legal discourse.

⁷⁹ See, eg, G Kanyeihamba, ‘Human Rights and Development with Special Reference to Africa’ in Francis Snyder and Peter Slinn (eds), *International Law of Development: Comparative Perspectives* (1987) 221, 221-2. Cf Chen Xianda, ‘Shehui Zhidu yu Renquan’ [The Social System and Human Rights] (1992) 7 *Qiushi* [Seeking Truth] 19.

⁸⁰ See, eg, Jost Delbrueck, ‘International Protection of Human Rights and State Sovereignty’ (1982) 57 *Indiana Law Journal* 567, 573. In Hobbes’ *Common-Wealth*, rebellion against the sovereign or *Leviathan* is sanctioned only where the sovereign frustrates the end for which his [*sic*] sovereignty was ordained, or loses the power to protect his [*sic*] subjects, but ultimately, the ruler is responsible to God: Hobbes, above n 42, 189.

⁸¹ See, eg, Louis Henkin, *The Rights of Man Today* (1978) 31-88; Richard Falk, *Human Rights and State Sovereignty* (1981) 125-52. It can be argued that these ‘rights’ are inconsistent with the notion of the ‘rights of man’ as enunciated in the French Constitution of 1793 — ie, these rights came *before* creation of the State, which cannot, therefore, owe positive obligations of a similar *fundamental* order to its citizens.

The argument, as it is generally put, is that democracy has displaced the traditional notion of sovereignty as the divine or inherited right of rule, establishing the sovereign as legal personification of the territorially-bounded State. According to this understanding, sovereignty is now based on the notion of 'popular sovereignty' where '[t]he will of the people shall be the basis of the authority of government'.⁸² It has been argued that within this framework it is the rights of the individual rather than those of the sovereign State that become the foundation of international or *global* law.⁸³ The Austinian view of the sovereign as (by definition) the repository of legal authority would therefore be supplanted by the State authorised to represent and protect the individuals from whom it derives its *raison d'être*.⁸⁴ Parallel to this, through the diversification of power relations at the foundation of international law there is far greater scope for non-State entities (in particular non-governmental organisations) to contribute to the creation of customary norms.⁸⁵ Therefore, it is concluded that the international society is more susceptible to the protection of human rights as against the maintenance of State sovereignty.⁸⁶ (And, parenthetically, this is a good thing.)

Such developments would clearly be of value in achieving the goals of human rights activists, but cannot be pursued uncritically. The essentialised concept of the abstract individual at the centre of the liberal internationalist agenda relies on precisely the same legitimation as that of the European State as 'self-evident': its historical grounding in Western liberal thought.⁸⁷ This is not to say that the

⁸² Universal Declaration of Human Rights, GA Res 217A, 3 UN GAOR, UN Doc A/Res/810 (1948) art 21(3). It further provides that 'this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'. Such parts of the Declaration are widely considered to be declaratory of customary international law: Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1992) 12 *Australian Yearbook of International Law* 82, 90-1. Nevertheless, avowed pragmatists such as Antonio Cassese still maintain that 'in formal terms, [the Universal Declaration] is not legally binding, but possesses only moral and political force': Cassese, above n 46, 299. Cf Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

⁸³ See, eg, W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866, 872-3; J Starke, 'Human Rights and International Law' in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Human Rights* (1978) 113. It would be idle to argue that this necessarily represents a victory for human rights: the values expressed in public international law are very much 'those of liberal individualism transposed to the interstate level': Martti Koskenniemi, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397, 404. Cf Alan Rosenbaum, 'The Editor's Perspectives on the Philosophy of Human Rights' in Alan Rosenbaum (ed), *The Philosophy of Human Rights: International Perspectives* (1980) 8-37.

⁸⁴ See, eg, Leslie Macfarlane, *The Theory and Practice of Human Rights* (1985) 7. Cf de Tocqueville's warning of the dangers of a democracy based on a principle of equality: 'democratic communities ... call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism, but they will not endure aristocracy': Alexis de Tocqueville, *Democracy in America* (1st published 1835, 1945 ed) vol II, 97.

⁸⁵ Gunning, above n 64, 221-34.

⁸⁶ Isabelle Gunning concludes that this is essential in order to 'modernise' customary international law: *ibid* 247. Cf Levontin, above n 18, 155-66.

⁸⁷ See, eg, Kanyehimba, above n 79, 222, 234; Xianda, above n 79. Cf Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486. See also Koskenniemi, above n 14, 499.

discourse of human rights must retreat into facile cultural relativism, but rather that it has to be self-critical and aware of the inadequacy of universalising norms in imposing historically and culturally specific order,⁸⁸ and the contradictions that emerge in legitimising such moves by reference to extant paradigms.

2. Where human rights discourses are exerting pressure on the State as subject from within, the opposite effect is observable in the expanding *corpus* of international environmental law. The nature and magnitude of the problem being addressed (referred to by some commentators as being at a 'precrisis stage'⁸⁹) has led to a recognition not merely of the inadequacy of international institutions to achieve meaningful change, but of the limitations of viewing it as a problem reducible to the interaction of States:

The time has come to break out of past patterns. Attempts to maintain social and ecological stability through old approaches to development and environmental protection will increase instability. Security must be sought through change.⁹⁰

In its challenge to the traditional view of the State as monolithic and independent — seeing it rather as contextual and *interdependent* — and its focus on global obligations, international environmental law has been associated with the feminine 'ethic of care'.⁹¹ There are, of course, problems in dealing with such essentialised dualisms,⁹² but international environmental law's contribution to the current debate on the centrality of the State in international law lies in its challenge to the State as a body defined negatively, as bounded in reality and as

⁸⁸ Cf Simma and Alston, above n 82, 94; D Greig, 'Reflections on the Role of Consent' (1992) 12 *Australian Yearbook of International Law* 125, 141-2.

⁸⁹ See Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, and references there cited.

⁹⁰ World Commission on Environment and Development, *Our Common Future* (1987) 22 ('the *Brundtland Report*'). The Report continues:

The Commission has noted a number of actions that must be taken to reduce risks to survival and to put future development on paths that are sustainable. Yet we are aware that such a re-orientation on a continuing basis is simply beyond the reach of present decision-making structures and institutional arrangements, both national and international.

This Commission has been careful to base our recommendations on the realities of present institutions, on what can and must be accomplished today. But to keep options open for future generations, the present generation must begin now, and begin together.

⁹¹ Ibid 22-3. Cf Lothar Gündling, 'Our Responsibility to Future Generations' (1990) 84 *American Journal of International Law* 207, 212 (arguing that '[p]rotecting the environment is primarily a duty of the state'). Both State and disciplinary boundaries are cited as barriers to this change: Alexandre Kiss and Dinah Shelton, *International Environmental Law* (1991) 4-7; Catherine Tinker, "'Environmental Security" in the United Nations: Not a Matter for the Security Council' (1992) 59 *Tennessee Law Review* 787.

⁹² See, eg, Moira McConnell, 'The Relationship Between Theories About Women and Theories About International Law' in *State Sovereignty: The Challenge of a Changing World: 'New Approaches and Thinking on International Law'* (Proceedings of the 21st Annual Conference of the Canadian Council on International Law at Ottawa, October 1992), cited in Knop, above n 74, 327.

⁹² See below nn 147-51 and accompanying text.

absolute in its concentration of power, rather than as a body existing in a web of power relations.⁹³

Juxtaposed to the discussion of human rights above, this embodies a sentiment articulated most clearly in the words of Chief Seattle to the United States President seeking to purchase his people's land:

This we know: The earth does not belong to man; man belongs to the earth. This we know. All things are connected like the blood which unites one family. All things are connected.

Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself.⁹⁴

In this first Part, I have problematised the question of the 'validity' — that is, the 'legality' — of international law and the conceptions of equality and power that function as axioms and axes of this normative regime. Current challenges to the legal meaning of sovereignty within international law were considered, but these approaches raised, without resolving, the conceptions of subjectivity that provide the epistemological foundations for the State and its sovereignty, and for its order as *law*. In Part II, I approach this question of subjectivity from an oblique (and more productive) direction: the problematic subjectivity of the war criminal.

II THE SUBJECT

I think it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding.

Justice Robert H Jackson, US Chief of
Counsel at the Nuremberg Trials⁹⁵

The introduction of the individual war criminal into the State-centric discourse of international law provides a critical interface with the conceptions of subjectivity that legitimise and construct that normative order. As in the first section, my intention here is not to make a definitive pronouncement on the validity of international law in general, or of war crimes in particular; rather, it is to play out the philosophical antinomies that so often lie dormant in debate over these issues and in this way make critical reflection possible. In this Part, I briefly look at the traditional legal and philosophical arguments for the prosecution of individual war criminals at international law, before revisiting the question of the subject of international relations as understood in relation to the normative order that is its

⁹³ See, eg, Kiss and Shelton, above n 90, 379-80; cf Philip Allott, *Eunomia: New Order for a New World* (1990) 405-11.

⁹⁴ Chief Seattle's reply to US President Franklin Pierce, reprinted *sub nom*: 'We May be Brothers After All' (1976) 2 *Environmental Policy and Law* 48.

⁹⁵ Report of Robert Jackson, United States Representative to the International Conference on Military Trials (1949) 329 in M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) 116.

'prodigal son' — international law.⁹⁶ This theoretical space-clearing gesture thus complements the historical and jurisprudential genealogy undertaken in Part I, and makes possible the critique and analysis of the concluding Part.

These arguments will be taken up in the context of the formative trials at Nuremberg and Tokyo after the Second World War, and in light of more recent moves establishing similar Tribunals for alleged war crimes in the former Yugoslavia⁹⁷ and Rwanda.⁹⁸ In the shadows of these developments, the International Law Commission continues to work on establishing a permanent International Criminal Court which, it is claimed, would obviate the technical problems raised with respect to the *ad hoc* tribunals that have characterised the modern experience of war crimes.⁹⁹

Of particular importance in this context is the legal basis upon which the more recent Tribunals have been established. Each Tribunal's authority emerges from a determination by the United Nations Security Council that breaches of humanitarian law in Bosnia and Herzegovina and in Rwanda constitute a 'threat to international peace and security' within the meaning of Chapter VII of the United Nations Charter.¹⁰⁰ We have, then, the equation of law and order, through the legitimization of law *as* order.

⁹⁶ The ambiguous relationship between the two discourses and attempts at *rapprochement* were discussed in the previous Part; the gendered aspects of this relation are briefly considered below nn 144-52 and accompanying text.

⁹⁷ SC Res 827, above n 4.

⁹⁸ SC Res 955, above n 5.

⁹⁹ This has involved two discrete tasks: establishing the court itself, and consolidating the body of law to be adjudicated. On the Statute for an International Criminal Court, see generally McCormack and Simpson, above n 6; Crawford, above n 7. On the Code of Crimes Against the Peace and Security of Mankind, see Twelfth Report on the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc A/CN.4/460 (1994); Timothy McCormack and Gerry Simpson, 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5 *Criminal Law Forum* 1.

Here I do not address the contentious area of State responsibility, as to which see Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989). Cf Geoff Gilbert, 'The Criminal Responsibility of States' (1990) 39 *International and Comparative Law Quarterly* 345.

¹⁰⁰ SC Res 827, above n 4; SC Res 955, above n 5. See also Report of the Secretary-General, above n 3, paras 22 and 26:

22. ... [Establishing the International Tribunal by Security Council Resolution rather than by treaty and without the involvement of the General Assembly] would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

...

26. ... [T]he establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.

A *The War Criminal*

This is why it is not so much the natural innocence of creatures that Kafka and Walser allow to prevail against divine omnipotence as the natural innocence of temptation. Their demon is not a tempter, but a being infinitely susceptible to being tempted. Eichmann, an absolutely banal man who was tempted to evil precisely by the powers of right and law, is the terrible confirmation through which our era has revenged itself on their diagnosis.

Giorgio Agamben, *The Coming Community*¹⁰¹

It is customary to begin a discussion of war crimes with a caveat as to the difficulty of speaking openly about political and legal issues surrounding acts that, for many people, define that which is evil.¹⁰² This difficulty revisits the dilemma faced by the war crimes tribunal *par excellence* at Nuremberg: whether the retrospective extension of international criminal responsibility to perpetrators of war crimes under the applicable Charter¹⁰³ — a breach of strict legal positivism — was a greater or lesser evil than allowing such perpetrators to go unpunished. Such questions were ultimately resolved by moral (and often tautologous) rather than strictly legal arguments: so far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished.¹⁰⁴

Within the legal community, it is widely accepted that although adherents of the various schools of naturalism, relative positivism, pragmatism and utilitarianism found common ground in defending the legitimacy of the Charter, most acknowledged its technical legal deficiencies.¹⁰⁵ That common ground was,

¹⁰¹ Giorgio Agamben, *The Coming Community* (1993) 32.

¹⁰² A recent example is provided by the debates surrounding Helen Darville/Demidenko's *The Hand that Signed the Paper* (1994): see generally Robert Manne, *The Culture of Forgetting: Helen Demidenko and the Holocaust* (1996).

¹⁰³ Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279, reprinted in (1945) 39 *American Journal of International Law* 257, Supplement 257, 259-60, art 6; cf Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, reprinted in Bassiouni, above n 95, 606, art 5. The Nuremberg Charter provided in art 6 as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the count where perpetrated.

¹⁰⁴ Trial of the Major War Criminals, above n 1, vol 22, 462.

¹⁰⁵ For a legal positivist critique of the Nuremberg Trials, see August von Knieriem, *The Nuremberg Trials* (1959). See also Whitney Harris, 'Book Review of *The Nuremberg Trials* by August von

however, viewed from divergent perspectives. Whereas deist and ethicist naturalists relied on metaphysical essences and transcendental beliefs, legal pragmatists and utilitarianists had recourse to relativism, empiricism and realism.¹⁰⁶ Ultimately, however, such issues were seen as irreducible to problems of legal technicalities. Friedman, for example, summarises approaches to the Charter's legality from transcendental ethics, intuitionist ethics and various relativistic perspectives, concluding that:

no legally compelling solution can be found for this type of problem. Whatever the technical device, a subsequent and differing set of values has to be substituted for the values governing the offensive action.¹⁰⁷

The vast majority of debate surrounding the validity of the trials thus involved moral, ethical and equitable considerations, rather than dealing systematically with the legal issues arising under international law.¹⁰⁸ Indeed, it is argued that the attempt to do so is regressive:

[T]he international moral order must be regarded as the cause, not the effect, of positive law; ... such law does not derive its essence from physical power, and ... any attempt to isolate such law from morals is a symptom of juridical schizophrenia caused by the separation of the brain of the lawyer from that of the human being.¹⁰⁹

The splitting referred to here in such extreme language is the doctrinal aftershock of the primitive international legal system being forced to develop by practice rather than theory. In many ways, contemporary debate over the validity of international criminal law evinces a similar resistance to theoretical interrogation:

We do not address those who are ideologically or politically predisposed to the rejection of the idea [of an International Criminal Court]. We wish to address

Knieriem' (1960) 54 *American Journal of International Law* 443. For other critical views, see generally Wilbourn Benton and Georg Grimm, *Nuremberg: German Views of War Trials* (1955). See also the views of four of the defence lawyers at Nuremberg: Herbert Kraus, 'The Nuremberg Trial of the Major War Criminals: Reflections After 17 Years' (1964) 13 *De Paul Law Review* 233; Carl Haensel, 'The Nuremberg Trial Revisited' (1964) 13 *De Paul Law Review* 248; Otto Kranzbuhler, 'Nuremberg 18 Years Afterwards' (1965) 14 *De Paul Review* 333; Otto Pannenbecker, 'The Nuremberg War Crimes Trial' (1965) 14 *De Paul Law Review* 348. See also B Röling, 'The Nuremberg and Tokyo Trials in Retrospect' in M Cherif Bassiouni, *International Criminal Law* (1986) vol 1, 590; H Pappé, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 *Modern Law Review* 260.

¹⁰⁶ See generally Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 *California Law Review* 530; Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *British Yearbook of International Law* 58; Sheldon Glueck, *War Criminals, Their Prosecution and Punishment* (1944); Georg Schwarzenberger, 'The Judgment at Nuremberg' (1947) 21 *Tulane Law Review* 328; Quincy Wright, 'Legal Positivism and the Nuremberg Judgment' (1948) 42 *American Journal of International Law* 405; J Keenan and B Brown, *Crimes Against International Law* (1950); Robert Woetzel, *The Nuremberg Trials in International Law* (1960); G Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1968) vol 2; Ann Tusa and John Tusa, *The Nuremberg Trial* (1983).

¹⁰⁷ W Friedmann, *Legal Theory* (5th ed, 1967) 42.

¹⁰⁸ But see Knieriem, above n 105, and Woetzel, above n 106.

¹⁰⁹ Keenan and Brown, above n 106, v-vi.

the many legitimate questions raised in good faith by those who support the idea ...¹¹⁰

From a strictly legal perspective, the two crucial questions of the laws imposed being *ex post facto* (with retroactive effect), and directed unilaterally at the 'captive enemies', are far from adequately addressed.

The retroactivity of the law enforced by the Military Tribunals at Nuremberg and Tokyo was justified essentially by unstated conceptions of justice (presumably divined by reference to some 'higher law') and the removal of the Tribunal's power to consider the validity of those laws.¹¹¹ One of the crucial sites of contestation in the definition of war crimes, however, centres on this reliance on a *universal* morality to legitimise a legal order restricted to *particular* historical circumstances. This was the case in Nuremberg and Tokyo,¹¹² and remains problematic in the constitution of the more recent Tribunals for the former Yugoslavia and Rwanda.¹¹³ Such problems also arise in domestic prosecutions of alleged war criminals — the irony of a Commonwealth law relying on the exercise of a global power to try alleged war criminals for acts committed '*in Europe* in the period *beginning* on 1 September 1939 and *ending* on 8 August 1945'¹¹⁴ was apparently lost on the High Court of Australia when it upheld the validity of the War Crimes Act in *Polyukhovich*.¹¹⁵

¹¹⁰ M Cherif Bassiouni and Christopher Blakesley, 'The Need for an International Criminal Court in the New International World Order' (1992) 25 *Vanderbilt Journal of Transnational Law* 151, 160.

¹¹¹ Bassiouni identifies four basic answers to the contention that the retroactivity of the 'principles of legality' rendered them invalid: (i) a tautological argument that the Tribunal was bound by its own law and could not inquire into its own validity or the validity of its law; (ii) 'Crimes against humanity' was an extension of 'war crimes' and as such did not violate the 'principles of legality'; (iii) the Charters were declarative of international law; and (iv) 'Principles of legality' are non-binding principles of national criminal justice: Bassiouni, above n 95, 114-29.

¹¹² This was brought out in the Nuremberg trials in relation to acts prior to 1939 and the problematic distinction between war crimes and 'crimes against humanity'. '[R]evolting and horrible as many of these crimes were', they were not proved to have been committed in execution of, or in connection with, 'war crimes'. As such, they were not 'crimes against humanity' within the meaning of the Charter: Trial of the Major War Criminals, above n 1, vol 22, 498. In this context, Edward Morgan observes the curiosity of the tribunal's distinction of crimes under the Charter that have no geographic location (as opposed to those that took place in Germany) by reference to their date rather than their location: Edward Morgan, 'Retributory Theater' (1988) 3 *American University Journal of International Law and Policy* 1, 42. See also Bassiouni, above n 95, 176-91.

¹¹³ The Tribunal for the Former Yugoslavia was established by the Security Council 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace': SC Res 827, above n 4, para 2. The Rwandan Tribunal was established 'for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994': SC Res 955, above n 5, para 1.

¹¹⁴ War Crimes Act 1945 (Cth) s 5 (emphasis added).

¹¹⁵ *Polyukhovich v Commonwealth* (1991) 172 CLR 501. Contrast the selective exclusion of acts carried out by the French military in Algeria prior to French adoption of the crimes against humanity provisions of the London Agreement. During the trial of Klaus Barbie, charges against him were specifically narrowed to exclude such acts from the meaning of 'crimes against humanity': see Guyora Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie' (1989) 98 *Yale Law Journal* 1321, 1335, 1337-9.

Similarly, the significance of the Nuremberg and Tokyo Tribunals enforcing 'victors' justice' has never been adequately resolved. There was never any question of the Allies applying the same laws to their own conduct, though this was raised by defence attorneys at Nuremberg¹¹⁶ and has been the subject of limited domestic prosecution.¹¹⁷ Bassiouni refers to this as a 'moral flaw' whose 'lack of impartiality taints the [International Military Tribunal] and Subsequent Proceedings under [Control Council Law] 10, the Tokyo trials, and other post-Second World War trials with the one-sidedness of victor's law.'¹¹⁸ The politicisation of these laws was put most bluntly by Justice Robert Jackson in his comment on the *ex post facto* debate quoted at the beginning of this Part.¹¹⁹

This problem is said to be avoided in the Tribunal established to try suspected war criminals in the former Yugoslavia, 'the first truly international criminal tribunal'.¹²⁰ However, despite the fact that it and the Rwandan Tribunal do not represent either victor or combatants *per se* — though from the outset the former was clearly aimed at alleged *Serbian* war criminals¹²¹ — the issue of partiality remains unaddressed in the choice of prosecuting these war criminals and not, for example, pursuing Khmer Rouge leaders in Cambodia or the Iraqi military elite after the Gulf War.¹²² (Indeed, it appears that the United Nations is more than prepared to forgo bringing war criminals to 'justice' in order to preserve hopes of peace in the Balkans.¹²³)

A permanent International Criminal Court such as that proposed in the International Law Commission's 1994 Draft Statute would presumably remove both

¹¹⁶ See the discussion of the '*tu quoque*' defence in Bassiouni, above n 95, 460-2.

¹¹⁷ Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds), *National and International Approaches to War Crimes* (forthcoming).

¹¹⁸ Bassiouni, above n 95, 84. See also Karl Jaspers, 'The Significance of the Nürnberg Trials for Germany and the World' (1946) 22 *Notre Dame Lawyer* 150.

¹¹⁹ See Bassiouni, above n 95. Cf Joel Cavicchia, 'The Prospects for an International Criminal Court in the 1990s' (1992) 10 *Dickinson Journal of International Law* 223, 242-3.

¹²⁰ Theodor Meron, 'War crimes in Yugoslavia and the development of international law' (1994) 88 *American Journal of International Law* 78.

¹²¹ See SC Res 808, 48 UN SCOR (3175th mtg), UN Doc S/Res/808 (1993); and SC Res 827, above n 4 (referring in the preamble specifically to 'the practice of "ethnic cleansing"'). See also 'Tribunal to Cite Bosnian Serb Chief as War Criminal', *New York Times*, (New York) 1995, A1; 'UN to try Serbian war crimes in Bosnia', *The Age* (Melbourne), 21 April 1995, 10.

¹²² See Simpson in McCormack and Simpson, above n 117. Cf David Martin, 'Reluctance to Prosecute War Crimes: Of Causes and Cures' (1994) 34 *Virginia Journal of International Law* 255; and Gareth Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (1993) 43, arguing that the creation of an International Criminal Court 'would certainly further underline the resolve of the international community to respond to breaches of humanitarian law and gross violations of human rights, and have an even stronger general deterrent effect — provided the commitment of the international community to pursue perpetrators was firm and clear, which may not be easily achievable in the short term.'

¹²³ See the recent allegations of a United Nations' reluctance to report Serb brutality in the fall of Srebrenica: John Sweeney, 'UN Cover-up of Massacre', *Guardian Weekly* (London), 17 September 1995, 4. Cf Kenneth Anderson's argument that the pursuit of symbolic justice may undermine the task of achieving 'substantive justice', which 'can come for the millions of people affected by ethnic cleansing only by massive outside intervention — war, in other words, and making sure that the just side wins ... Nuremberg was a lovely hood ornament on the ungainly vehicle that freed Europe from the Nazis; it was not, however, a substitute for D-Day': Kenneth Anderson, 'Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States' (1993) 33 *Virginia Journal of International Law* 385, 405, n 56.

these legal question marks (at least resituating the two jurisprudential problems as jurisdictional and prosecutorial respectively), as well as the issue of the Tribunals dispensing executive justice.¹²⁴ For my purposes here, however, I am primarily concerned with an issue not being addressed in the context of any of these current moves: the implications of inserting a human subject into the international criminal legal regime.¹²⁵

The existence of rights and privileges conferred on individuals by international law is argued to be demonstrative of the adoption of the individual as a subject of such a body of law. The protection of individuals under the Treaty of Versailles¹²⁶ as diplomatic envoy, head of State, alien or member of military forces abroad, was said to realise in positivist terms that which had been seen by naturalists and humanists by the late eighteenth century.¹²⁷ Individuals were granted rights and privileges that made them subject *to* international law and (it is argued) they were, by implication, made subjects *of* that body of law. Scholastic debate as to the position of the individual under international law was said to have moved in this way from 'substantive to procedural'.¹²⁸

This 'movement' in the debate has rendered the question being considered here relatively uncontentious and, as outlined above, tarred with the brush of regression. As has also been discussed above, however, the problematic legal status of war crimes is far from resolved, at best being translated into more specific questions of particularity (of jurisdiction) and partiality (of prosecution). What has not been acknowledged in these debates, then, is the crucial relation between the subject of law and the higher-order construction of the legal discourse within which that subject emerges. This aspect of international law was discussed in Part I in relation to the primary and constitutive subject of the State, but it is through the person of the war criminal that the political implications of this legal 'technicality' are laid bare.

In the context of the Nuremberg and Tokyo Tribunals, the applicability of international law to individuals came to constitute the first of the 'Nuremberg Principles' adopted by the United Nations General Assembly in 1950.¹²⁹ In the

¹²⁴ International Law Commission, 'Revised Draft Statute for an International Criminal Court'. See 'Report of the Working Group on a Draft Statute for an International Criminal Court' in Report of the International Law Commission on its Forty-Sixth Session, UN Doc A/49/10 (1994) ('ILC Report 1994').

¹²⁵ Contrast Edward Morgan's interesting discussion of the Nuremberg and subsequent war crimes trials as a piece of legal theatre. The symbolic purpose of the punishment, he argues, is the reassurance of the world-wide audience of this play of the rational basis of autonomous personal existences: Morgan, above n 112, 4-43.

¹²⁶ Treaty of Peace between the Allied and Associated Powers and Germany, signed in Versailles, 28 June 1919, ATS 1948 No. 8, (entered into force 1920), extracted in Bassiouni, above n 95, 551. Cf Harris, above n 15, 135-7.

¹²⁷ See Bassiouni, above n 95, 67 and sources there cited. Cf Kelsen, above n 106, 538 (arguing that national law is derived in part from international law).

¹²⁸ Bassiouni, above n 95, 67 n 49. Cf Morgan, above n 112, 15 (discussing the 'trite, if not entirely accurate' proposition that individuals found no place within the thought structure of classic international law).

¹²⁹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 UN GAOR Supp (No 12) 11, UN Doc A/1316 (1950), reprinted in (1950) 44 *American Journal of International Law (Official Documents Supplement)* 126. Prin-

course of the trials, this was variously justified by reference to the precedent established by piracy as an international crime;¹³⁰ to international duties that 'transcend the national obligations of obedience imposed by the individual State';¹³¹ and to the results that would flow from allowing individuals to hide behind the veil of the State:

Crimes against international law are committed by men [*sic*], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹³²

With respect to the more recent 'moves', the approach has been analogous to the underlying rationale of the stances taken in Nuremberg and Tokyo — pragmatic.¹³³ And yet it seems that this resistance to interrogation represents more than an aversion to theory. The intricacy of the legal institutions, the doctrine and the defences of the regime (in particular, the hope that is invested in the prospect of the first 'truly international' tribunal) constitute an attempt to reconcile these antinomies — antinomies that resonate strongly with tensions within international law due to its realist foundations and idealist agenda.¹³⁴

The applicability of international law to the human subject is, therefore, not able to be questioned, not merely because that discretion is placed beyond the consideration of a Tribunal, nor because it is a necessary step to achieving a politically determined goal. Rather, or in addition, such questioning challenges the very pulpit from which law is enunciated. It raises questions the abnegation of which is axiomatic to the constitution of a crime. And it discloses the particular-

ciple I reads: 'Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.'

¹³⁰ Robert Jackson, *The Nürnberg Case* (1st published 1947, 1971 ed) 88. The analogy with piracy is questionable at best: see, eg, A Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War' (1963) 39 *British Yearbook of International Law* 402, 421.

¹³¹ '[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state': Trial of the Major War Criminals, above n 1, vol 22, 466.

¹³² *Ibid.* Cf Jackson, above n 130, 88:

Of course, the idea that a state, any more than a corporation, commits crimes is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or a corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

For a discussion of the problematic liability of corporations in Australian domestic criminal law, see Simon Chesterman, 'The Corporate Veil, Crime and Punishment: *The Queen v Denbo Pty Ltd*' (1994) 19 *Melbourne University Law Review* 1064 and sources there cited.

¹³³ See, eg, Jackson, above n 130, 88:

This principle of personal liability is a necessary as well as logical one if International Law is to render real help to the maintenance of peace. An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare Only sanctions which reach individuals can peacefully and effectively be enforced.

The Security Council Resolution calling for the establishment of a tribunal for the former Yugoslavia ostensibly relied upon the Geneva Convention of 12 August 1949 to justify the statement that 'persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches' (to whom such persons are generally responsible was left unstated): SC Res 808, above n 121. See also the earlier resolutions enunciating this proposition: SC Res 764, 47 UN SCOR (3093rd mtg), UN Doc S/Res/764 (1992); 31 ILM 1465; SC Res 771, 47 UN SCOR (3106th mtg), UN Doc S/Res/771 (1992); 31 ILM 1470.

¹³⁴ See above nn 12-14 and accompanying text.

ity, the partiality, and the historico-cultural *peculiarity* of the law-subject relationship that serves as both the self-legitimising framework and normative *telos* of that regime.

B Reimplicating the Subject

The role of the criminal in punishment was to reintroduce, in the face of crime and the criminal code, the real presence of the signified — that is to say, of the penalty which, according to the terms of the code, must be infallibly associated with the offence. By producing this signified abundantly and visibly, and therefore reactivating the signifying system of the code, the idea of crime functioning as a sign of punishment, it is with this coin that the offender pays his debt to society. *Individual correction must, therefore, assure the process of redefining the individual as subject of law, through the reinforcement of the systems of signs and representations that they circulate.*

Michel Foucault, *Discipline and Punish*¹³⁵

The relative ease with which the human subject was inserted into the international legal discourse in many ways rehearses an ‘Alice through the Looking Glass’ effect of the anthropomorphism considered in the first Part of this article. Just as the State came to be the territorial embodiment of the person of the Prince,¹³⁶ so the war criminal, the human subject, is now uncritically *reinserted* as a subject of that normative order.¹³⁷

Here, the exploration in Part I regarding moves towards an understanding of sovereignty as *relational* in character, may be usefully juxtaposed to the more explicitly normative and politicised framework constituting the war criminal discussed in the preceding section. For the war criminal, presumed to be a subject *of* international law by reference to the fact of being subject *to* that law, demonstrates that *international* law is not capable of being ‘extended’ as such to embrace the *human* subject — and, indeed, that this formulation of the question is misleading. International humanitarian law cannot exist without its foundational human subject any more than realist international relations would be a meaningful discourse absent the State. Rather, *law* and *subject* are dependent on one another and are, in this sense, *co-defining*. These acts of anthropomorphism and reverse-anthropomorphism, which rehearse a miscegenation of such questions, are contingent on an untheorised conception of law and subject as *independent*.

The implications of this go beyond legal theory. Such a conception of subjectivity as existing independent of — though nevertheless ‘subject to’ — the normative order of ‘law’, precludes the contestation of subjectivity itself as a site of political inquiry. In one sense, this point is analogous to the common criticism of the realist conception of international relations as the interactions of *States*, but it also goes further. For whereas most notionally post-realist theoretical frameworks seek to expand the range of actors on the global plane — subjects to the

¹³⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977) 128 (emphasis added).

¹³⁶ See above nn 45-67 and accompanying text.

¹³⁷ See above nn 126-32 and accompanying text.

discourses — here I am more concerned to challenge what it is that is meant by a subject *of* discourse (*of* law, *of* order). The reconceptualisation of international relations is not simply a matter, then, of ‘adding’ multinational corporations, inter- and non-governmental organisations, and perhaps certain stateless peoples (such as the Kurds, the PLO etc). It requires instead a deeper analysis of what effects of the discourse constitute these ‘actors’, and what their insertion as subjects means to the discourse itself.

Here Foucault’s work on discipline in the modern State and the constitution of subjectivity provides a useful (but ultimately limited) theoretical tool with which to prise open this question. Crucial to my analysis here is the inter-relation between law and subject, a relation which Foucault describes in *Discipline and Punish* as positioning the subject (here the ‘delinquent’) not outside the law, but

in the law, at the very heart of the law, or at least in the midst of those mechanisms that transfer the individual imperceptibly from discipline to the law, from deviation to offence.¹³⁸

The individual-as-subject (and, by extension, the State-as-subject) is, therefore, seen not as an atomised actor that reacts *to* law-as-power, but as one of the prime effects *of* power.¹³⁹ The human subject form is not, therefore, ‘defined’ by the word of God or European rationality; rather, it exists *through* its interactions with these (and other) sites of power.¹⁴⁰ This insight is of limited application in the idealised schema of a horizontally-structured international legal order, but provides a useful vantage point from which to reflect back upon the artificiality of that construct as discussed in Part I, and on the ground-clearing that has taken place in this Part.

In the earlier analysis of the law of nations, the position of the State as constitutive member and individuated subject was seen to have both theoretical and practical implications. The theoretical implications have been expanded upon in this Part through the analysis of the problematic subjectivity of the war criminal. What was originally characterised as the replication of a specific conception of an actor (the State), was seen to depend upon an *a priori* conception of the relation between the subject (the individual) and its normative order (the law). The political implications of the State-centric legal regime was seen not simply in its capacity to disempower certain (non-Western) States, but in its legitimation of their status as disempowered.¹⁴¹ Through the analysis in this Part, this can be seen as implicated more deeply in the relation between subjectivity and conceptions of *order*.

¹³⁸ Foucault, above n 135, 301 (emphasis added.)

¹³⁹ Cf Colin Gordon (ed), *Power/Knowledge* (1980) 98:

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals.

¹⁴⁰ See Michel Foucault, ‘The Life of Infamous Men’ in Meaghan Morris and Paul Patton (eds), *Michel Foucault: Power, Truth, Strategy* (1979) 76-91.

¹⁴¹ See above nn 56-66 and accompanying text.

The putatively anarchical order of the international system may therefore be juxtaposed to the normative framework that is international law, redeploying the question of whether international law 'really is "law"' as concerning the relationship between the subject and that body of law.

It is the conception of the subject as a unitary and transcendental individual — that is, independent of law/order — that leads to a presumption of law as an objective framework that does not itself impact on the (natural and autonomous) constitution of that subject. As has been demonstrated in this Part, this approach reverses or at least conflates this relation. By seeing the subject instead as an *effect* of law, not existing independently of but *subsisting* in co-dependence with its normative order, the attempt to change the position of that subject must look to reconceptualising the understanding of order (and of order as law). And if international relations are to be opened up to alternative conceptions of order, the subject must be reinstated as a site of contestation.

III SUBJECTIVITY REINSTATED

The state is invisible; it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived.

Michael Walzer¹⁴²

To say that the state is in transition is to pose the possibility that the claim to autonomous subjectivity is in serious trouble. Analyses of the state, or of world politics, that wish it were otherwise are doomed to repeat its play of histories, of hopes and tragedies circumscribed by the boundaries of territorial space. It remains to be seen whether there can be a politics that is neither here nor there, though intimations that it can are sometimes glimpsed among the wreckage of the here and now.

R Walker¹⁴³

The constitution of a 'subject' of international relations is founded, as I have argued, on its presumed independence from the normativity of the discourse in which that subject acts. That independence has been shown to be illusory, but it is necessary to distinguish the two discrete moves that give rise to that illusion. The first of these moves is the double-act of anthropomorphism and reverse-anthropomorphism that presumes a certain relation between the individual and the normative order within which it exists — this was considered in Part II. Left unstated in that discussion, however, and at a deeper level, is the question of what it means to demand a coherent subjectivity in international relations at all.

In this final Part of the article, then, I look to open up the question of order in international relations through reconceptualising its subject. By way of introduction, I look first to one of the more promising critical trajectories within the broader discipline of international relations; feminist theories of the State and more general critiques of gendered power relations *within* the State (and,

¹⁴² Walzer, above n 42, 194.

¹⁴³ R Walker, 'From International Relations to World Politics' in Joseph Camilleri, Anthony Jarvis and Albert Paolini (eds), *The State in Transition: Reimagining Political Space* (1995) 21, 36.

importantly, *through* the State) which provide an alternative conception of order and power, seen through the lens of gender.

Secondly, in the wake of this and the more general critique put forward here — and as it appears that all that is solid may well be melting into air — I bring the question of the subject back more generally to the epistemological and ontological foundations that render such transcendental conceptions conceivable. In Part I, my concern was in the application of a peculiarly European form of human organisation to the presumed blank slate of the world; in Part II I discussed the universalisation more broadly of a subject form in relation to which, and in symbiosis with which, the notion of international crime came to be taken up. Now, I move to that which underpins all such theoretical approaches: the unified subjectivity of the human form generally. Here the ‘third debate’ led by postmodern theorists within international relations will be addressed briefly, before looking at a more promising line of inquiry in the broad school of postcolonialism. In particular, Homi Bhabha’s hybridity thesis will be considered through an analogy between the universalising discourses of colonialism with that of the modern conceptions of an international legal order. Colonialism, as defining the relation that made possible the extension of the State-subject form (in many ways through the extension of the individual-subject form), provides the critical juncture that will enable me to conclude this project.

In this light, then, the question of subjectivity is played out on the parallel lines of the State-subject of international law and the putative human subject of global law. The productivity of their opposition will be reconsidered for their capacity to open new lines of communication between the previously disparate discourses of international law and ‘post-realist’ international relations, and the opening up of those discourses, those orders, to their alternative — the *other* order, and the other *of* the order.

A *The Gendered State*

Feminist critiques of international law have shown that at a very basic level, the State is patriarchal in that it is an instrument of men’s authority over women. The vast majority of heads of State and foreign service personnel are men and the fetishised sovereignty of international law delimits them as the voice of the State. International law is thus a primarily male discourse.¹⁴⁴ A corollary of this is that the division between external and internal aspects of the State in international law may be analogised to the public/private demarcation at municipal law in most States.¹⁴⁵ Women and women’s issues are thereby hidden not merely by the fact

¹⁴⁴ See Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 613, 621-5 and references there cited. Cf Fernando Tesón’s response: Fernando R Tesón, ‘Feminism and International Law: A Reply’ (1993) 33 *Virginia Journal of International Law* 647, especially 655 (arguing that the breadth and heterogeneity of international law renders ‘the great bulk of international legal rules’ gender *neutral* — thereby missing the point that it is largely this ‘neutrality’ which serves to maintain (gender) power imbalances).

that a male perspective dominates the international arena, but that it is claimed to be universal.

In addition to demonstrating the partiality of this discourse, however, broader feminist analyses may be seen as personalising and personifying its normative constructs.¹⁴⁶ Rather than highlighting the exclusion of women from participation in an objective, universal discourse, such critiques seek to politicise and undermine this objectivity and universality.¹⁴⁷ Where the former approach seeks to open the State as individual to female (and other) marginalised voices (the *other* order), these latter critiques have the larger goal of rethinking the international law subject form itself (the *other of the order*).¹⁴⁸

In the current discussion, a consideration of the State as gendered (that is, through the external/internal dimensions of State power and the relationship between States) is more helpful than looking for specific male/female identifying characteristics in the State as individual. The purpose of any emancipatory analysis of international relations must be to go beyond unveiling the gendered nature of the discourse — again, I emphasise, an important part of the process¹⁴⁹ — and seek to move the conversation beyond such (phallogocentric) dualisms.¹⁵⁰ In this light, the ambiguities of sexual roles in international law described by

¹⁴⁵ Charlesworth *et al.*, above n 144, 625-9, 644 (concluding that the dichotomy is not as strict as it is in the domestic sphere, and that this, coupled with the differing process and aims of international law, may render it more open to feminist analysis than other areas of law).

¹⁴⁶ Knop, above n 74, 294.

¹⁴⁷ See generally Katharine Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829. Cf Carol Smart, *Feminism and the Power of Law* (1989) 85-9; Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635, 641-4.

¹⁴⁸ The diversity of feminist analyses is both a strength and a weakness in this project. Much feminist thinking in relation to the State centres around critiquing it as an embodiment of power and 'rationality' and the need for an introduction of an 'ethic of care': see, eg, Joan Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs* 644. Such analysis draws heavily on the work of psychologist Carol Gilligan and related texts: see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982). See also Linda Kerber *et al.*, 'On *In a Different Voice*: An Interdisciplinary Forum' (1986) 11 *Signs* 304. This approach has drawn criticism for its tendency to essentialise 'the feminine', and more generally for universalising the experiences of white women: see, eg, Smart, above n 147, 75; Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 38-9. Cf Ellen Dubois *et al.*, 'Feminist Discourse, Moral Values, and the Law: A Conversation' (1985) 34 *Buffalo Law Review* 11 (panel discussion including Carol Gilligan and Catharine MacKinnon), especially 73-5. See also bell hooks, *Feminist Theory: from margin to center* (1984) 1, 50 (critiquing the white, middle class vision of women's liberation: *contra* Betty Friedan, *The Feminine Mystique* (1963) especially 32). As has been the subject of much discussion within the context of municipal law, addressing *gender* bias goes far deeper than the *sex* of those in a position of power: cf Madame Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507; Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship & Colonial Discourses' in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World Women and the Politics of Feminism* (1991) 58: 'Sisterhood cannot be assumed as the basis of gender; it must be forged in concrete historical and political practice and analysis.'

¹⁴⁹ See, eg, Cynthia Enloe's work *Bananas Beaches & Bases: Making Feminist Sense of International Politics* (1989), especially her conclusion, 'The Personal is International': 195-201.

¹⁵⁰ Luce Irigaray, *This Sex which is not One* (1985) 33; cf Elshstain, above n 53, 563. Cf also Derrida's explication in 'The Double Session', discussing a move from 'the logic of the palisade, which is always, in a sense, "full", to the logic of the hymen', that which 'takes place' in the space between desire and fulfilment: Jacques Derrida, 'The Double Session' in Peggy Kamuf (ed), *A Derrida Reader: Between the Blinds* (1991) 186.

Edward Morgan resonate strongly with the earlier considerations of its central normative contradiction:

The paradox of male sovereignty is that nations cannot be both assertive and submissive as they confront one another, the dilemma of female universality is that the law cannot both engulf sovereigns and be their underpinning.¹⁵¹

Tying this back to the question of the ways in which the constitution of the subject restricts the conceptions of order in international relations, the State as subject form legitimating international law can be seen to be doing far more than valuing its representation as a white, Western, male instrument of power. For above and beyond this it acts to reify these dualisms, rendering them 'self-evident'. International law may therefore be linked not merely to the idea of the State as individuated subject, but to the subject itself as white/non-coloured, Western/non-Western, male/female. To retain such a framework is to limit any expanded concept of international law (and hence international relations) to these partialities, predicating reform on a politics of opposition.

The task, then, is not to reveal some higher-order ontological truth about the individuated State-subject as white or Western or male. Rather, through using feminist analyses to reveal the constructed and *gendered* nature of the State as individual, the opposing sexual roles at work in international law discourses can be juxtaposed to the binary oppositions that *must* dominate a Hobbesian world view predicated on power as opposition.¹⁵² In this way, feminist insights into the incompleteness of the male/female dichotomy within which the State as individual is constructed, provide a theoretical framework to address the antinomies within international law, and the contradictions within the subject of international relations.

The denaturalising of international relations as a field of study is, of course, crucial to the project being undertaken here of opening up that discipline to its alternative. In the next section I extend the feminist critique discussed above to consider the so-called 'third debate' in international relations posed by postmodernism, leading to a consideration of the allied project of postcolonial theory. It is the latter that will prove most productive, for whereas the feminist lens of gender is useful in its illumination of subjectivity as constituted through relation to power (analogous to the Foucauldian thesis), a fuller explication of the theoretical and practical effects of discourse as the construction of international order is found in the loosely-defined school of postcolonialism.

B *Postmodernism, Postcolonialism, 'Postrealism'?*

The debate surrounding Sankaran Krishna's nominally postcolonial critique of postmodern moves within international relations provides a useful entry point for

¹⁵¹ Edward Morgan, 'The Hermaphroditic Paradigm of International Law: A Comment on Alvarez-Machain' in Knop, above n 74, 326-327. Cf Elshtain, above n 74, 1361. Contrast this with the above discussion of the realist-idealist dilemma at the heart of international law in general (text accompanying above n 14) and war crimes in particular (text accompanying above n 134).

¹⁵² See above nn 62-65 and accompanying text.

this consideration of the challenges to dominant (modernist) paradigms within international relations. While recognising the value of the postmodern contribution in denaturalising that which is taken for granted (thereby potentially creating the space for alternative orders), he nevertheless raises a series of concerns that relate to its political utility, arguing that it is unhelpful, or at worst politically disastrous and counterproductive, in its effacement of coherent identities and subjectivities.¹⁵³

Avoiding the slather of polemic in both Krishna's review essay and the response of one of his authors, James Der Derian,¹⁵⁴ the point that will be pursued here is the need for subjectivity in political praxis. Krishna comes down squarely behind Spivak's call for a 'strategic essentialism' — a politically informed stance that recognises both the Foucauldian power/knowledge nexus that constitutes subjectivity, while at the same time remaining wary of the privilege associated with the position from which such a self-contained world view may be enunciated.¹⁵⁵ He concludes, following Said, that the exigencies of political struggle (on behalf of those 'who were and are victimized and continue to suffer in various ways from an unequal, capitalist, patriarchal, and neocolonial world order'¹⁵⁶) require an enabling politics of subjectivity:

The point is not to choose, in some final sense, where one stands (what else is the vacuous and ahistorical quest for an 'authentic' self-identity) but rather, paraphrasing Said, to be an informed skeptic, a secular wet blanket, even as one actively participates in the efforts to change reality in desired directions.¹⁵⁷

Der Derian's response on this point queries the possibility of a text that is 'politically enabling' without being at the same time *disempowering* in its rendering of the subaltern as victim and the hegemon by whom she or he is so defined as insuperable. He argues instead that what the historicisation of subjectivity achieves is not the privileging of Eurocentrism but 'a cosmopolitan rejection of all chauvinisms based on fear and hatred of the other':

¹⁵³ Sankaran Krishna, 'The Importance of Being Ironic: A Postcolonial View on Critical International Relations Theory' (1993) 18 *Alternatives* 385. For a more general discussion of postmodernism in international relations, see James Der Derian, 'The Boundaries of Knowledge and Power in International Relations' in Der Derian and Shapiro, above n 46, 3; Roy *et al*, above n 50; Alastair Pennycook, 'The Diremptive/Redemptive Project: Postmodern Reflections on Culture and Knowledge in International Academic Relations' (1990) 15 *Alternatives* 53.

¹⁵⁴ James Der Derian, 'The Pen, the Sword, and the Smart Bomb: Criticism in the Age of Video' (1994) 19 *Alternatives* 133.

¹⁵⁵ Krishna, above n 153, 402-3. This simplifies Spivak's position somewhat: see Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstructing Historiography' in Guha and Spivak, above n 69, 13. Spivak advocates a 'strategic use of positivist essentialism in a scrupulously visible political interest' that would allow historiographers 'to use the critical force of anti-humanism, in other words, even as they share its constitutive paradox: that the essentializing moment, the object of their criticism, is irreducible'. Cf Ania Loomba, 'Overworlding the "Third World"' (1991) 13 *Oxford Literary Review* 164, 185.

¹⁵⁶ Krishna, above n 153, 389.

¹⁵⁷ *Ibid* 406. Cf Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977-84* (1988) 124:

I dream of the intellectual who destroys evidence and generalities, the one who, in the inertias and constraints of the present time, locates and marks the weak points, the openings, the lines of force, who is incessantly on the move, doesn't know exactly where he is heading nor what he will think tomorrow for he is too attentive to the present.

True, this approach does not posit a new center, like Afrocentrism, because it accepts and seeks to understand new hybrid identities and multicultural forces.¹⁵⁸

Postcolonial theorist Homi Bhabha looms large, if silent, in these ruminations. It should be clear that this is no longer a clear engagement between 'postcolonialism' and 'postmodernism': both (as each author would ultimately agree) share some common theoretical ground in poststructuralism, and the debate here represents an instance of the hermeneutic games that prevent easy articulation of either school as a coherent entity. The debate, then, serves not to define the boundaries of a postcolonial space, but rather to foreshadow the questions with which it must be interrogated.

Parallels may be drawn here with Kwame Anthony Appiah's 'Is the Post- in Postmodernism the Post- in Postcolonial?'¹⁵⁹ Concluding that it is not, he calls for two opposing moves: on the one hand rejecting the perceived anti-ethical politics of postmodernism, while on the other abandoning the dreams of salvaging an autochthonous African culture.¹⁶⁰ This leads him to advocate a 'contingent humanism':

[Postcolonialism's] *post*, like postmodernism's, is also a post that challenges earlier legitimating narratives ... But it challenges them in the name of the ethical universal; in the name of *humanism* ... And on that ground it is not an ally for Western postmodernism but an agonist: from which I believe postmodernism may have something to learn.

For what I am calling humanism can be provisional, historically contingent, anti-essentialist (in other words, postmodern) and still be demanding. We can surely maintain a powerful engagement with the concern to avoid cruelty and pain while nevertheless recognising the contingency of that concern.¹⁶¹

There is, then, a belief that whereas postmodernism exists as an 'aestheticising of the political', postcolonialism foregrounds the political as inevitably contaminating the aesthetic, *while nevertheless remaining distinguishable from it*.¹⁶² This conscious contradistinction — this contingent humanism, this strategic essentialism — must be borne in mind in the consideration of the possibilities and problematiques of the postcolonial as a political space.¹⁶³

¹⁵⁸ Der Derian, above n 154, 134.

¹⁵⁹ Kwame Anthony Appiah, 'Is the Post- in Postmodernism the Post- in Postcolonial?' (1991) 17 *Critical Inquiry* 336 (reprinted with some alterations as 'The Postcolonial and the Postmodern' in Appiah, above n 72).

¹⁶⁰ *Ibid* 353-4. Cf Simon During, 'Postmodernism or Post-colonialism Today' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Postcolonial Studies Reader* (1995) 125. 'For me, perhaps eccentrically, post-colonialism is regarded as the need, in nations or groups which have been victims of imperialism, to achieve an identity *uncontaminated by universalist or Eurocentric concepts and images*' (emphasis added).

¹⁶¹ Appiah, *In my Father's House* above n 72, 250. Cf Appiah, 'Is the Post in Postmodernism the Post in Postcolonial' above n 159, 353-4.

¹⁶² Cf Diana Brydon, 'The White Inuit Speaks: Contamination as Literary Strategy' in Ian Adam and Helen Tiffin (eds), *Past the Last Post: Theorizing Post-colonialism and Post-modernism* (1991) 191-202.

¹⁶³ Cf Achille Mbembe's rejection of social theory's attempt to construct 'universal grammars [that] were put to the test — and failed — in Africa': Achille Mbembe, 'The Banality of Power and the

C A Postcolonial Space?

Outsider! Trespasser! You have no right to this subject! ... I know: nobody ever arrested me. Nor are they ever likely to. Poacher! Pirate! We reject your authority. We know you, with your foreign language wrapped around you like a flag: speaking about us in your forked tongue, what can you tell but lies? I reply with more questions: is history to be considered the property of the participants solely? In what courts are such claims staked, what boundary commissions map out the territories?

Can only the dead speak?

Salman Rushdie, *Shame*¹⁶⁴

Postcolonialism as a discourse is not as susceptible to definition (or, indeed, characterisation) as mainstream international relations. With a theoretical indebtedness to the poststructuralism of Foucault and Derrida,¹⁶⁵ and drawing upon the historical experiences of (de)colonisation, postcolonialism has evolved from a study of Commonwealth literature to what has been heralded as 'the emergence, on the left, of a new discourse of global cultural relations'.¹⁶⁶ Indeed, the slipperiness of its significations has led to calls for a more restrictive usage of the term.¹⁶⁷

Leaving its political project appropriately vague, it is possible to discern a consistent *methodology* that postcolonialism invokes, to varying degrees: the primacy of discursive analysis and historiography, and a critique of the sublimating modernist narrative of colonial discourse.¹⁶⁸ These aspects of postcolonialism may be contrasted to the diplomatic history of States that has characterised realist international relations, and its uncritical adoption of the modernist project through the vehicle of sovereignty.

More importantly, postcolonialism provides the crucial nexus that enables me to conclude this article. For it is in postcolonial theory that the juxtaposition of discursive practices with the experience of colonialism is posed as a *theoretical* problem with the *practical* effects of seeking to create the space for new identities and alternative orders. The uneasy tension between these theoretical and practical projects has led to the diversity of the field. Here, however, I pursue it for its capacity to shed a self-reflective light on the theoretical and practical

Aesthetics of Vulgarly in the Postcolony' (1992) 4(2) *Public Culture* 1, 44. The cause of this failure, he states, lies not in Africa's exceptionality, but rather

at the heart of an authoritarian epistemology, with its rigid categories ... and above all, the adulterous coherence of its signs, and the dissolutive effects that it produces when dealing with all those objects whose language it does not (seek to) understand.

¹⁶⁴ Salman Rushdie, *Shame* (1983) 28.

¹⁶⁵ Francis Barker and Peter Hulme, 'Introduction' in Francis Barker, Peter Hulme and Margaret Iversen (eds), *Colonial Discourse, Postcolonial Theory* (1994) 5. Cf Wilson Harris, *Tradition, the Writer and Society* (1973), which Ashcroft *et al* posit as a postcolonial text predating the poststructuralism of Foucault and Derrida: Ashcroft *et al*, above n 160, 117.

¹⁶⁶ Darby and Paolini, above n 56, 374-5; John McClure and Aamir Mufti, 'Introduction' (1992) 31/32 *Social Text* 3-4.

¹⁶⁷ Ella Shohat, 'Notes on the "Post-Colonial"' (1992) 31/32 *Social Text* 99, 100; Anne McClintock, 'The Angel of Progress: Pitfalls of the Term "Postcolonialism"' in Barker *et al*, above n 165, 257-60.

¹⁶⁸ See, eg, Shohat, above n 167, 106-7.

effects that discursive hegemony — as seen, experienced and acted out in the colonial endeavour — can have on the subjects of the hegemon, *even as they are defined by and in relation to it*.

In the light of this discussion, then, and the caveat lodged in the preceding section,¹⁶⁹ I now proceed to evaluate two of the basic postcolonial approaches to the question of opening the space for alternative orders in international relations (and hence making possible new forms of subjectivity, and identity): the displacing of the centre, and the (re)constitution of a postcolonial subject through hybridity.

1. Dipesh Chakrabarty considers the question of a space for non-Western politics through an interrogation of the epistemological privileging of a European history: the provincialising of Europe.

The project of provincializing 'Europe' ... cannot be a project of 'cultural relativism'. It cannot originate from the stance that the reason/science/universals which help define Europe as the modern are simply 'culture-specific' and therefore only belong to the European cultures. For the point is not that Enlightenment rationalism is always unreasonable in itself but rather a matter of documenting how — through what historical process — its 'reason', which was not always self-evident to everyone, has been made to look 'obvious' far beyond the ground where it originated ...

The idea is to write into the history of modernity the ambivalences, contradictions, the use of force, and the tragedies and the ironies that attend it.¹⁷⁰

Recognising the political ingenuousness that would be an out of hand rejection of modernity (if that were possible),¹⁷¹ and the inadequacy of cultural relativism and nativist or atavistic alternative histories, provincialisation embodies the seemingly contradictory aspects of recognising the contestability of the modern while simultaneously acknowledging that this condition is inescapable.¹⁷²

Europe cannot, therefore, be provincialised, but it is within this dual necessity and impossibility — 'a history that embodies this politics of despair' — that the

¹⁶⁹ See above nn 102-9 and accompanying text.

¹⁷⁰ Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 *Representations* 1, 20-1. Cf Walter Benjamin, *Illuminations* (1968) 255: 'To articulate the past historically does not mean to recognize it the "way it really was." ... It means to seize hold of a memory as it flashes up at a moment of danger.'

¹⁷¹ See, eg, Chakrabarty, above n 170, 21:

That the rhetoric and the claims of (bourgeois) equality, of citizens' rights, of self-determination through a sovereign nation state have in many circumstances empowered marginal social groups in their struggles is undeniable What effectively is played down, however, in histories that either implicitly or explicitly celebrate the advent of the modern state and the idea of citizenship is the repression and violence that are as instrumental in the victory of the modern as is the persuasive power of its rhetorical strategies.

Cf Edward Thompson's discussion of the rule of law, which he calls an 'unqualified human good'. Thompson argues that the law as it developed in England was certainly a means of systematising oppression of the under-classes, but at the same time it 'mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers': Edward Thompson, Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975) 258-69.

¹⁷² Chakrabarty, above n 170, 20-3.

attempt to do so is said to undermine the self-authenticating myth that is modernity, and the self-evidence of its territorialisation in the nation-State.

I ask for a history that deliberately makes visible, within the very structure of its narrative forms, its own repressive strategies and practices, the part it plays in collusion with the narratives of citizenships in assimilating to the projects of the modern state all other possibilities of human solidarity. The politics of despair will require of such history that it lays bare to its readers the reasons why such a predicament is necessarily inescapable.¹⁷³

At this point, I take up Chakrabarty's ambiguous conclusion as the lead into a broader consideration of alternatives to Western hegemony in the international order. The contention here is that this ambiguity — characteristic also of the ingenuousness of the political projects he seeks to avoid — arises from the attempt to juxtapose discourses at differing levels of inquiry. Specifically, he conflates the modernity project itself with the subjects constituted within its epistemic cloisters: 'these dreams [that] the modern represses in order to be',¹⁷⁴ whilst instructive as a metaphor for modernity's ambivalent relation to individuality, fail to bring into contestation the dreamer herself.¹⁷⁵

The disagreement is not with the broad thrust of Chakrabarty's argument, but with the methodology he adopts. For what is required here is not so much the provincialising of Europe as *episteme*, but the opening up of Europe and the Western *self* to contestation as an entry point into a political space that recognises its specificity and its limits. This is subtly different to the provincialising project in that it posits neither the shifting of Europe from without,¹⁷⁶ nor the opening up of a space within the centre,¹⁷⁷ but the implosion of the myth that constitutes the European political space as omnipresent, omniscient, and omnipotent.¹⁷⁸

¹⁷³ Ibid 23. Cf Ania Loomba, 'Dead Women Tell No Tales: Issues of Female Subjectivity, Subaltern Agency and Tradition in Colonial and Post-colonial Writings on Widow Immolation in India' (1993) 36 *History Workshop Journal* 209, 218.

¹⁷⁴ Chakrabarty, above n 170, 23.

¹⁷⁵ Cf Jayant Lele, 'Orientalism and the Social Sciences' in Carol Breckenridge and Peter van der Veer (eds), *Orientalism and the Postcolonial Predicament: Perspectives on South Asia* (1993) 45, 70:

Man cannot become a child again, said Marx, or he becomes childish. But he must strive to reproduce the truth of his childhood, its naivete, at a higher stage. To the extent that tradition carries within it the naive dreams and aspirations of humanity anchored in its historic childhood, it reconstitutes its modernity in trying to reproduce the truth of that naivete at moments of crisis brought on by excessive or unnecessary suppression of the bodily felt spontaneity and naivete.

¹⁷⁶ Cf Arturo Escobar, 'Imagining a Post-Development Era? Critical Thought, Development and Social Movements' (1992) 31/32 *Social Text* 20, 48-9.

¹⁷⁷ *Contra* Edward Said, *Culture and Imperialism* (1994) 386-7. Cf David Blaney and Naeem Inayatullah, 'Prelude to a Conversation of Cultures in International Society? Todorov and Nandy on the Possibility of Dialogue' (1994) 19 *Alternatives* 23, 24 (advocating 'an ideal "form of othering"').

¹⁷⁸ Cf Linda Alcoff, 'The Problem of Speaking for Others' (1991-92) 20 *Cultural Critique* 5, 26. See also Gavin Jantjes, 'The Artist as Cultural Salmon: A View from the Frying Pan' (1993) 23 *Third Text* 103, 106:

Theorists speak of a new postmodern space as if it exists, as if there is a harbour in which we could all draw up beside one another and weigh anchor, despite our differences; believing that there is now a discourse which alters radically that which modernism had constructed. The old fish are sceptical, their trust had been beaten thin, and they take only what they see. What is

Homi Bhabha's reading of Derrida takes up this mantle in his interrogation of colonial discourse through the interpretive construct of hybridity.

2. Bhabha sees in the ambivalent reception of the colonial experience *as text* the ambivalence of the colonial presence itself.¹⁷⁹ Here he draws upon the Derridean notion of *différance*: the movement of differentiation and deferral, spacing and temporalisation that precedes and comprehends the positioning of identifiable differences or oppositions.¹⁸⁰ Bhabha argues that by conceiving the colonial presence as existing in the space of a 'double inscription', by bringing to the fore the productivity of the sign of difference that is constituted in the relation of the European presence in the colonial space, a truth-game characterised by Foucauldian power-as-relation is enjoined: a state of flux whose contestation is seen in the *hybridity* of the subjects constituted by that relation.

Hybridity is the sign of the productivity of colonial power, its shifting forces and fixities; it is the name for the strategic reversal of the process of domination through disavowal (that is, the production of discriminatory identities that secure the "pure" and original identity of authority). Hybridity is the revaluation of the assumption of colonial identity through the repetition of discriminatory identity effects.¹⁸¹

The articulation of this productivity, he argues, both unsettles the mimesis and narcissism of colonial power and implicates its manifestations by the inverted gaze of the discriminated back upon the eye of power. This ambivalence then provides the (uncertain) foundation for a subversive critique 'that turns the discursive conditions of dominance into the grounds of intervention',¹⁸² a problematic of colonial representation and individuation 'that reverses the effects of the colonialist disavowal, so that other "denied" knowledges enter upon the dominant discourse and estrange the basis of its authority — its rule of recognition.'¹⁸³ Resistance, then, may be seen as the effect of an ambivalence.¹⁸⁴

The effect of mimicry on the authority of colonial discourse is profound and disturbing. For in 'normalizing' the colonial state or subject, the dream of post-

visible in the clear waters of postmodernism, is that it continues to avoid making the ambiguity in African art a part of discourse.

¹⁷⁹ Homi Bhabha, 'Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi, May 1817' (1985) 12 *Critical Inquiry* 144, 150.

¹⁸⁰ Jacques Derrida, *The Ear of the Other: Otobiography, Transference, Translation* (1985) xii. Cf Jacques Derrida, *Positions* (1981) 40:

Subjectivity — like objectivity — is an effect of *différance*, an effect inscribed in a system of *différance*. That is why the *a* of *différance* also recalls the fact that spacing is *temporisation*, detour, delay via which intuition, perception, consumption, in a word the relationship to the present, the reference to a present reality, to a *being (étant)*, are always deferred. Deferred precisely because of the principle of difference, which means that an element only functions and signifies, only takes or gives 'meaning' ('sens') by referring to another past or future element in an economy of traces.

¹⁸¹ Bhabha, above n 179, 154.

¹⁸² *Ibid.*

¹⁸³ *Ibid.* 156.

¹⁸⁴ Cf Loomba, above n 155, 174.

Enlightenment civility alienates its own language of liberty and produces another knowledge of its norms.¹⁸⁵

And yet it is difficult to see the import of Bhabha's hybridity — the 'metonymy of presence' — beyond the gesture it makes in contesting the myth of complete colonial domination. His semiotic challenge, though important, does not of itself provide the necessary purchase for a challenge to the narrative constituting the myth that *denies* hybridity. The experience of hybridity is evidence of that narrative's incompleteness,¹⁸⁶ but the basis of self-authentication in the broader colonial discourse is seen not in its *enunciation* within the colonial encounter, but in the constitution of the transcendental individuated subject wielding power over the word¹⁸⁷ — the application of Western epistemology as it is applied to the natural sciences, where truth is based upon the subject-object relation of man and nature, translated now to the level of social interaction between the empowered Self and the abstracted (and hence disempowered) Other.¹⁸⁸

Moreover, exclusive reliance on hybridity as the site of resistance to Western hegemony may emerge as an apologetic for that which is ultimately globalisation by another name. In place of the domination of a monoculture, however, it has been argued that hybridity may give rise to the danger of a global cultural *market*: where heterogeneity is reduced not to a bleak homogeneity, but to a scopic feast for consumption.¹⁸⁹ Where the Grand Exhibition of 1851 sought 'to give us a living picture of the point of development at which the whole of mankind has arrived',¹⁹⁰ the (post)modern exhibition lays goods out on display in ever more enticing configurations for easy consumption — absent a critique of the constitution of their difference, or the consumer culture of global capitalism into which they become appropriated.¹⁹¹

¹⁸⁵ Homi Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' in Annette Michelson, Rosalind Krauss, Douglas Crimp and Joan Copjec (eds), *October: The First Decade, 1976-1986* (1987) 318 (originally appearing in (1984) 28 *October* 125).

¹⁸⁶ Cf *ibid* 318: 'the discourse of mimicry is constructed around an *ambivalence*; in order to be effective, mimicry must continually produce its slippage, its excess, its difference.'

¹⁸⁷ Cf Loomba, above n 155, 174. Contrast also the colonial project undertaken by missionaries in nineteenth century Africa: John Comaroff and Jean Comaroff, *Ethnography and the Historical Imagination* (1992) ch 9, 'The Colonisation of Consciousness'.

¹⁸⁸ Cf Chatterjee, above n 55, 14-5. See also above n 50 and accompanying text.

¹⁸⁹ Annie Coombes, 'Inventing the "Postcolonial": Hybridity and Constituency in Contemporary Curating' (1992) 18 *New Formations* 39, 42-3; McClintock, above n 167. Obvious correlations emerge with current versions of the globalisation thesis: see, eg, Mike Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity* (1990), in particular Jonathan Friedman's contribution, 'Being in the World: Globalization and Localization', especially 312-4.

¹⁹⁰ Prince Albert, cited in Bruce Rich, *Mortgaging the Earth* (1994) 221.

¹⁹¹ Coombes, above n 189, 43, 52; Arif Dirlik, 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) 20 *Critical Inquiry* 328, 331, 355-6. As Appiah has noted, above n 72, 286-7, there is, in addition, a danger that hybridity may itself become a privileged discourse:

Being-African already has 'a certain context and a certain meaning.' But, as Achebe suggests, that meaning is not always one we can be happy with; and that identity is one we must continue to reshape. And in thinking about how we are to reshape it, we would do well to remember that the African identity is, for its bearers, only one among many. Like all identities, institutionalised before anyone has permanently fixed a single meaning for them ... being-African is, for its bearers, one among other salient models of being, all of which have to be constantly fought for and refought.

This is not, however, to agree with critiques that challenge his deconstructive methodology as privileging one rupture (semiotic theories of language) at the expense of another (the teleological Marxist social text),¹⁹² but rather to problematise his *departure* from Derrida:

This question demands a departure from Derrida's objectives in 'The Double Session'; a turning away from the vicissitudes of interpretation in the mimetic act of reading into the question of the effects of power, the inscription of strategies of individuation and domination in those 'dividing practices' which construct the colonial space — a departure from Derrida which is also a return to those moments in his essay when he acknowledges the problematique of 'presence' as a certain quality of discursive transparency which he describes as 'the production of mere reality-effects' ... In the rich ruses and rebukes with which he shows up the 'false appearance of the present', Derrida fails to decipher the specific and determinate system of *address* (not referent) that is signified by the 'effect of content'. It is precisely such a strategy of address — the *immediate presence* of the English — that engages the questions of authority that I want to raise ...

The reality effect constructs a mode of address in which a complementarity of meaning — not a correspondential notion of truth, as anti-realists insist — produces the moment of discursive transparency.¹⁹³

The problem that emerges in Bhabha's approach is in his reconstitution of the space of address as productive in and of itself. Hybridity, so construed, recasts the *experience* of a dis-location (which *takes place* in the interstices of the colonial double inscription) as a quasi-independent discourse.¹⁹⁴ Hence, the similarity with the presumed autonomy of the monocultural globalisation discourse, and hence the concomitant danger of identity being (re)produced solely for its abnegation through consumption. In this way, Bhabha repeats the ambivalent reception of poststructuralist critiques of subjectivity that have been discussed above as contingent humanism and strategic essentialism.¹⁹⁵ But he does so in a more sophisticated context that may now make it possible to

This is perhaps not difficult to conceive for one such as Appiah, who grew up as a child of 'two worlds', seeing it as one world in two 'extended' families, and who learned only at an English boarding-school 'that not everybody had family in Africa and in Europe; not everyone had a Lebanese uncle, American and French and Kenyan and Thai cousins': Appiah, above n 72, ix.

¹⁹² See, eg, Loomba, above n 155, 174 and Suvir Kaul cited therein.

¹⁹³ Jacques Derrida, *Dissemination* (1981) in Bhabha, above n 179, 151.

¹⁹⁴ Ibid 154. Cf Homi Bhabha, 'Cultural Diversity and Cultural Differences' in Ashcroft *et al*, above n 160, 208 (extracted from 'The Commitment to Theory' (1988) 5 *New Formations* 5).

¹⁹⁵ Cf Avtar Brah, 'Difference, Diversity, Differentiation' in James Donald and Ali Rattansi (eds), *Race, Culture and Difference* (1992) 126-45. Cf Derrida's discussion of this problem through the metaphor of the hymen in 'The Double Session', above n 150, 185-6:

the hymen, the confusion between the present and the nonpresent, along with all the indifferences it entails within the whole series of opposites (perception and nonperception, memory and image, memory and desire, etc), produces the effect of a medium (a medium as element enveloping both terms at once; a medium located between the two terms). It is an operation that *both* sows confusion *between* opposites *and* stands *between* the opposites 'at once'. What counts here is the *between*, the in-between-ness of the hymen. The hymen 'takes place' in the 'inter-', in the spacing between desire and fulfilment, between perpetration and its recollection. But this medium of the *entre* has nothing to do with a center.

articulate the problematique at the heart of each: the desire to incorporate political praxis within a theoretical counter-metanarrative.¹⁹⁶

This, then, represents the final juncture of this inquiry that has taken me from the problem of the State to the problem of the subject and the problematique of subjectivity. It is a juncture that at once constitutes the end of this article and the beginning of a broad field for further study. For the purpose at hand, however, I will restrict myself to the articulation of the theoretical implications of this investigation and the practical ramifications that these might have in the study of international relations and the practice of international law — a legal discourse unique for the significance accorded to ‘the teachings of the most highly qualified publicists of the various nations’.¹⁹⁷

D Towards a Critical Methodology

First, what is required *of* theory is a politicisation of the subject form that acknowledges the contingency of subjectivity not through its hybridisation for consumption, nor as contingently (strategically) essentialised, but as *essentially contingent*. The productivity of the interaction of cultures (and, indeed, of subjects) is not in the constitution of a discourse as process, nor in the inscription of a new and hybrid identity form. It is, rather, the *space* in which the contestation of that discourse and that identity *take place*.¹⁹⁸

And so the question of the nation-State is *reinstated* as a crucial point of contestation — not as the fulcrum between competing world orders old and new, but as the site of a dis-location in contemporary politics. The dilemma of ‘Third World States’ (and their perceived failure) is thus reimplicated as more than evincing the inexorable tide of modernity, it being instead the primary site of a relation within and through which the State *as political space* is negotiated.

Secondly, and as a corollary of the above, what is required *from* theory as it is constituted in Western academe is first and foremost the bringing into contestation of the Western self as repository of knowledge and power. Instructive though the thought experiment of provincialising Europe is, a more productive line of critique may be to have the West step *forward* into the relation to acknowledge its own constructedness.¹⁹⁹

And so the question of the subject of international law/global acculturation is reimplicated in the question of what is meant by *law*; what *order* represents; and how one’s conception of each is contingent on an understanding of the relation between these normativities and the *selves* upon which they operate, and *by* and

¹⁹⁶ Cf Blaney and Inayatullah, above n 177. Contrast also Arif Dirlik’s footnoted critique of Homi Bhabha as ‘exemplary of the Third World intellectual who has been completely reworked by the language of First World cultural criticism’, singular for the ‘virtuosity (and incomprehensibility [sic]) that he brings’ to the postcolonial debate: Dirlik, above n 191, 333-4.

¹⁹⁷ Statute of the International Court of Justice, art 38(1)(d). This is one of the four bases of international law to be considered by the Court in making determinations between disputants.

¹⁹⁸ Cf Alcoff, above n 178, 26 (highlighting the need to reconceptualise discourse as an *event*); Agamben, above n 101.

¹⁹⁹ Cf Vron Ware, ‘Moments of Danger: Race, Gender, and Memories of Empire’ (1992) 31 *History and Theory* 116.

with which they are defined. Subjectivity is thus seen as a point of contestation in its own right, with a prime site for further analysis being the transcendental individuated (white, Western, male) subject form itself.

The implications of these propositions are at once ethical and political, but cannot be laid down as a counter-metanarrative. Instead, we are left with the Derridean aporia: the impossible demand that requires that we remain faithful to the intellectual promises of the Enlightenment (the *Aufklärung*, the *Illuminis-simo*) while at the same time railing against its limits *precisely because it has given us our language*, struggling against Aristotelian dualisms and Hegelian dialectics *precisely because we cannot escape them*.²⁰⁰ This in turn implies a politics premised not on the realisation of the modernist dream of mind defeating matter, nor on the (re)construction of 'alternative' discourses through revisionist historiography, but on a critical methodology that requires the responsibility to think, speak, and act in compliance with these antinomies, and to do so *experimentally*, conscious of the limit that is imposed by the act of speaking, of identifying, and the need to make of that identity a *chance*.

CONCLUSION

Who seeks in the noise and the confusion of war, in the grime of battle, the principle for the intelligibility of order?

Michel Foucault, 'The Subject and Power'²⁰¹

When questioned as to the wisdom of its course, the newly converted fanatic of nationalism answers that 'so long as nations are rampant in this world we have not the option to freely develop our higher humanity. We must utilize every faculty that we possess to resist the evil by assuming it ourselves in the fullest degree. For, the only brotherhood possible in the modern world is the brotherhood of hooliganism.'

Rabindranath Tagore, *Nationalism*²⁰²

And so is international law really 'law'? Are war criminals 'criminals'? As I trust has become obvious by now, this is not really the point. Legal orders will continue to be asserted, criminals will be convicted. Normative regimes will have their subjects. Justice is not meted out — it is *invoked*. The discursive formations that are international law and the associated regime of war crimes will continue to be practised and, indeed, continue to serve a function often useful within their limited jurisdictions. What has been at issue here, however, is the effect that the

²⁰⁰ Derrida, above n 8, 78-9. 'Aporia' is taken from the Greek *aporia* with the double meaning of 'doubt, perplexity' and 'impassable': *The Shorter Oxford English Dictionary of Historical Principles* (revised 3rd ed, 1978) 88. For Derrida, the aporia signifies the impossible demand, the *necessity* to choose between alternatives, neither of which is the other of (*contingent* on) the other, and the limit between which is not accountable to the two (thus any choice does some violence to the other) — and yet we must choose. See also Jacques Derrida, *Aporias: Dying — Awaiting (One Another at) the 'Limits of Truth'* (1993) especially 8, 12-21.

²⁰¹ Michel Foucault, 'The Subject and Power' in Hubert L Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982) 212.

²⁰² Rabindranath Tagore, *Nationalism* (1st published 1917, 1973 ed) 39.

reliance on *law* — and *criminal law* in particular — has on the questions of subjectivity that remain almost entirely untheorised in international law, and remain signally under-theorised in international relations.

Through the historical and jurisprudential genealogy of international law undertaken in Part I, the historico-cultural specificities of international law were unpacked. The conservatism of thought and political project that are complicit with the statist and static conception of order were considered by reference to contemporary challenges to the legal notion of sovereignty, but these were seen to be inadequate. A critical point of juncture marked Part II: the problematic subjectivity of the war criminal — the human subject *reinserted* into the international legal order. This served as the basis for an opening up of the question of the subject in international relations through its prodigal son, international law, and the laying bare of the intimacy between questions of the subject and those of order *as law*; conceiving the subject as an *effect* of law, not ex-isting but *subsisting* in co-dependence with its normative framework.

Part III then took the problematique of subjectivity further, playing out the antinomies discussed earlier in the context of the status of international law as 'law' and the legality of war crimes. Crudely rendered, these antinomies rehearsed a conflation of a realist subject and an idealist order. The conflicting conceptions of subjectivity in each constitute a central problematique for international law, but also inform contemporary studies of international relations. In opening up the question of subjectivity, feminist analyses of power relations as constituting gendered identity (as knowledge) led to the discussion of subjectivity as constituted by and in relation to the discursive hegemon of (post)colonialism.

Here, I argued that a crucial step in the opening up of international relations is the reconceptualisation of subjectivity as a meaningful *space* within and through which political contestation *takes place*. Hence, the State, the subject and the State-subject become reinstated *as political spaces*. And hence, subjectivity is revealed not as the blank slate onto which the hegemon inscribes its dreams, nor as the receptacle of an autochthonous author-ised identity, but as the site of a dislocation, of identity neither contingent nor essential but *essentially contingent*.

And so we return to our 'New' World Order — an order in which, as I began this article, *law* has been invoked as a criterion of peace and security. The framing of international discourse in the robes and rhetoric of legality/legitimacy at one level attempts to mask the politicised content of its subject matter. But it also does far more. For positing law as an ordering principle of international relations does not merely engage in an act of anthropomorphism, equating the State and human subjects of law — it reifies a symbiotic relation by, through, and *in* which both law and subject are co-defining.

This insight sheds a self-reflective light back onto the international legal discourse, which has much to learn from the debates within the discipline of international relations that have been discussed here. It further has implications for the discipline of international relations itself, as the opening of the subject of law reflects back once more on the constitution of the subject of discourse, the

theorisation of the 'order' with(in) which it subsists, and the possibilities and problems of opening that subject, that identity, to its very future.